



PhD-FLSHASE-2018-03

The Faculty of Language and Literature, Humanities, Arts and Education

## DISSERTATION

Defence held on 08/01/2018 in Luxembourg  
to obtain the degree of

DOCTEUR DE L'UNIVERSITÉ DU LUXEMBOURG  
EN SCIENCES POLITIQUES

by

**Jakub GREN**

Born on 10 June 1987 in city of Cieszyn, (Poland)

THE CAPACITY FOR COMPLIANCE WITHIN EU  
MULTILEVEL ADMINISTRATION: THE CASE OF  
THE BANKING UNION'S SINGLE SUPERVISORY  
MECHANISM (SSM)

### Dissertation defence committee

Dr David John Howarth, dissertation supervisor

*Professor, Université du Luxembourg*

Dr Robert Harmsen, Chairman

*Professor, Université du Luxembourg*

Dr Aneta Spendzharova

*Professor, Université du Luxembourg*

Dr Lucia Quaglia

*Professor, Università di Bologna*

Dr Joana Mendes

*Professor, Université du Luxembourg*

**(this page was intentionally left blank)**

VERSION BETA

# CONTENTS

<b>PREFACE .....</b>	<b>5</b>
Acknowledgments .....	5
Abstract .....	6
List of figures.....	12
<b>PART I. SETTING THE SCENE .....</b>	<b>13</b>
CHAPTER 1 Introduction to the study .....	14
CHAPTER 2 Research design.....	24
2.1 Research scope and limitations .....	24
2.2. Research problem.....	27
2.3. Research question .....	37
2.4. Hypotheses on the formal top-down compliance expectation .....	40
2.5. Methodology.....	47
<b>PART II. COMPLIANCE EXPECTATION WITHIN MULTILEVEL ADMINISTRATION (ANALYTICAL FRAMEWORK) .....</b>	<b>51</b>
CHAPTER 3 EU multi-level administration .....	52
3.1. The nature of EU administration.....	52
3.2. The development of EU administrative capacities for the provision of financial stability.....	52
CHAPTER 4 Organisational design of EU multilevel administration .....	57
4.1. Introductory remarks.....	75
4.2. Conceptual perspectives on EU multilevel administrative order.....	75
4.3. Elements of the organisational design of EU multilevel administration .....	76
4.4. Organisational models of EU multilevel administration.....	95
CHAPTER 5 Operational design of EU multilevel administration .....	103
5.1. Introductory remarks.....	103
5.2. The Principal-Agent perspective on top-bottom compliance .....	104
5.3. Review of Principal-Agent applications to study of inter-institutional relations.....	121

<b>PART III. COMPLIANCE EXPECTATION WITHIN THE SINGLE SUPERVISORY MECHANISM (SSM) (INSTITUTIONAL ANALYSIS) .....</b>	<b>142</b>
CHAPTER 6 Organisational design of the Single Supervisory Mechanism (SSM).....	143
6.1. Introductory remarks.....	143
6.2. Constitutional foundations of the SSM.....	144
6.3. Allocation of supervisory responsibilities within the SSM.....	151
6.4. Administrative supervisory interactions within the SSM.....	197
6.5. Jurisdictional outreach of the SSM.....	219
6.6. Preliminary observations as regards the first structural condition affecting formal top-down compliance expectation .....	229
CHAPTER 7 Operational design of the Single Supervisory Mechanism ...	238
7.1. Introductory remarks.....	238
7.2. Application of the Principal-Agent framework to this study .....	240
7.3. The formal capacity for control in the SSM .....	257
7.4. The formal capacity for cooperation in the SSM .....	291
7.5. Preliminary observations as regards the second structural condition affecting formal top-down compliance expectation.....	321
<b>PART IV. CONCLUSIONS.....</b>	<b>338</b>
CHAPTER 8 Assessing the capacity for compliance within the SSM .....	339
8.1. Introductory remarks.....	339
8.2. The capacity for compliance within the SSM under the Enforcement approach .....	340
8.3. The capacity for compliance within the SSM under the Management approach .....	354
8.4. Implications of the study .....	360
8.5. Policy recommendations .....	362
<b>BIBLIOGRAPHY .....</b>	<b>364</b>
Primary sources .....	364
Secondary sources .....	374
<b>ANNEX .....</b>	<b>396</b>
Interviewees' sample .....	396
Executive summaries of informal interviews conducted .....	397

# PREFACE

## Acknowledgments

Firstly, I would like to express my sincere gratitude to my supervisor Prof. David John Howarth for the continuous support of my PhD and related research, for his patience, advice, sense of humor and immense knowledge. His guidance helped me in all the time of research and writing of this thesis. I could not have imagined having a better supervisor and mentor for my PhD study.

Besides my supervisor, I would like to thank the rest of my thesis committee: Prof. Jean-Victor Louis, Prof. Joana Mendes, Prof. Lucia Quaglia, and Prof. Aneta Spendzharova, as well as Dr Demosthenes Ioannou, for their insightful comments and encouragement, but also for the hard question which incited me to widen my research from various perspectives.

My sincere thanks also go to Mr Giacomo Caviglia and Mr Stéphane Kerjean, who gave me an opportunity to join their supervisory team at the European Central Bank as trainee. This experience provided me with better insights into day-to-day operations of the Single Supervisory Mechanism, from which this dissertation has benefited a lot. I would also like to thank all experts and supervisors at the European Central Bank, European Banking Authority and various National Competent Authorities who agreed to share their early experience of working for European banking supervision. I am grateful to my friends who still remain friends despite my limited availability during last years and to my closest family for their spiritual support.

Finally, I would like to thank the University for Luxembourg for a very generous funding and the Doctoral School of my Faculty for excellent research support.

Jakub Gren

## Abstract

This dissertation offers a deep political science insight into the functioning of the EU new multilevel administrative system governing the micro-prudential supervision of credit institutions operating in the Single Market. It aims to explain the conditions affecting the formal top-bottom compliance expectation within this multilevel system. In doing so, it engages in the institutional analysis of the organisational and operational design of the Single Supervisory Mechanism (SSM).

The SSM is the first pillar of the European Banking Union and is composed by the ECB and National Competent Authorities (NCAs) of participating Member States. It consists of two specific supervisory (sub) systems: (i) SSM Direct Supervision, applicable to the micro-prudential supervision of large and systemic (“significant”) banks established within the jurisdiction of Member States; and (ii) SSM Indirect Supervision, applicable to the micro-prudential supervision of smaller and medium-sized (“less significant”) banks established within the jurisdiction of Member States.

Both supervisory subsystems are considered to be of a multilevel nature, consisting of independently organized supervisory apparatus residing at the higher (supranational) and lower (national) levels, whose mutual administrative interactions are embedded in a certain structural (institutional) context. The formal legal and administrative framework in which they operate needs to provide the necessary conditions to promote the systemic top-down compliance required in order ensure the smooth and robust functioning of the SSM as a whole. To explain

under which structural conditions the expected top-bottom compliance within the SSM is likely to reach higher levels, this study rests on a calibrated analytical framework that applies the Principal-Agent theory in the context of EU multilevel administration.

More specifically, this dissertation argues that two specific structural conditions (namely, the operational and the organisational designs of the respective SSM supervisory subsystems) are likely to influence the expected compliance of the NCA lower-level supervisory apparatus (the agent) with the preferences and objectives of the ECB higher-level supervisory apparatus (the principal) relating to the Union's policies on prudential banking supervision. To prove this argument, this dissertation constructs two hypotheses (the "Enforcement" and the "Management" hypotheses) based on the main tenants of two traditional schools that have sought to explain compliance within international regimes: the enforcement school and the management school. In brief, the "Enforcement" hypothesis relates the formal-top-down compliance expectation to the capacity of control within the SSM. The "Management" hypothesis links the formal-top-down compliance expectation to the capacity of cooperation within the SSM.

These hypotheses are tested by the application of two dimensions of the Principal-Agent framework: (i) the "traditional" Principal-Agent perspective, used to test the "Enforcement" hypothesis, and (ii) the "liberal" Principal-Agent perspective, used to test the "Management" hypothesis. The test of the Enforcement hypothesis is conducted in two phases. In the first phase, the systemic position of the higher level

actor (the principal) in the respective SSM supervisory system is assessed by looking at its organisational design. In the second phase, the operational design of the respective SSM supervisory system is analyzed by gauging the higher level actor's (the principal's) control capacity over the lower level actor's (the agent) within that system. The test of the "Management" hypothesis follows the same two-step approach. In the first phase, the higher level actor's (the principal's) "shadow of hierarchy" cast upon the lower level actor (the agent) is assessed by looking at its organisational design. In the second phase, the operational designs of the respective SSM supervisory systems are analyzed by ascertaining the cooperation capacity between the higher and lower level actors (the principal and the agent) within each system.



## List of abbreviations

AQR	Asset Quality Review
AUT	Division Authorisations of the ECB Directorate General Micro-Prudential Supervision IV
BRRD	Bank Recovery and Resolution Directive
BU	Banking Union
CA	Comprehensive Assessment
CASC	Comprehensive Assessment Steering Committee
CJEU	Court of Justice of the European Union
CNP	Central Notification Point
COI	Division Centralized On-site Inspections of the ECB Directorate General Micro-Prudential Supervision IV
CRDIV	Capital Requirements Directive IV
CRM	Division Crisis Management of the ECB Directorate General Micro-Prudential Supervision IV
CRR	Capital Requirements Regulation
CVA	Credit Valuation Adjustment
DG-MSI	ECB Directorate General Micro-Prudential Supervision I
DG-MSII	ECB Directorate General Micro-Prudential Supervision II
DG-MSIII	ECB Directorate General Micro-Prudential Supervision III
DG-MSIV	ECB Directorate General Micro-Prudential Supervision IV
DSSB	ECB Directorate General Secretariat to the Supervisory Board
DI	Differentiated integration
EBA	European Banking Authority
ECA	European Court of Auditors
ECB	European Central Bank
ECOFIN	Economic and Financial Affairs Council
EIOPA	European Insurance and Occupational Pensions Authority
EH	Enforcement hypothesis

EMU	Economic and Monetary Union
ESAs	European Supervisory Authorities
ESMA	European Securities and Markets Authority
ECOFIN	Economic and Financial Affairs Council
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
EU	European Union
GDP	Gross Domestic Product
IMD	Division Internal Models of the ECB Directorate General Micro-Prudential Supervision IV
IMF	International Monetary Fund
LSI	Less significant institution
JSS	Joint Supervisory Standards
JST	Joint Supervisory Team
MH	Management hypothesis
MLA	Multilevel administration
MoU	Memorandum of Understanding
MSD	Division Methodology and Standards Development of the ECB Directorate General Micro-Prudential Supervision IV
NCA	National Competent Authority
NDA	National Designated Authority
NPLs	Non-performing loans
OECD	Organisation for Economic Cooperation and Development
ONDs	Options and National Discretions
P2G	Pillar 2 Guidance
P2R	Pillar 2 Requirement
PSC	Division Planning and Coordination of Supervisory Examination Programmes of the ECB Directorate General Micro-Prudential Supervision IV
RIA	Division Risk Analysis of the ECB Directorate General Micro-Prudential

	Supervision IV
SEP	Supervisory Examination Programme
SGP	Stability and Growth Pact
SI	Significant institution
SM	Supervisory Manual
SMN	Senior Management Network
SPO	Division Supervisory Policies of the ECB Directorate General Micro-Prudential Supervision IV
SPQ	Division Supervisory Quality Assurance of the ECB Directorate General Micro-Prudential Supervision IV
SSM	Single Supervisory Mechanism
SREP	Supervisory Review and Evaluation Process
ST	Stress Testing
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty of the European Union
UN	United Nations
WG-HSS	Working Group on High Supervisory Standards
WTO	World Trade Organisation

## List of figures

Figure 1 Case study table .....	26
Figure 2 Determinants of the top-down compliance expectation in the SSM .....	40
Figure 3 “Enforcement” hypothesis test .....	43
Figure 4 “Management” hypothesis test.....	46
Figure 5 Analytical tools for the inquiry on the organisational design of the SSM.....	102
Figure 6 Analytical tools for the inquiry on the operational design of the SSM .....	120
Figure 7 Areas of supervisory decision-making competence in the SSM .....	197
Figure 8 Phases of the supervisory process .....	219
Figure 9 Bureaucratic principal in the subsystem of SSM Direct Supervision .....	247
Figure 10 Bureaucratic agent in the subsystem of SSM Direct Supervision.....	248
Figure 11 Bureaucratic principal in the subsystem of SSM Indirect Supervision .....	250
Figure 12 Bureaucratic agent in the subsystem of SSM Indirect Supervision .....	251
Figure 13 Capacity for control within the subsystem of SSM Direct Supervision.....	276
Figure 14 Capacity for control within the subsystem of SSM Indirect Supervision.....	290
Figure 15 Capacity for cooperation within the subsystem of SSM Direct Supervision.....	311
Figure 16 Capacity for cooperation within the subsystem of SSM Indirect Supervision.....	320

# **PART I.**

## **SETTING THE SCENE**

# CHAPTER 1

## Introduction to the study

On 4 November 2014, the Council Regulation No. 1024/2013 establishing the Single Supervisory Mechanism (the “SSM Regulation”) became applicable. It delegated to the European Central Bank (“ECB”) exclusive competences to carry out a number of specific supervisory tasks related to the prudential supervision of credit institutions in the newly created Banking Union (“BU”). The SSM Regulation is the founding act of the first and key pillar of the Banking Union – the Single Supervisory Mechanism (“the SSM”) - which is a common framework for the micro prudential supervision of banks headquartered in euroarea Member States.

The institutional design of the SSM is unique in the EU constitutional and administrative framework. It is a “system of financial supervision consisting of the ECB and the National Competent Authorities (“NCAs”) of the participating Member States.”<sup>1</sup> It is clear that neither is the SSM an EU institution/agency, nor does it possess legal personality. The fact that the SSM is essentially composed of different and autonomous elements, located both at supranational and national level, entails far-reaching implications from the legal and political science perspective. Both components of the system are embedded in a specific legal and institutional structure which necessarily shapes their behavioural motivations and chosen courses

---

<sup>1</sup> See Article 2(9) of the SSM Regulation.

of action when performing their respective supervisory tasks. This specific structure also raises delicate questions concerning the interactions between different levels of administration, and the ways that the actors situated at different levels cooperate to pursue common tasks and policy objectives. In particular, one of the greatest challenges that the multilevel design of the SSM is likely to face concerns the way of ensuring a higher compliance of the lower (national) level supervisory administration with the policy preferences and objectives of the higher (supranational) level supervisory administration. In this context, a growing number of accounts indicate that disruptions in interactions between national and supranational levels within a multi-level setting appear to be common in the EU context.<sup>2</sup>

Against this backdrop, this dissertation identifies and analyses two main conditions which are formally expected to positively influence the NCA supervisory administrations' compliance with the policy preferences and objectives of the ECB supervisory administration operating in the framework of the multi-level SSM (top-down compliance). Following the understanding of the institutional design of a multi-level regime as a set of "rules of the game"<sup>3</sup> which "prescribe, proscribe and

---

<sup>2</sup> See, for example, Andrew Jordan, 'The implementation of EU environmental policy; a policy problem without a political solution?', *Environment and Planning C: Government and Policy* 17, no. 1 (1999): pp. 69–90; Christoph Knill, 'Implementing European policies: the impact of national administrative traditions' (1997); Maria Mendrinou, 'Non-compliance and the European commission's role in integration', *Journal of European Public Policy* 3, no. 1 (1996): pp. 1–22; Esther Versluis, 'Even rules, uneven practices: Opening the 'black box' of EU law in action', *West European Politics* 30, no. 1 (2007): pp. 50–67.

<sup>3</sup> See Douglas North, *Institutions, Institutional Change and Economic Performance* (2009), Cambridge: Cambridge University Press, page 40.

permit behavior”<sup>4</sup> to the actors operating therein, this dissertation argues that two variables influence the most essential “rules of the game” affecting formal top-down compliance expectation within the SSM multi-level supervisory administration: (i) the specific organisational design of the SSM and (ii) the specific operational design of the SSM.

The first condition is deemed to shape the formal position of the higher and lower level actors operating therein, including their respective hierarchies (i.a. their competences, tasks, or roles). The “organisational” rules are encapsulated within the legal and regulatory framework underpinning the functioning of the SSM’s supervisory machinery. Different models of EU multi-level administration can be distinguished by resorting to the theoretical accounts of federal theory. The second condition captures internal mechanisms which are put in place to address potentially conflicting preferences and objectives of the actors pertaining to the multi-level regime. The “operational” rules are deemed to be reflected in the control and cooperation capacity of the ECB over/with the NCAs. Control and cooperation capacities can be estimated by the application of an analytical toolkit developed under the Principal-Agent approach to the relations between the ECB and the NCA supervisory administrations within the SSM.

The study of the organisational and operational “rules of the game” governing the SSM offered by this dissertation can be regarded a clear example of how the analyses

---

<sup>4</sup> See Elinor Ostrom, ‘An agenda for the study of institutions’ (1986), *Public choice*, 48(1), pp. 3-25.



of both the legal and the political dimension of EU administrative realities mutually complement each other and reinforce the quality of academic research in the field.

By analyzing the institutional design of the SSM through the theory of federalism and the Principal-Agent framework, this dissertation *firstly* aims to provide a meaningful contribution to the study on compliance within multi-level regimes, since top-down relationships between the EU and its Member States' administrations have not yet been extensively addressed in the existing literature. *Second*, by accepting theoretical insights from federalism in order to reconstruct the SSM's organisational "rules of the game", this dissertation aims to significantly add to the research on the post-crisis transformations of bureaucratic interactions in the EU. As noted by Michael Bauer and Jarle Trondal, "the administrative reality of the EU (...) remains under-studied even though it has received increased academic attention in recent years".<sup>5</sup> *Third*, by looking at the SSM's operational "rules of the game" through the Principal-Agent framework, this dissertation intends to

---

<sup>5</sup> With the notable exception of research on administrative realities concerning the European Commission as the main EU executive actor, see Jarle Trondal and Michael W. Bauer, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system', *European Political Science Review* (2015): pp. 1–22.

In this regard, see indicatively the following contributions by Bauer, Ellinas, Egeberg, Kassim, Peterson, Trondal and Wille: Jarle Trondal, *An emergent European executive order* (Oxford University Press, 2010); Morten Egeberg and Jarle Trondal, 'National agencies in the European administrative space: government driven, commission driven or networked?', *Public Administration* 87, no. 4 (2009): pp. 779–790; Antonis Ellinas and Ezra Suleiman, 'Reforming the Commission: between modernization and bureaucratization', *Journal of European Public Policy* 15, no. 5 (2008): pp. 708–725; Antonis A. Ellinas and Ezra N. Suleiman, 'Supranationalism in a transnational bureaucracy: The case of the European Commission', *JCMS: Journal of Common Market Studies* 49, no. 5 (2011): pp. 923–947; Antonis A. Ellinas and Ezra Suleiman, *The European Commission and Bureaucratic Autonomy: Europe's Custodians* (Cambridge University Press, 2012); Hussein Kassim, 'The secretariat general of the European commission', *The European Commission. London: John Harper Publishing* (2006): pp. 75–102; Hussein Kassim, John Peterson, Michael W. Bauer et al., *The European Commission of the twenty-first century* (OUP Oxford, 2013); Wille, including: Anchrit Wille, *The normalization of the European Commission: Politics and bureaucracy in the EU executive* (OUP Oxford, 2013).

contribute the rational choice literature pioneered by Jonas Tallberg, which explains the “post-decisional stage” of European integration.

The choice to rely on the Principal-Agent framework, which has been championed by the rational choice institutionalism in political science scholarship, is a strategic decision which is primarily informed by the following considerations.

In the author’s view, the application of the rational choice approach to the institutional analysis of the SSM offers a convincing deductive explanation of actors’ behavior that is based on a set of universal claims about rationality. It focuses on identifying the interests and motivations behind actors’ behavior which are assumed to be largely unchanged over time. The underlying logic of rational choice institutionalism is that the behavior of actors responds to predefined “rules of the game” pertaining to the institutional structure<sup>6</sup> in which those actors operate. Therefore, it is well-suited to address the issues of compliance within multi-level regimes, such as the SSM, which are predominantly based on formal rules and policies.<sup>7</sup>

Given its deductive nature, rational choice institutionalism is not only very helpful for capturing the range of reasons why actors would take any given action within a given institutional incentive structure, but it can also be useful for bringing out particularities or actions that would not be unexpected under normal

---

<sup>6</sup> See B. Guy Peters, ‘Institutional theory: Problems and prospects’ (2000).

<sup>7</sup> On more specific reasons why the Principal-Agent approach is a suitable analytical framework for this dissertation, see in particular its sections II.5.2 and III. 7.2.

circumstances.<sup>8</sup> However, rational choice institutionalism may not be the best analytical choice when it comes to explaining these particularities, especially where they are not a result of an interest-motivated action. In those cases, it is possible that they might better be explained in historical, sociological institutionalist, or constructivist terms.

Therefore, one of the potential analytical alternatives to the rational choice approach could be historical institutionalism. The institutionalist approach is particularly insightful when explaining the origins and development of institutional structures and processes over time, as it focuses on continuity and path dependence, and tends to highlight sequences in development, timing of events, and phases of political change. It also considers the interests of the actors as more context-driven rather than being universally defined.<sup>9</sup> However, historical institutionalism might not be the best analytical choice to study compliance within the newly created SSM, since it is better suited to explaining the persistence of policies or structures rather than explaining their change.<sup>10</sup>

Another alternative to the choice of rational choice institutionalism could be sociological institutionalism. This institutionalist approach puts emphasis on the shared understandings and norms that frame actions, shape identities and influence interests. As sociological institutional explanations are obtained in an inductive

---

<sup>8</sup> See Vivien A. Schmidt, George Tsebelis, Thomas Risse et al., 'Approaches to the study of European politics', *ECSA review* 12, no. 2 (1999): p. 15.

<sup>9</sup> See John Zysman, 'How institutions create historically rooted trajectories of growth', *Industrial and corporate change* 3, no. 1 (1994): pp. 243–283; Kathleen Thelen, 'Historical institutionalism in comparative politics', *Annual Review of Political Science* 2, no. 1 (1999): pp. 369–404.

<sup>10</sup> See Peters, 'Institutional theory: Problems and prospects' (above, n. 6).

(bottom-up) rather than deductive (top-bottom) manner, sociological institutionalism can shed more light on individuals' reasons for action in ways that rational choice institutionalism cannot. However, obtaining sociological institutionalist explanations is not without challenges. Notably, defining the dependent variable and the rules of the game could be challenging from the sociological institutionalist perspective. This is due to the comprehensive notion of institutions, which are considered to include not only formal rules and policies, but also symbol systems, cognitive scripts, and moral templates.<sup>11</sup> Given that complexity, it appears that rational choice institutional may wield more power than its sociological counterpart when explaining compliance issues within the SSM at the phase of its development.

Finally, one could also apply constructivist approaches to the study of the SSM; these approaches tend to highlight the importance of long lasting shared ideas in explaining political phenomena. They typically survey changing context developments over decades, and therefore offer an analytical perspective on the action undertaken by the actors in the longer term. However, as the SSM is a relatively new EU politico-administrative phenomenon, it is debatable whether at the current juncture the application of a constructivist framework could provide more satisfactory explanations than the rational choice framework. In this context, it has been convincingly argued that the rational choice approaches (for example, the

---

<sup>11</sup> See W. Richard Scott, 'Institutions and Organizations: Towards a Theoretical Synthesis' in W. Richard Scott, John W. Meyer et al., *Institutional Environments and Organizations: Structural Complexity and Individualism* (Thousand Oaks CA, Sage, 1994), pp. 55–80.

Principal-Agent analytical framework) have proven to be better designed for the analysis of short- and medium-term action, when actors' preferences and interests remain fixed.<sup>12</sup> Furthermore, the application of the constructivist approach would necessarily require conducting a significant number of formal interviews, which are not easy to obtain as ECB and NCA supervisors are very reluctant to discuss their supervisory practices in public. Therefore, in the author's view rational choice institutionalism, in the form of the Principal-Agent framework, can be regarded as the most suitable analytical framework to answer the specific research question posed by this dissertation.

This dissertation is composed of four parts. Part one sets the research scene. It introduces the dissertation's design, which sets out the research problem, the research question, the hypotheses to be tested, the methodology and its limitations, as well as the material and sources used for the analysis (I.2). It also walks the reader through the nature of EU administration and its general development, including the field of banking supervision (II.3).

Part two introduces the analytical framework used to approach the research question that this dissertation poses. This framework provides analytical tools to carry out the assessment of the formal top-down compliance expectations in the SSM. The tools to assess the first structural condition – the organisational design of an EU multilevel administration – are described in chapter four (II.4). Based on the

---

<sup>12</sup> See David Howarth and Tal Sadeh, 'In the vanguard of globalization: The OECD and international capital liberalization', *Review of International Political Economy* 18, no. 5 (2011): pp. 622–645

concept of multilevel administration, this chapter builds three organisational models that can be used to capture the systemic position of the higher level actor vis-à-vis the lower level in a multilevel regime. The analytical tools to evaluate the second structural condition – namely, the operational design of an EU multilevel administration – are presented in chapter five (II.5). Based on the agency theory, this chapter develops two Principal-Agent approaches. The first is geared to assess the credibility of the principal's control capacity as required by the enforcement approach to compliance, whereas the second aims to assess the credibility of the cooperation capacity between the principal and the agent as required by the management approach to compliance (II.5.2). This chapter also reviews the relevant applications of the Principal-Agent framework to the studies of inter-institutional contexts (II.5.3).

Part three consists of chapters six and seven, which apply the analytical tools developed in chapters three and four to the SSM multilevel supervisory subsystems. Accordingly, chapter five analyses the two supervisory systems of the SSM in accordance with the criteria provided in chapter three (III.6.2-6.5), classifies them as one of the organisational models identified there and discusses the implications thereof (III.6.6). This exercise concludes the first phase of the testing of the “Enforcement” and “Management” hypotheses. Subsequently, chapter six inspects the operational design of the systems of SSM Direct and Indirect Supervision through the analytical lens the developed in chapter five (two dimensions of the Principal-Agent framework) (II.5.2).

More specifically, this part assesses the credibility of the principal (ECB supervisory apparatus)'s capacity of control over its agents (NCA supervisory apparatus) with a view to finalising the test of the “Enforcement” hypothesis (III.7.3). It also looks at the credibility of the cooperation capacity between the principal and the agent in order to finalize the test of the “Management” hypothesis (III.7.4). This exercise concludes the second phase of the testing of the “Enforcement” and “Management” hypotheses, which is summarized in the last section of this chapter (III.7.5).

Part four consists of the concluding chapter eight, in which the results of testing the “Enforcement” and “Management” hypotheses are summarized (IV.8). It presents the findings regarding the capacity for compliance in the SSM analyzed through the lens of the enforcement and management schools of thought. It also uses the findings of this study to offer a more critical perspective of the overall functioning of the SSM, perceived as an EU multilevel administrative system governing micro-prudential supervision. Finally, a number of recommendations are offered.

# CHAPTER 2

## Research design

### 2.1 Research scope and limitations

This study will limit the formal-institutional analysis of the EU's post-crisis administrative architecture governing banking supervision exclusively to the administrative arrangements pertaining to the SSM. This implies that another of the most prominent administrative arrangements of the EU post-crisis, the “banking arm” of the European System of Financial Supervision, remains beyond the scope of this dissertation. There are two reasons for this limitation. First, the word limit of the dissertation, combined with the objective of a detailed insightful analysis, necessarily requires a delimitation of the scope of the research. Second, the future of the “banking arm” of the ESFS remains uncertain due to the loss of its institutional prominence in the face of the upcoming departure of the United Kingdom from the European Union. At the time of finalizing this dissertation (December 2017), the Commission has presented a proposal for the EFSF reform which may considerably change the set-up of this arrangement in the months and years to come. It is therefore impossible for this dissertation to reflect on the new set-up of the ESFS.

Furthermore, this study engages in the institutional analysis of the SSM's administrative arrangements governing the micro-prudential dimension of the supervision over credit institutions (also referred to as “entities”). This implies that



the administrative framework governing the macro-prudential supervision in the SSM, which remains shared between the ECB and the NDAs, is not the subject of the analysis in this study.

This dissertation considers the SSM as a complex system of micro-prudential supervision. Depending on the significance status of a supervised institution, two multilevel supervisory subsystems can be identified. The first SSM administrative arrangement, referred to as the SSM Direct Supervision subsystem, governs the supervision of significant institutions. Within this subsystem, the exercise of micro-prudential tasks conferred upon the ECB by the SSM Regulation is carried out by Joint Supervisory Teams (JSTs), which are special, inter-institutional and remote administrative structures consisting of ECB and NCA-based supervisory apparatuses.<sup>13</sup> The second SSM administrative arrangement, referred to as the SSM Indirect Supervision subsystem, governs the supervision of less significant institutions. Within this subsystem, the exercise of micro-prudential tasks conferred upon the ECB by the SSM Regulation is operationally carried out by organisationally distinguished NCA internal structures consisting of national supervisors who have

---

<sup>13</sup> In fact, JSTs are comprised to a large degree (75% on average) by staff members of the national supervisors, but are always managed by an ECB staff member (JST coordinator). See Ignazio Angeloni, *Exchange of views on supervisory issues with the Finance and Treasury Committee of the Senate of the Republic of Italy* (Rome, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150623.en.html>, accessed 01 December 2017. As specifically explained by the ECB, the ratio of 25 % ECB staff and 75 % NCA staff was a widely agreed benchmark when the SSM was established and not a formalised target. See European Court of Auditors, *Single Supervisory Mechanism - Good start but further improvements needed*, Special Report No. 29/2016, p.127.

not been assigned to the JSTs, and under the ECB's multi-dimensional oversight.<sup>14</sup> Importantly, the functional border between both administrative supervisory arrangements is not fixed and can be modified on the basis of the annual significance assessments or an ECB decision to “directly exercise all relevant powers” over less significant institutions.<sup>15</sup>

Case study	Single Supervisory Mechanism (SSM)	
	SSM Direct Supervision subsystem	SSM Indirect Supervision subsystem
Applicability	Supervision of significant institutions	Supervision of less significant institutions
Higher level actor	ECB (supervisory apparatus assigned to the supervision of significant institutions )	ECB (supervisory apparatus assigned to the supervision of less significant institutions )
Lower level actor	NCA JST supervisory apparatus assigned to the supervision of significant institutions	NCA non-JST supervisory apparatus assigned to the supervision of less significant institutions

**Figure 1** Case study table

<sup>14</sup> With the exception of supervisory responsibilities related to common procedures which are reserved to the ECB exclusive competence regardless of the SSM supervisory subsystem. See Article 4(1)(a) and (c) of the SSM Regulation.

<sup>15</sup> See Article 6 (5)(c) of the SSM Regulation.

Both SSM supervisory subsystems are classified as administrative arrangements comprising supervisory apparatuses residing at different political levels – supranational and national. In this setting, the higher level supervisory apparatus based at the ECB is considered to be the bureaucratic principal, whereas the lower level supervisory apparatus based at the NCAs is considered to be the bureaucratic agent. In an optimal multilevel administrative setting, one would assume that the bureaucratic actors located at the lower levels would automatically follow the preferences and objectives formulated by their higher level counterparts so that such multilevel administrative machinery is able to function in a smooth and robust way. However, this is not the case in the real world because any socio-political, including administrative, interactions are always embedded in a certain institutional context which can be structured by a number of conditions. By virtue of being an administrative order, the SSM is necessarily organized and constrained by a collection of rules, procedures and organized practices which may affect the behaviour of the actors operating within it,<sup>16</sup> and which may create structural challenges as regards its efficient functioning.

## 2.2. Research problem

Following the main tenants of the “Westphalian model” of state, for around three centuries domestic public administration was in charge of producing public goods

---

<sup>16</sup> See James March and Johan P. Olsen, *Rediscovering Institutions. The Organizational Basis of Politics* (New York: Free Press, 1989); James G. March and Johan P. Olsen, *Democratic governance* (Free Press, 1995); Douglass C. North, *Institutions, institutional change and economic performance* (Cambridge University Press, 1990); Douglass C. North, ‘Institutions and credible commitment’, *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft* (1993): pp. 11–23.

inside the nation state. This however is not the case in the twenty-first century. Since the increasing globalization has brought more interconnectedness and interdependence between individual states, the positive or negative effects of a number of national public policies, programs and services has started to extend beyond national boundaries.<sup>17</sup>

These structural transformations have made the pursuit of public policies for the provisioning of public goods a much more complex process than before, involving multilateral cooperation between different public actors located at the national, international or supranational level. Financial stability is often regarded as such a public good, the delivery of which within individual state jurisdictions is heavily influenced by international and global conditions. In the EU, the SSM consists of higher level administration (the ECB) and lower level administration (the NCAs) and has a crucial and legally recognized role in the provision of financial stability across the Member States.<sup>18</sup> The fact that the SSM is essentially characterized by multilevelness entails far-reaching consequences from the viewpoint of legal and political science analysis.

Multilevel systems are expected to calibrate supranational integration with Member State discretion in order to adopt common solutions to shared policy problems,

---

<sup>17</sup> On this phenomenon, see – for example - Joseph E. Stiglitz, *The theory of international public goods and the architecture of international organizations* (Department for Economic and Social Information and Policy Analysis, United Nations, 1995); Inge Kaul, Isabelle Grunberg, and Marc A. Stern, 'Defining global public goods', *Global public goods: international cooperation in the 21st century* (1999): pp. 2–19; I. Kaul, I. Grunberg, and M. A. Stern, 'Conceicao, P.-le Goulven, K.-Mendoza, RU (Eds)(2003)', *Providing Global Public Goods. Managing Globalization*.

<sup>18</sup> See Article 1 of the SSM Regulation, which obliges the ECB to carry out its supervisory tasks “with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State (...)”.

tailor-made to specific local contexts.<sup>19</sup> In particular, seamless cooperation between those actors is necessary to ensure systemic compliance within such multilevel administrative systems. However, the occurrence of automatic compliance within multilevel systems cannot be taken for granted. The participants to a multi-lateral or a multilevel regime are always embedded in certain structural conditions which may influence their behavioural motivations and chosen course of action when performing their tasks and pursuing their policy objectives.

Since the EU does not possess fully-fledged “state capacities”, it has to rely essentially on its Member States’ administrative structures when applying and enforcing its laws and policies in local jurisdictions. This particular institutional set-up causes that the European Union, as a polity, is increasingly confronted with growing compliance problems.<sup>20</sup> They are reflected in an inherent dilemma of national level actors regarding the extent to which the preferences and objectives formulated by the supranational actors should be followed. With respect to the SSM, concerns have already been expressed as to whether the new mechanism can deliver the objectives it promised given its institutional complexity.<sup>21</sup>

---

<sup>19</sup> See, for example, Helga Pölzl and Oliver Treib, ‘Implementing public policy’, edited by Frank Fischer and Gerald J. Miller, in *Handbook of public policy analysis: theory, politics, and methods* (crc Press, 2006), pp. 89–107.

<sup>20</sup> See, notably, Esther Versluis, ‘Compliance Problems in the EU What potential role for agencies in securing compliance?’ (2005); Ellen Mastenbroek, ‘EU compliance: Still a ‘black hole’?’, *Journal of European Public Policy* 12, no. 6 (2005): pp. 1103–1120; Jonas Tallberg, ‘Paths to compliance: Enforcement, management, and the European Union’, *International Organization* 56, no. 03 (2002): pp. 609–643.

<sup>21</sup> Skepticism has come from different perspectives and disciplines, see in particular, Rishi Goyal, Petya Koeva Brooks, Mahmood Pradhan et al., *A Banking Union for the Euro Area, IMF Staff Discussion Note, SDN/13/01*; Tobias H. Tröger, ‘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. 04 (2014): pp. 449–497; Eilis Ferran, ‘European Banking Union: imperfect, but it can work’, *University of Cambridge Faculty of Law Research Paper*, no. 30 (2014); Eilis Ferran, ‘European Banking Union and the EU Single Financial Market: More Differentiated Integration, or

An ideal compliance situation can be defined as “a state of conformity between the actor’s behaviour and a specified rule”.<sup>22</sup> In studies on international regulatory regimes, the contemporary debate on compliance in international cooperation is dominated by two main analytical approaches: the enforcement and the management schools.<sup>23</sup> Both approaches are inspired by rationalism when formulating expectations about compliance within a given regime.<sup>24</sup>

Although the enforcement and management schools share the same rational choice foundations, they nevertheless have developed two different strategies for achieving higher compliance levels. Whereas the enforcement strategy emphasizes “hard” mechanisms (“sticks”), such as hierarchical control, deterrence and sanctioning as means of producing compliance within a regime, the management strategy rejects coercion and assigns more importance to “softer” tools (“carrots”), such as cooperation and collective management of non-compliance via assistance, analysis and negotiations to achieve the same purpose.<sup>25</sup>

Despite the analytical dominance of the enforcement and management perspectives on compliance within various strands of literature on regulatory regimes, emerging

---

Disintegration?’, *University of Cambridge Faculty of Law Research Paper*, no. 29 (2014); Iain Begg, ed., *Banking union: inevitable, but profoundly challenging?* (Institut für Wirtschaftsforschung (Ifo), 2012).

<sup>22</sup> See Kal Raustiala and Anne-Marie Slaughter, ‘International law, international relations and compliance’ (2002); Roger Fisher, *Improving compliance with international law* (Univ of Virginia Pr, 1981); Ronald B. Mitchell, ‘Regime design matters: intentional oil pollution and treaty compliance’, *International Organization* 48, no. 3 (1994): pp. 425–458.

<sup>23</sup> See Tallberg, ‘Paths to compliance: Enforcement, management, and the European Union’ (above, n. 20); Lisa Conant, ‘Compliance and what EU member states make of it’, *Compliance and the Enforcement of EU Law* (2012): pp. 1–30.

<sup>24</sup> *Ibid.*, p. 6.

<sup>25</sup> See Abram Chayes and Antonia Handler Chayes, *The new sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998).

alternative approaches to the issues of compliance (and non-compliance) should also be acknowledged. There are researchers who develop analytical frameworks which are more focused on normative, ideas-based aspects of compliance, such as mutual persuasion and socialization.<sup>26</sup> Other authors offer a more detailed analytical toolbox to analyze compliance and can be grouped into as many as seven specific schools.<sup>27</sup> Altogether, research has identified a broad number of factors motivating actors's decisions on the extent of their own compliance. These factors include self-interest, enforcement and inducements, pressure from society, a sense of obligation, or habit.<sup>28</sup>

Since the objective of this study is to rely exclusively on the rational-choice approaches to compliance, the following subsections will introduce the main tenants of the enforcement and management strategies of compliance that will be applied to a further analysis. This choice follows the guidance offered by Karen Alter who considers a combination of both the enforcement and management strategies to explain compliance as a “simply sound policy”.<sup>29</sup>

---

<sup>26</sup> See *inter alia*; Raustiala and Slaughter, ‘International law, international relations and compliance’ (above, n. 22) Anne-Marie Slaughter, ‘Sovereignty and power in a networked world order’, *Stan. J. Int’l L.* 40 (2004): p. 283; Eleni Tsingou, ‘Transnational governance networks in the regulation of finance’, *Business and Global Governance* (2010): pp. 138–156.

<sup>27</sup> The ‘seven’ layered classification was formulated by George Downs and Andrea Trento who distinguished realism, Kantian liberalism, democratic process, strategic, managerial, transformationalist and transnationalism among possible approaches to cope with non-compliance. See George W. Downs and Andrea W. Trento, ‘Conceptual Issues Surrounding the Compliance Gap’, *International Law and Organization*, New York: Rowman & Littlefield (2004): pp. 19–40.

<sup>28</sup> See Oran R. Young, *International cooperation: Building regimes for natural resources and the environment* (Cornell University Press, 1989) (chapter two).

<sup>29</sup> Karen J. Alter, ‘Do international courts enhance compliance with international law?’, *Review of Asian and Pacific Studies*, No. 25 (2003), p. 56.

### 2.2.1. Enforcement strategy of compliance

The enforcement school, pioneered by the works of George Downs, David Rocke and Michael Jones<sup>30</sup>, attributes a capital importance to strategic cost-benefit calculations of the actors concerned when facing the compliance dilemma.<sup>31</sup> Actors might have a number of underlying interests when carrying out a cost-benefit analysis. An actor which is a unit of public administration (technocratic actor) is primarily expected to behave so as to promote its strategic interests of maximizing its resources and power,<sup>32</sup> implementing applicable laws and policies,<sup>33</sup> and aiming at problem solving or innovation (“bureau shaping”).<sup>34</sup> As noted by Max Rheinstein, for modern bureaucracy, the element of “calculability of its rules” has been of great significance when deciding on whether or not to comply with authoritative rules and regulations.<sup>35</sup>

Consequently, where a range of options is available, rational actors will choose the one which would serve the fulfillment of their objectives the best.<sup>36</sup> They are also deemed to be utility maximizers acting on the basis of the “logic of calculus”. This

---

<sup>30</sup> See George W. Downs, ‘Enforcement and the Evolution of Cooperation’, *Mich. J. Int’l L.* 19 (1997): p. 319; George W. Downs and Michael A. Jones, ‘Reputation, compliance, and international law’, *The Journal of Legal Studies* 31, S1 (2002): pp. S95-S114; George W. Downs, David M. Rocke, and Peter N. Barsoom, ‘Is the good news about compliance good news about cooperation?’, *International Organization* 50, no. 03 (1996): pp. 379-406.

<sup>31</sup> See Jeffrey T. Checkel, ‘Why comply? Social learning and European identity change’, *International Organization* 55, no. 03 (2001): pp. 553-588, p. 556; Downs and Jones, ‘Reputation, compliance, and international law’ (above, n. 126).

<sup>32</sup> See William A. Niskanen, *Bureaucracy and representative government* (Transaction Publishers, 1971).

<sup>33</sup> See Max Weber, *Wirtschaft und gesellschaft: Grundriss der verstehenden Soziologie* (Mohr Siebeck, 2002), pp. 124-127.

<sup>34</sup> See Patrick Dunleavy, ‘Democracy, bureaucracy and public choice’, *New York: Harvester Wheatsheaf* (1992).

<sup>35</sup> See Max Weber, ‘Law in Economy and Society, ed. Max Rheinstein’, *Trans, by, Edward Shils and Max Rheinstein, New York, Simon and Schuster* (1954): p. 350.

<sup>36</sup> See P. Green Donald and Ian Shapiro, *Pathologies of rational choice theory* (New Haven: Yale University Press, 1994), p. 4.



does not however imply that the range of their options is unlimited. On the contrary, the formal rules shaping the structural setting in which they operate are relevant since they constrain the actors' self-interested behaviour.<sup>37</sup> In this context, their decisions whether to increase or decrease compliance will be informed by a particular system of incentives pertaining to the structure which provides benefits for compliant behavior and sanctions for non-compliant behaviour. A choice to decrease compliance may be preferred in case the costs of increasing compliance outweigh its benefits.<sup>38</sup> An additional incentive to decrease compliance is provided when multiple actors operate in a cooperative context since they may reap more benefits without contributing their share (the "free-riding" problem).<sup>39</sup>

To promote compliance, the representatives of the enforcement school would highlight the strategic dimensions of cooperation within a regime and the nature of the actors' commitments within the regime, specifically their depth.<sup>40</sup> Deeper (binding) agreements require harsher punishments to deter non-compliance such as monitoring and sanctioning instruments,<sup>41</sup> which necessarily implies that compliance is likely to be increased when strong leadership is provided within the

---

<sup>37</sup> See Jack Knight, *Institutions and social conflict* (Cambridge University Press, 1992).

<sup>38</sup> See Ronald B. Mitchell, *Compliance theory: an overview* (Earthscan London, 1996): p. 11.

<sup>39</sup> See, for example, Ronald B. Mitchell, 'Situation Structure and Regime Implementation Strategies', *Unpublished manuscript, Stanford University, Stanford, Calif* (1999); Oran R. Young, *Governance in world affairs* (Cornell University Press, 1999).

<sup>40</sup> See Raustiala and Slaughter, 'International law, international relations and compliance' (above, n. 22).

<sup>41</sup> See, for example, Mancur Olson, 'The logic of collective action Cambridge', *Mass.: Harvard 1971* (1965); Robert Axelrod and Robert O. Keohane, 'Achieving cooperation under anarchy: Strategies and institutions', *World Politics: A Quarterly Journal of International Relations* (1985): pp. 226–254; George W. Downs, David M. Rocke, and Peter N. Barsoom, 'Is the good news about compliance good news about cooperation?', *International Organization* 50, no. 03 (1996): pp. 379–406; Arild Underdal, 'Explaining compliance and defection: three models', *European Journal of International Relations* 4, no. 1 (1998): pp. 5–30.

regime<sup>42</sup> - namely leadership grounded on legal (and financial) authority.<sup>43</sup> The leader is expected to establish control and sanctioning processes and procedures to deter defections and promote compliance of the actors participating in the regime.<sup>44</sup> These tools are likely to raise the costs of non-compliance and make it a less attractive choice.<sup>45</sup> When there is no effective system to detect and respond to violations or infringements of the agreed commitments, actors participating in the regime are not likely to increase their compliance.<sup>46</sup> Therefore, it is imperative that (reluctant) actors are convinced that any substantial decrease in their compliance will be detected and sanctioned in a manner that exceeds the costs of increasing compliance.<sup>47</sup> It follows that an enforcement strategy tends to assign the primary role to effective control and sanctioning matched by strong leadership to ensure compliance within the regime.<sup>48</sup>

### 2.2.2. Management strategy of compliance

Similarly to the enforcement school, its managerial equivalent also relies on rationalist arguments when explaining actors' choice whether to increase or decrease

---

<sup>42</sup> Ibid. (Underdal), p. 9.

<sup>43</sup> Ibid.

<sup>44</sup> See Tallberg, 'Paths to compliance: Enforcement, management, and the European Union' (above, n. 20), p. 612; Ulf Sverdrup and John Erik Fossum, *Compliance and styles of conflict management in Europe*, ARENA, pp. 19-20.

<sup>45</sup> See Tallberg, 'Paths to compliance: Enforcement, management, and the European Union' (above, n. 20).

<sup>46</sup> See Esther Versluis, 'Compliance Problems in the EU What potential role for agencies in securing compliance?' (2005), p. 7.

<sup>47</sup> See Mitchell, *Compliance theory: an overview* (above, n. 38), p. 14.

<sup>48</sup> See Michael Zürn and Jürgen Neyer, 'Compliance in comparative perspective: The EU and other international institutions' (2001) 8.

their compliance with certain norms, policies or preferences.<sup>49</sup> The main difference between those two schools lies however in the actors' motivations. Scholars of management school do not see "the logic of calculus" as the sole determinant of actors' compliance choices as the enforcement theorists would advocate for. As Abram Chayes and Antonia Handler Chayes – the founders of the school – claim, the actors' decisions are not only influenced by their strategic interests. In principle, they assume that there is a general propensity of actors (states, bureaucracy) to follow their obligations since they have interest in compliance because, especially in complex environments, explicit calculation of costs and benefits for every decision is itself costly.<sup>50</sup> Efficiency implies considerable policy continuity,<sup>51</sup> which is of particular relevance to actors operating in bureaucratic contexts.<sup>52</sup> Decreasing compliance may not only be the outcome of cost-benefit analysis, but also the result of inadvertence.<sup>53</sup> As Jonas Tallberg points out, inadvertent non-compliance may result from the uncertainty involved in choosing the policy strategies required to

---

<sup>49</sup> As noted by Jutta Brunnee and Stephen Toope, the Chayesian managerial school ultimately also relies on interest-based explanations for compliance. However, given the Chayesian focus on processes of interaction and persuasion, constructivism seems to provide a natural complement to managerialist perspectives on compliance. This angle will not be however explored by this study since it follows solely the rational choice accounts. On predominantly interest-based focus of managerialism, see Jutta Brunnee, 'The Kyoto Protocol: A Testing Ground for Compliance Theories?' (2003), p.260; Jeffrey L. Dunoff and Mark A. Pollack, *Interdisciplinary perspectives on international law and international relations: the state of the art* (Cambridge University Press, 2013), p.130. On the other hand, on its constructivist elements, see Kal Raustiala and Anne-Marie Slaughter, 'International law, international relations and compliance' (2002); Kal Raustiala, 'Compliance & (and) Effectiveness in International Regulatory Cooperation', *Case W. Res. j. Int'l L.* 32 (2000): p. 387.

<sup>50</sup> See Raustiala and Slaughter, 'International law, international relations and compliance' (above, n.49).

<sup>51</sup> See Abram Chayes and Antonia Handler Chayes, 'On compliance', *International Organization* 47, no. 2 (1993): pp. 175–205.

<sup>52</sup> See Weber, 'Law in Economy and Society, ed. Max Rheinstein' (above, n. 35).

<sup>53</sup> See Ronald B. Mitchell, 'Regime design matters: intentional oil pollution and treaty compliance', *International Organization* 48, no. 03 (1994): pp. 425–458 Abram Chayes, Antonia Handler Chayes, and Ronald B. Mitchell, 'Managing compliance: a comparative perspective', *Engaging countries: Strengthening compliance with international environmental accords* (1998): pp. 39–62.

meet a certain policy target.<sup>54</sup> Furthermore, ambiguities and inconsistencies in the rules and policies governing the functioning of the regime can produce decreasing levels of compliance<sup>55</sup> since they allow different (possibly even equally plausible) interpretations of the actors' commitments.<sup>56</sup>

In order to promote compliance, the management strategy would emphasize the use of a problem solving approach which would aim to establish non-coercive and participatory procedures and processes to communicate, interpret and clarify commitments of actors pertaining to the regime and rules governing it. This problem-solving approach can take the form of developing non-binding best practices, guidelines and methodologies to improve the actors' technical capacities to meet their binding commitments.<sup>57</sup> The processes and procedures established for rule communication, clarification and interpretation need not be formalized.<sup>58</sup> However, some scholars have expressed doubts whether such "soft" processes can be effective unless there is a strong "shadow of hierarchy" within the regime.<sup>59</sup>

---

<sup>54</sup> See Tallberg, 'Paths to compliance: Enforcement, management, and the European Union' (above, n. 20), p. 613.

<sup>55</sup> See Harold Hongju Koh, Abram Chayes, Antonia Handler Chayes et al., *Why do nations obey international law?* (JSTOR, 1997), p. 2641-45.

<sup>56</sup> See Gerda Falkner, Miriam Hartlapp, Simone Leiber et al., 'Non-Compliance with EU directives in the Member States: Opposition through the Backdoor?', *West European Politics* 27, no. 3 (2004): pp. 452-473.

<sup>57</sup> See Versluis, 'Compliance Problems in the EU What potential role for agencies in securing compliance?' (above, n. 20), p. 9; Jutta Brunnée and Stephen J. Toope, *Legitimacy and legality in international law: an interactional account* (Cambridge University Press, 2010). Jonas Tallberg, 'Paths to compliance: Enforcement, management, and the European Union', *International Organization* 56, no. 03 (2002): pp. 609-643.

<sup>58</sup> See Tallberg, 'Paths to compliance: Enforcement, management, and the European Union' (above, n. 20), p. 614.

<sup>59</sup> The "shadow of hierarchy" is a concept developed in political science literature which assumes a credible threat of hierarchical administrative intervention is a factor which positively influences voluntary compliance expectations within a regulatory regime. On this concept, see in particular contributions of Héritier and Smismans, including: Adrienne Windhoff-Héritier, *Common goods: reinventing European and international governance* (Rowman & Littlefield, 2002); Adrienne Héritier, 'New Modes of Governance in Europe: Policy Making without Legislating?', edited by Adrienne Heritier and Martin Rhodes, in *New modes of governance in Europe: Governing in the shadow of hierarchy* (Springer, 2010); Stijn Smismans, *Law, legitimacy and European*

In the managerialist understanding, a decrease in compliance may not necessarily be a result of deliberate choice, but may stem from rule misinterpretation or capacity limitations of the parties pertaining to the regime.<sup>60</sup> Therefore, the application of sanctions is not likely to increase compliance since “sanctioning authority is rarely granted by treaty, rarely used when granted and likely to be ineffective when used”.<sup>61</sup> Instead, promoting compliance requires proper management through the use of “carrot” strategies. In this context, managerialism is the most explicit in providing solutions to the compliance puzzle: establishment of problem-solving and collaborative processes for rule elaboration and application which will ultimately establish a community of practice.<sup>62</sup> It follows that the management strategy tends to assign the primary role to effective and non-coercive cooperation processes, designed to clarify obligations and reduce uncertainty, in ensuring compliance within the regime.

### 2.3. Research question

This study presents the SSM as an EU multilevel administrative system mandated to promote banking stability across participating Member States. It is assumed that this system faces inherent difficulties related to ensuring the highest levels of compliance

---

*governance: functional participation in social regulation* (Oxford University Press, 2004); Stijn Smismans, ‘Reflexive law in support of directly deliberative polyarchy: reflexive-deliberative polyarchy as a normative frame for the OMC’, edited by Olivier de Schutter and Simon F. Deakin, in *Social rights and market forces: is the open coordination of employment and social policies the future of social Europe?* (Emile Bruylant, 2005), pp. 99–144.

<sup>60</sup> See Tallberg, ‘Paths to compliance: Enforcement, management, and the European Union’ (above, n. 153), p. 613.

<sup>61</sup> See Chayes and Chayes, *The new sovereignty: Compliance with International Regulatory Agreements* (above, n. 25), pp. 32–33.

<sup>62</sup> Emphasizing the role of these elements in promoting compliance pushes in fact the managerial school further toward constructivism; see notably Ryan Goodman, ‘International law and state socialization: Conceptual, empirical, and normative challenges’, *Duke LJ* 54 (2004): p. 983.

of the supervisory apparatus residing at the lower (NCA) level with the preferences and objectives of the supervisory apparatus residing at the higher (ECB) level when they interact within the subsystems of SSM Direct and Indirect Supervision. Against this backdrop, the research question of this dissertation is the following:

*Under which structural conditions can the NCAs (supervisory apparatus) be expected to comply with the policy preferences and objectives of the ECB (supervisory apparatus) when operating in a given multilevel context (the sub-subsystem of SSM Direct/Indirect Supervision)?*

The dependent variable of this dissertation is the formal “top-down compliance expectation” within the SSM that is understood here as the NCAs’ (supervisory apparatus) formal likelihood of complying with the preferences and objectives of the ECB (supervisory apparatus) concerning the Union’s policies on prudential supervision of credit institutions. This dissertation asserts that two structural (institutional) conditions<sup>63</sup> are likely to affect the formal top-down compliance expectation within EU multilevel administration: (i) the *specific organisational design* of a given administrative arrangement (the regime) which determines the formal position of the higher and lower level actor therein; and (ii) the *specific operational design* of a given administrative arrangement (the regime) which

---

<sup>63</sup> In political science, structural conditions are commonly referred to as ‘institutional factors’ which are widely conceived as a set of formal and informal rules of the game which prescribe, proscribe and permit behaviour of the actors in various units of the polity and economy (socio-political perspective). This understanding contrasts with the narrow (legal-political) perception of institutions as organs of administration. For the purpose of this study, the second understanding is embraced. On the broader concept of institutions, see Douglass C. North, *Institutions, institutional change and economic performance* (Cambridge University Press, 1990); Elinor Ostrom, ‘An agenda for the study of institutions’, *Public choice* 48, no. 1 (1986): pp. 3–25; Peter A. Hall, ‘Governing the economy: The politics of state intervention in Britain and France’ (1986).

provides for formal internal mechanisms to address possibly conflicting preferences and objectives of the actors pertaining to the regime.

The choice of the independent variables follows the core premises of the institutionalist approach, which attributes the leading role to the institutional environment in which the actors operate and which shapes their behaviour. According to this approach, a particular institutional structure may exert an independent (or intervening) influence on policy choices and strategies made by the actors operating within it (“institutions matter”).<sup>64</sup> In this context, the institutional analysis conducted in this study will uncover specific configurations OF the two abovementioned structural conditions within two SSM multilevel supervisory subsystems. By addressing those issues, this dissertation is expected to provide valuable insights from the institutional perspective on whether the formal design of the SSM ensures the smooth and robust operation of the EU administrative machinery mandated to supply financial stability across the EU.

---

<sup>64</sup> See Sven Steinmo and Kathleen Thelen, *Structuring politics: historical institutionalism in comparative analysis* (Cambridge University Press, 1992), p. 7.

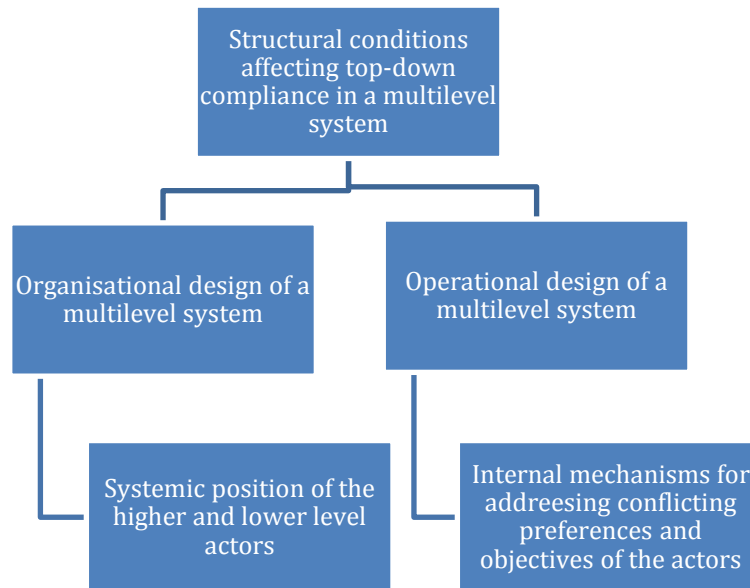


Figure 2 Determinants of the top-down compliance expectation in the SSM

## 2.4. Hypotheses on the formal top-down compliance expectation

In accordance with the main assumptions of the abovementioned strategies of compliance presented in section two of the present chapter, this dissertation formulates two hypotheses concerning the formal top-down compliance expectations derived from the “Enforcement” and the “Management” approaches. Both hypotheses aim to explain the NCAs’ (supervisory apparatus)<sup>65</sup> formal top-down compliance within the multilevel SSM with the preferences and objectives of the ECB (supervisory apparatus)<sup>66</sup> on the Union’s policies on prudential supervision of credit institutions. The two hypotheses differ as to the leading causal factors

<sup>65</sup> For the purposes of testing both hypotheses, the NCA (supervisory apparatus) is referred to as the lower level actor in respect of the organisational design analysis, and as the bureaucratic agent in respect of the operational design analysis.

<sup>66</sup> For the purposes of testing of both hypotheses, the ECB (supervisory apparatus) is referred to as the higher level actor in respect of the organisational design analysis and as the bureaucratic principal in respect of the operational design analysis.



shaping formal compliance expectations, in respect of both the organisational and operational design of the SSM.

#### 2.4.1. The “Enforcement” hypothesis

The Enforcement hypothesis (“EH”), as the name suggests, is informed by the insights derived from the enforcement school<sup>67</sup> which in the context of the multilevel SSM would assume that

*The formal compliance by the NCAs (supervisory apparatus) with the preferences and objectives of the ECB (supervisory apparatus) in a multilevel SSM supervisory (sub)system is likely to be higher where the ECB’s control capacity is credible and backed by its strong systemic position within this (sub)system .*

In determining the formal top-down compliance expectation, the Enforcement approach would focus on (i) the systemic position of the higher level actor – the ECB (supervisory apparatus) – within a given SSM supervisory subsystem, and (ii) internal control-based mechanisms over the NCAs (supervisory apparatus) available to the ECB (supervisory apparatus) in a given SSM supervisory subsystem. Accordingly, the EH will be tested in two respective phases.

The first phase of the EH testing will analyze the organisational design of two SSM multilevel supervisory subsystems in order to gauge the systemic position of the ECB (considered a higher level actor) and the NCAs (considered a lower level actor)

---

<sup>67</sup> The main assumptions of the enforcement strategy of compliance have been presented in subsection 2.2.1.

therein. To this end, chapter three elaborates on three models of EU multilevel administration that are applied to classify the subsystems of SSM Direct and Indirect Supervision in chapter five. These models reflect different configurations of power between the higher and lower level actors pertaining to a multilevel administrative arrangement. They are distinguished on the basis of four formal characteristics that are inherent parts of the institutional design of a multilevel administrative arrangement: its constitutional foundations, the internal allocation of administrative responsibilities between higher and lower level actors, the nature of administrative interaction between higher and lower level actors, and the scope of its territorial applicability.

The second phase of the EH testing will investigate the operational design of two SSM multilevel supervisory subsystems in order to measure the capacity of internal control-based mechanisms that the bureaucratic principal – the ECB (supervisory apparatus) – has over the bureaucratic agent – the NCAs (supervisory apparatus) – within the subsystems of SSM Direct and Indirect Supervision. To this end, this dissertation will employ an analytical toolbox developed by traditional and conservative accounts of Principal-Agent research, which are presented in chapter four.<sup>68</sup> These accounts assume that the agent tends to minimize the effort it exerts on its principal's behalf and pursues its particular preferences which may differ from those of its principal. Therefore, the principal is expected to install and activate so-called *ex ante* and *ex post* control mechanisms to monitor its agents' actions.

---

<sup>68</sup> More specifically, by more traditional and conservative accounts of the Principal-Agent studies.

To assess the ECB's (supervisory apparatus) capacity to exert formal control over the NCAs (supervisory apparatus), the following elements will be taken into account: the range (the forward-looking/backward-looking dimension) of established control mechanisms, their intrusiveness (the direct/indirect dimension), their origin (embedded in the rules of law/practice), and whether they have been actually activated.

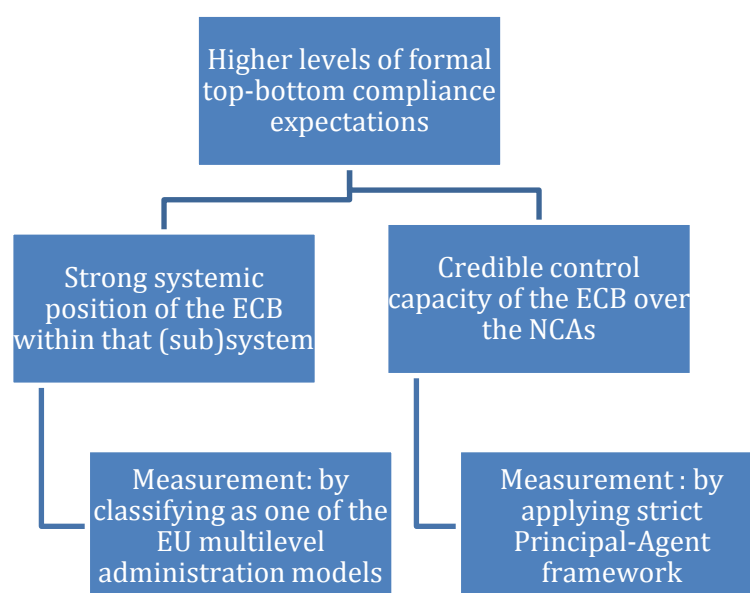


Figure 3 “Enforcement” hypothesis test

#### 2.4.2. The “Management” hypothesis

The Management hypothesis (“MH”), as the name suggests, is informed by insights derived from the management school of compliance theory<sup>69</sup> which would assume that

<sup>69</sup> The main assumptions of the management school of compliance theory have been presented in subsection 2.2.2.

*The of formal compliance by the NCAs (supervisory apparatus) with the preferences and objectives of the ECB (supervisory apparatus) in a multilevel SSM supervisory (sub)system is likely to be higher where there exists a credible cooperation capacity between both actors that allows for the clarification of obligations and the reduction of uncertainty, while being backed by a strong shadow of the ECB (supervisory apparatus) hierarchy within that (subsystem).*

In determining the formal top-down compliance expectation, the Management approach would concentrate on (i) the shadow of hierarchy of the higher level actor - the ECB (supervisory apparatus) - within a given SSM supervisory subsystem, and (ii) internal cooperation-based mechanisms between the ECB (supervisory apparatus) and NCAs (supervisory apparatus) in a given SSM supervisory subsystem. Accordingly, the MH will be tested in two phases.

The first phase of the MH testing will analyze the organisational design of two SSM multilevel supervisory subsystems in order to ascertain the shadow of hierarchy the higher level actor - the ECB (supervisory apparatus) therein. Determining the shadow of hierarchy supports the management strategy of ensuring compliance since it is suggested that compliance can be best achieved when the leader of the regime has established a strong systemic position which would allow him to make recourse to enforcement mechanisms to transmit its preference in case an informal cooperation fails (“managerial authority”).<sup>70</sup> For the purposes of this exercise, it

---

<sup>70</sup> See Günter Frankenberg, *Political technology and the erosion of the rule of law: normalizing the state of exception* (Edward Elgar Publishing, 2014), p. 8.

would be assumed that a long shadow of hierarchy is correlated to a strong systemic position of a higher level actor therein. Therefore, this phase will rely on the outcomes of the assessment of the ECB's systemic position conducted in the first phase of the EH testing in accordance with the framework developed in chapter three.

The second phase of the MH testing will scrutinize the operational design of the two SSM multilevel supervisory subsystems in order to measure the capacity of internal cooperation-based mechanisms between the bureaucratic principal – the ECB (supervisory apparatus) – and the bureaucratic agent – the NCAs (supervisory apparatus) – within the subsystems of SSM Direct and Indirect Supervision. To this end, this dissertation will employ the analytical tools developed by more recent and liberal accounts of the Principal-Agent research, which continue to construct Principal-Agent relations between politico-administrative actors operating in a dense web of many cooperative, egalitarian and reciprocal relations.<sup>71</sup> They assume that the agent tends to display general propensity to comply with the policy preferences and objectives of its principal, and that the lower levels of compliance would not stem from the agents' deliberate choice, but rather from the ambiguity of the principal's expectations under their inherently incomplete agency contract. Therefore, the principal is expected to establish informal, cooperative and reciprocal processes and procedures with its agent, which would allow the reduction of the

---

<sup>71</sup> The most recent example of the analytical applications of those more “liberal” Principal-Agents perspectives can be found in Tom Delreux and Johan Adriaensen, ‘The Principal Agent Model and the European Union’, *Palgrave Studies in European Union Politics* (2017).

ambiguities of the agency contract and the clarification of the principal's contractual expectations.

To assess the capacity for formal cooperation between the ECB (supervisory apparatus) and the NCAs (supervisory apparatus), the following two elements will be taken into account: (i) whether any informal structures for cooperation between ECB and NCAs supervisory apparatus have been established, and (ii) whether there are any tangible outcomes of that cooperation aiming, on the one hand, at reducing the ambiguities of the agency contract between the ECB and NCAs (supervisory apparatuses) and, other other hand, at clarifying contractual expectations of the ECB (supervisory apparatus), such as system-wide policy stances, guides and methodologies on certain aspects of the Union's policies on prudential supervision of credit institutions.

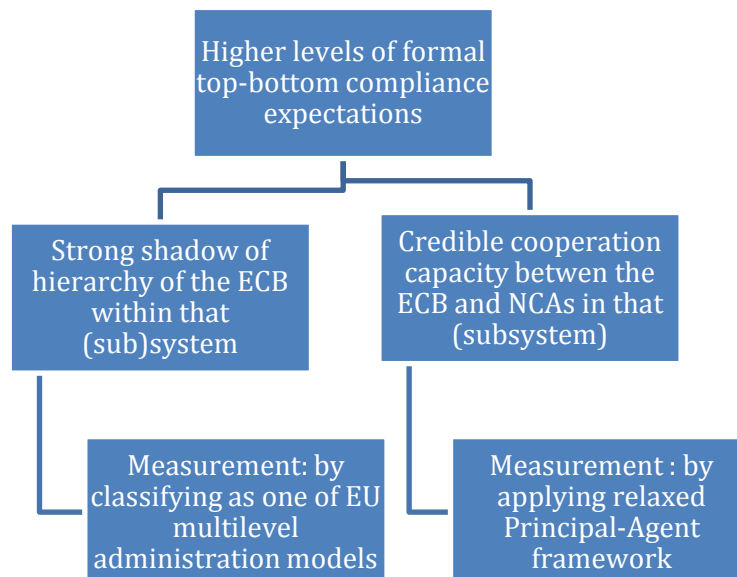


Figure 4 “Management” hypothesis test

By applying the Principal-Agent approach to support the measurement of the formal top-down compliance expectation in the SSM, the aim of this study is (i) to present a (first ever) comprehensive institutional analysis of the organization and operation of the EU's multilevel system governing banking supervision post-crisis, and (ii) to contribute to the Principal-Agent research explaining the “post-decisional stage” of European integration in banking supervision (the modalities of the exercise of powers transferred from the Member States to the Union). As the Principal-Agent framework still appears to operate under the assumption of a hierarchical rather than non-hierarchical setting, this study tends to ascribe more explanatory power to the application of its traditional and conservative dimension, rather than to that of its more recent and liberal dimension, when analyzing the politico-administrative phenomenon of the SSM.

## **2.5. Methodology**

The data collection for this study has been primarily conducted through the documentary analysis of two categories of data. The first and most relevant type (both in qualitative and quantitative terms) of data is the primary material in the form of European supervisory legislation. This includes Regulations, Directives and other legally binding instruments adopted by the EU institutions as well as, where applicable, national laws of EU Member States that set rules governing the functioning of the SSM. The core of this category consists of binding SSM

supervisory law (including the SSM Regulation<sup>72</sup>, the SSM Framework Regulation,<sup>73</sup> and other supplementary legal instruments<sup>74</sup> adopted by the ECB) and substantive legislation, the so-called Single Rulebook, governing the conduct of banking supervisory tasks in the EU (notably, but not only including the Capital Requirements Regulation<sup>75</sup> (CRR), the Capital Requirements Directive IV<sup>76</sup> (CRDIV) and the Bank Recovery and Resolution Directive (BRRD)).<sup>77</sup>

The second type of data comprises the official documentation produced by EU institutions, agencies and bodies as well as national organs of public administrations, including official reports, policy notes, studies, media coverage of these officials and officials' statements related to EU financial and banking supervision. This category

---

<sup>72</sup> 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: SSM Regulation', in *OJ L* 287 29.10.2013, pp. 63–89.

<sup>73</sup> See 'Regulation (EU) No 468/2014 of the ECB 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): SSM Framework Regulation', in *OJ L* 141, 14.5.2014.

<sup>74</sup> Including such supplementing legal acts as, *inter alia*, 'Decision of the ECB of 2 July 2014 on the provision to the European Central Bank of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014 (ECB/2014/29)', in *OJ L* 214, 19.7.2014; 'Regulation (EU) 2015/534 of the ECB of 17 March 2015 on reporting of supervisory financial information (ECB/2015/13)', in *OJ L* 86, 31.3.2015; 'Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4)', in *OJ L* 78, 24.3.2016; '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)', in *OJ L* 141, 1.6.2017; 'Decision of the ECB of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5)', in *OJ L* 198, 5.7.2014; 'Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9)', in *OJ L* 101, 13.4.2017.

<sup>75</sup> See '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: (CRR)', in *OJ L* 176, 27.6.2013.

<sup>76</sup> See '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: (CRDIV)', in *OJ L* 176, 27.6.2013.

<sup>77</sup> See 'Directive 2014/59/EU of the European Parliament and 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: (BRRD)', in *OJ L* 173, 12.6.2014.



also consists of any non-binding instruments issued by European and national administrations which may influence supervisory practice within the SSM (for example: recommendations, opinions, guides, guidance, Q&As, stock-stakes, or policy stances).

Finally, the above-mentioned categories of data are accompanied by 14 informal interviews held with a number of supranational and national supervisors between August 2015 and March 2017. They were intended to serve as an additional data collection tool and to supplement the first and second type of data. The main objective of the interviews was to get information about the SSM which had not been publicly reported. Furthermore, they were meant to develop an initial understanding of the points of view of actors located at different levels of the multi-level SSM and to share their early experience of working at the SSM, especially with respect to informal governance and cooperation within the SSM.

The reason for the choice of such an informal interviewing technique is the fact that interviewees were too reluctant to discuss — in the context of formal interviews — a number of sensitive matters about which little information was available publicly. However, they were more willing to discuss these matters and share their experience when it was explained that the interviews were informal and that they would neither be referenced as formal interviews in the thesis nor be used in such a manner as to divulge the identity of the interviewee. In addition, the choice of such an interviewing technique could also avoid the necessity of going through lengthy and multi-level pre- and post- authorization processes necessary for formal interviews,

which would not guarantee that the reported information would be ultimately shared with the interviewer.

However, those informal interviews were treated cautiously and exclusively as a supplementary data collection tool since it has been widely recognized that “interviews alone are an insufficient form of data to study social life.”<sup>78</sup> As noted by Geoffrey Walford, “what people say in an interview will indeed be shaped, to some degree, by the questions they are asked; the conventions about what can be spoken about; (...) by what time they think the interviewer wants; by what they believe he/she would approve or disapprove of”.<sup>79</sup> Therefore, these limitations needed to be duly taken into account given the prominently formal-institutional focus of the present dissertation and the enhanced professional secrecy requirements under which the recently established SSM has operated.

For the sake of academic rigour, it needs to be reported that the informal interviews included a sample of both junior and senior European and national supervisory officials. Each interview referenced in the text indicates the origin of an interviewee, and the date when an interview took place, but the identities of interviewees remain undisclosed.<sup>80</sup>

---

<sup>78</sup> See Geoffrey Walford, ‘Classification and framing of interviews in ethnographic interviewing’, *Ethnography and Education*, 2(2): p. 147.

<sup>79</sup> See Martyn Hammersley, Roger Gomm, ‘Assessing the radical critiques of interviews’, edited by Martyn Hammersley, in *Questioning Qualitative Inquiry: Critical Essays* (Sage London, 2008), pp. 89-100.

<sup>80</sup> In addition, executive summaries of 14 informal interviews with the identity of interviewees are attached to this dissertation in the form of an *Annex*.

**PART II.**  
**COMPLIANCE**  
**EXPECTATION WITHIN**  
**MULTILEVEL**  
**ADMINISTRATION**

**(ANALYTICAL**  
**FRAMEWORK)**

## CHAPTER 3

### EU multi-level administration

*“Administration is the most obvious part of government; it is government in action; it is the executive, the operative, the most visible side of government, and is of course as old as government itself”*  
(Woodrow Wilson)<sup>81</sup>

#### 3.1. The nature of EU administration

It has been widely recognized that the development of human well-being requires, by means of a social contract, the creation of a superior authority which would ensure the establishment of order in public life and would act to preserve common interests of a community. Such an authority would be expected to “actually do things”,<sup>82</sup> that is, to administer public policies with a view to provide public goods needed by people. From the very beginning, the advancements in the production of public welfare have been connected to territorial development of public administration, firstly at the local and state levels and subsequently at the international and supranational levels. States as territorially organized welfare producers appeared in history when their sovereigns managed to establish centralized administrative structures. Over years and decades, the range of public

---

<sup>81</sup> See Woodrow Wilson, ‘The study of administration’, *Political science quarterly* 2, no. 2 (1887): pp. 197–222.

<sup>82</sup> See Francis Fukuyama, *Political order and political decay: From the industrial revolution to the globalization of democracy* (Farrar, Straus and Giroux, 2014): p. 52.

goods provided by state public administration at different levels has gradually increased which can be associated with the human, scientific and technological progress. In the modern era, the role and scope of public administration has become ever expanding and all-encompassing, seeking to include activities “valued by the public”,<sup>83</sup> and constitutes an attempt to adapt state action to the complex realities of the increasingly globalized and, thus, interconnected world.<sup>84</sup> This trend is well captured by the rise of independent and specialized non-majoritarian agencies, sometimes branded as the “fourth branch of government”,<sup>85</sup> vested with a plethora of various competences — supervisory, regulatory and executive.<sup>86</sup> Although they form parts of state administration, these administrative units are effectively “de-coupled” from their respective ministerial departments reporting to elected members of governments.<sup>87</sup> They are considered to operate as:

*“[...] structurally disaggregated from their parent ministries, are said to face less hierarchical and political influence on their daily operations and have more managerial freedom in terms of finances and personnel, compared to ordinary ministries or departments [...].”<sup>88</sup>*

---

<sup>83</sup> See Giandomenico Majone, *Regulating Europe: Problems and Perspectives*, Jahrbuch zur Staats-und Verwaltungswissenschaft (Baden Baden, 1989).

<sup>84</sup> See Susanne Soederberg, Georg Menz, and Philip Cerny, *Internalizing globalization: the rise of neoliberalism and the decline of national varieties of capitalism* (Springer, 2005): p. 70.

<sup>85</sup> See Michelle Everson, ‘Independent agencies: hierarchy beaters?’, *European Law Journal* 1, no. 2 (1995): pp. 180–204.

<sup>86</sup> See Matej Avbelj, ‘Constitutional and Administrative Pluralism in the EU System of Banking Supervision’, *German LJ* 17 (2016): pp. 779–798.

<sup>87</sup> See Morten Egeberg, ‘EU Administration: Centre Formation and Multilevelness’, *Revue française d’administration publique*, no. 1 (2010): pp. 17–26.

<sup>88</sup> See Koen Verhoest, Sandra van Thiel, Geert Bouckaert et al., *Government agencies: practices and lessons from 30 countries* (Springer, 2016): p. 3.

Studies on phenomena of public administration have been traditionally locked in “national laboratories” concentrating on rather unified administrative structures falling under traditional command-control chains within the realm of national sovereignty.<sup>89</sup> Their analytical point of departure used to be the nation state considered as the supreme incarnation of administrative territorial organization.<sup>90</sup> Thus, these studies may not necessarily be the best placed to wield sufficient explanatory power to capture the singularities of supranational administrative structures that transcend the jurisdictional borders of single nation states, such as the administrative order of the European Union (EU).

As a result of slowly decreasing capacities of nation state administrations to produce enough welfare in certain areas (e.g. clean environment, security, international free trade, financial stability), the supply of these public goods across multiple state jurisdictions has become an increasingly important task of such supranational polities as, for example, the EU and its administration.<sup>91</sup> In this sense, the advancement of European integration is directly related to “the matter of defining

---

<sup>89</sup> See Tom Christensen and Per Lægreid, *The Ashgate research companion to new public management* (Ashgate Publishing, Ltd, 2011); Koen Verhoest, Sandra van Thiel, Geert Bouckaert et al., *Government agencies: practices and lessons from 30 countries* (Springer, 2016); Eva G. Heidbreder, ‘Multilevel policy enforcement: innovations in how to administer liberalized global markets’, *Public Administration* 93, no. 4 (2015): pp. 940–955; Diane Stone and Stella Ladi, ‘Global public policy and transnational administration’, *Public Administration* 93, no. 4 (2015): pp. 839–855.

<sup>90</sup> For instance, for Thomas Hobbes – one of the most radical philosophers of the state – the idea of the existence of independent administrative structures within a single territory (*imperium in imperio*) was inconceivable. See Olivier Beaud, ‘The Allocation of Competences in a Federation—A General Introduction’, edited by Loïc Azoulay, in *The question of competence in the European Union* (OUP Oxford, 2014), pp. 1–18.

<sup>91</sup> See Christoph Knill, Steffen Eckhard, and Stephan Grohs, ‘Administrative styles in the European Commission and the OSCE Secretariat: striking similarities despite different organizational settings’, *Journal of European Public Policy* 23, no. 7 (2016): pp. 1057–1076.

spheres of competences and power relationships”<sup>92</sup> between the EU and its Member States administration related to the production of public welfare. At the same time, the provisioning of specific public goods through the Union’s (common) policies across the Member States has become increasingly sophisticated.

Whereas national administration is of a unified nature and operates under the ultimate sovereignty of the state, EU administration is organized in a pluralistic manner. In order to function, EU administration needs to rely upon national administrative structures, even when explicitly empowered to directly apply and enforce laws and policies across the Member States’ jurisdictions. Instead of relying on rather weak command-and-control chains, EU administration often uses cooperative and persuasive patterns rather than exerting control over Member States’ administrations.<sup>93</sup> In doing so, it tends to weigh and balance general and particular interests, which in the EU context often turns into balancing Union and national interests.

Therefore, the choices and decisions made by Union-level administrative actors seem ultimately to be of a more *political* dimension in comparison to their national counterparts who act within one jurisdiction and one administrative, stated-founded structure. Indeed, actions of Union-level administrative actors may directly affect

---

<sup>92</sup> See Pierre Pescatore, *Droit de L'intégration* (Kluwer Law International, 1974): p. 26.

<sup>93</sup> See Arthur Benz, ‘Differentiating Multi-Level Administration: Patterns of Administrative Co-Ordination in the European Union’ (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2795429](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795429).

national ways of life and the redistributive choices of European societies which may raise concerns from the perspective of democratic principles.<sup>94</sup>

Furthermore, the pluralistic nature of EU administration requires cooperation between multiple levels of administration, which takes place through complex arrangements and processes. Since the Union lacks the administrative basis traditionally referred to as “state capacities”,<sup>95</sup> the implementation (i.e. application and enforcement) of the choices and decisions made by EU administration remains in the hands of the Member States and their administrative structures.

Although, over time, the Member States have conferred more and more tasks upon the Union, they have never been willing to renounce their “administrative sovereignty”<sup>96</sup> considered instrumental in “the capacity of the state to effectively achieve the chosen policy outcomes”<sup>97</sup> and safeguarding state sovereignty.<sup>98</sup> Such an institutional setting considerably limits the scope of Union independent administrative action directed to individuals under the jurisdiction of a given Member State without having recourse to the national administrative apparatus. This, in turn, may create centrifugal challenges and dilemmas at lower levels

---

<sup>94</sup> See Jürgen Habermas, *The crisis of the European Union: A response* (Polity, 2012).

<sup>95</sup> See Daniel R. Kelemen, P. Genschel, and M. Jachtenfuchs, ‘Building the New European State? Federalism, Core State Powers, and European Integration’, *Beyond the Regulatory Polity* (2013): pp. 211–229.

<sup>96</sup> See Morten Egeberg and Jarle Trondal, ‘National administrative sovereignty: Under pressure’, edited by Erik Oddvar Eriksen and John Erik Fossum, in *The European Union’s Non-Members: Independence Under Hegemony?* (Routledge, 2015), pp. 173–189.

<sup>97</sup> See Felicity Matthews, ‘Governance and state capacity’, edited by David Levi-Faur, in *The Oxford handbook of governance* (Oxford University Press, 2012), pp. 281–293.

<sup>98</sup> See Philipp Genschel and Markus Jachtenfuchs, *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford University Press, 2014).



(national administration).<sup>99</sup> It follows that the more the Union is involved in law and policy application and enforcement across its Member States, the more crucial the modalities of interactions between the supranational and national (or subnational) levels of EU administration become.<sup>100</sup>

### 3.2. The development of EU administrative capacities for the provision of financial stability

Financial stability may serve as an example of a sophisticated public good the delivery of which has become a complex process. It can be considered as a public good - that is, one which can be enjoyed by all society – “because it provides non-excludable and non-rival benefits”.<sup>101</sup> While financial stability serves as a public good which public administration is expected to provide, it is somehow challenging to offer a precise definition of what this stability encompasses. There exist numerous approaches on how to define financial stability so that it could serve as an objective to guide financial stability policy. Notably, it can be perceived in terms of preconditions and outcomes.<sup>102</sup>

---

<sup>99</sup> See Jarle Trondal, ‘Public Administration of the European Union’, edited by William R. Thompson, in *The Oxford Research Encyclopedia of Politics* (Oxford University Press, 2017), pp. 1–25.

<sup>100</sup> See Michael W. Bauer, ‘Co-managing programme implementation: conceptualizing the European Commission's role in policy execution’, *Journal of European Public Policy* 13, no. 5 (2006): pp. 717–735; Michael W. Bauer and Stefan Becker, ‘The unexpected winner of the crisis: The European Commission's strengthened role in economic governance’, *Journal of European Integration* 36, no. 3 (2014): pp. 213–229; Eva G. Heidbreder, ‘Structuring the European administrative space: policy instruments of multi-level administration’, *Journal of European Public Policy* 18, no. 5 (2011): pp. 709–727.

<sup>101</sup> Benefits are non-excludable if the provider/producer of the good cannot exclude others from the benefits without incurring significant costs. The benefits are non-rival if “consumption by one agent does not reduce benefits to others”. See María Nieto and Garry J. Schinasi, ‘EU framework for safeguarding financial stability: towards an analytical benchmark for assessing its effectiveness’, *IMF Working Papers* (2007): pp. 1–230–11.

<sup>102</sup> See Stefan Ingves, ‘Central bank governance and financial stability’, *BIS Report by a Study Group*, May (2011).

In terms of preconditions, financial stability is secured when “risks in the financial system are adequately identified, allocated, priced and managed”.<sup>103</sup> In terms of outcomes, in turn, financial stability can be understood as the absence of a negative crisis characterized by “some combination of (a) divergence of asset prices from fundamentals (b) significant distortions in market functioning and credit availability that thereby causes (c) aggregate spending to deviate (or to threaten to deviate) from long run potential”.<sup>104</sup> In addition, financial stability is also about “the smooth functioning of the key elements which make up the financial system”<sup>105</sup> and relates to the robustness in the face of negative shocks.<sup>106</sup> Finally, it may be also perceived as “a condition in which the financial system – intermediaries, markets and market infrastructures – can withstand shocks without major disruption in financial intermediation and in the general supply of financial services.”<sup>107</sup>

Financial stability is nowadays considered as one of the most important public goods, which transcends geographic, sectoral and jurisdictional borders.<sup>108</sup> It has a local, national, regional and international dimension since it is “important to the international community that for the most part cannot or will not be adequately

---

<sup>103</sup> Ibid., p.31.

<sup>104</sup> See R. W. Ferguson, ‘Should financial stability be an explicit central bank objective’, *Challenges to Central Banking from Globalized Financial Systems*, International Monetary Fund, Washington DC (2003): pp. 208–223.

<sup>105</sup> See Wim F. Duisenberg, ‘The contribution of the euro to financial stability’, *Globalization of Financial Markets and Financial Stability—Challenges for Europe* (2001): pp. 37–51.

<sup>106</sup> See Tommaso Padoa-Schioppa, ‘Central banks and financial stability: exploring the land in between’, *The Transformation of the European Financial System* (2003): pp. 269–310.

<sup>107</sup> See European Central Bank, *Financial Stability Review*, November 2015, <https://www.ecb.europa.eu/pub/pdf/other/financialstabilityreview201511.en.pdf>, accessed 11 December 2016: p.4.

<sup>108</sup> See Jeffrey Frieden, ‘The Governance of International Finance’, *Annual Review of Political Science* 19 (2016): pp. 33–48; Masaaki Shirakawa, *International financial stability as a public good*, Keynote address at a High-Level Seminar co-hosted by the Bank of Japan and the International Monetary Fund, 2012 (Tokyo, Japan, 2012).

addressed by individual countries acting alone”.<sup>109</sup> As the recent crisis experience indicated, instability can spread quickly through international and sector-specific linkages across different financial sectors, from one jurisdiction to another, and from one region to another. Therefore, adequately designed cross-sectoral and cross-border administrative supervisory arrangements are paramount to promote financial stability in a global and interconnected environment.<sup>110</sup>

A series of EU financial and economic crises<sup>111</sup> highlighted the crucial importance of financial stability for both public administration (which had to carefully design necessary anti-crisis measures) and ordinary people (who bear the majority of the costs of these measures) in the majority of developed countries. The magnitude of financial stability as a public good can be illustrated by the fact that, between 2008 and 2015 EU administration (the Commission’s Directorate General Competition) approved under State aid rules different anti-crisis measures at the value of almost 5 trillion euros to ensure financial stability in the EU (amounting to around 35% of the total EU’s GDP in 2015), of which Member States used around 2 trillion euros.<sup>112</sup>

Furthermore, these crises were further aggravated by the interlinkages between banks and sovereigns (“vicious circle”) which transmitted problems faced by the EU banking sector to the public finances of many EU Member States (mostly originating

---

<sup>109</sup> See Ernesto Zedillo, Tidjane Thiam, K. Y. Amoako et al., *Meeting global challenges: international cooperation in the national interest* (International Task Force on Global Public Goods, 2006).

<sup>110</sup> See Stijn Verhelst, ‘Renewed financial supervision in Europe—final or transitory?’, *Egmont Paper 44* (2011).

<sup>111</sup> By referring to a series of EU financial and economic crises, this dissertation understands EU banking crisis of 2008-2009 and the EU debt crisis of 2010-2012.

<sup>112</sup> See Commission’s State Aid Score Board 2016 available at [http://ec.europa.eu/competition/state\\_aid/scoreboard/index\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html) (accessed 01 December 2017).

from the southern part of the euro area). Their serious difficulties to access the market for public debt financing transformed the unravelling EU bank crisis into the EU debt crisis, which threatened the very existence of the single currency. In this adverse environment, the EU administrative system went through a tremendous transformation which considerably affected the design of the EU's economic constitution.<sup>113</sup> The sum of the EU's responses to the recent global financial crisis was designed to boost its independent administrative capabilities to produce more financial stability across its Member States. These responses resulted in the attribution of new tasks and competences in the areas of fiscal, macroeconomic and financial supervision to Union level administration.

In the fiscal and macro-economic area, the “Six-Pack” legislation<sup>114</sup> created a new administrative framework providing for the EU's administrative supervision of fiscal and budgetary policies and macro-economic coordination of all Member States. Furthermore, a number of administrative arrangements were created to cover a subset of Member States (the euro area). These included the so-called “Two-Pack” legislation<sup>115</sup> establishing an administrative basis for reinforced monitoring and

---

<sup>113</sup> See Herwig C. H. Hofmann and Katerina Pantazatou, ‘The Transformation of the European Economic Constitution’, *University of Luxembourg Law Working Paper*, 2015-01 (2015); Kaarlo Tuori and Klaus Tuori, *The Eurozone crisis: a constitutional analysis* (Cambridge University Press, 2014).

<sup>114</sup> The “Six-Pack” comprises the following legal measures: (i) Regulation 1175/2011 amending Regulation 1466/97: On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; (ii) Regulation 1177/2011 amending Regulation 1467/97: On speeding up and clarifying the implementation of the excessive deficit procedure; (iii) Regulation 1173/2011: On the effective enforcement of budgetary surveillance in the euro area; (iv) Directive 2011/85/EU: On requirements for budgetary frameworks of the Member States; (v) Regulation 1176/2011: On the prevention and correction of macroeconomic imbalances; (vi) Regulation 1174/2011: On enforcement action to correct excessive macroeconomic imbalances in the euro area.

<sup>115</sup> The “Two-Pack” comprises the following legal measures (i) Regulation 473/2013: On common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member

surveillance in the euro area, and the European Stability Mechanism (ESM) providing access to financial assistance programs for euro area Member States in financial difficulty.<sup>116</sup> In addition, 23 EU Member States were subject to the framework of the “Euro Plus” Pact<sup>117</sup>, and 25 EU Member States signed the Treaty on Stability, Coordination and Governance, which created special administrative procedures to monitor the implementation of the so-called “balanced budget rule”.<sup>118</sup> This study will however not focus on the new EU administrative capacities in these policy fields.

The EU’s recent crisis experience initiated debates on the failing of EU arrangements governing the supervision of financial market participants operating in the Single Market, and in particular of those governing the supervision of banking sector. In the EU, credit supply to the real economy in Europe is strongly linked to banks’ financing services and thus dependent, too, on banks’ capital and funding conditions.<sup>119</sup> It necessarily implies that EU’s financial stability is closely connected to the soundness of the EU banking sector and predominantly relies on the “on-going capacity of banks to meet the demands of their depositors and other creditors

---

States in the euro area; (ii) Regulation 472/2013: On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

<sup>116</sup> See Treaty establishing the European Stability Mechanism (ESM), D/12/3, Brussels, 01 February 2012

<sup>117</sup> See European Council, “Conclusions”, 20 April 2011, EUCO 10/1/11 REV 1 (2011), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/120296.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf)

<sup>118</sup> The signatory Member States commit themselves to implement in their legislation a fiscal rule which requires that the general government budget be balanced or in surplus. For an overview, see Heiko T. Burret and Jan Schnellenbach, ‘Implementation of the fiscal compact in the euro area member states’, *German Council of Economic Experts, Working Paper 8* (2014): p. 2013.

<sup>119</sup> See Sabine Lautenschläger, *Making the comprehensive assessment a success: Speech at the Expansi3n – 5th Financial Event* (Madrid, 23 May), <https://www.ecb.europa.eu/press/key/date/2014/html/sp140523.en.html>, accessed 01 December 2017.

such as retails customers, enterprises as well as other banks.”<sup>120</sup> Therefore, optimal institutional arrangements governing the supervision of credit institutions operating in the Single Market became of paramount importance to avoid disruptions in the provisioning of financial stability across the EU.

Prior to the EU banking crisis, the system of banking supervision in the Union was based on the principle of home-country control, according to which the national competent authorities (NCAs) of the Member States are responsible for the regulation and supervision of a bank licensed in their jurisdiction and operating across the Single Market, including its foreign branches and operations. This approach stemmed from another central principle governing the functioning of the Single Market – namely, mutual recognition as formulated by the Court of Justice of the European Union (CJEU) in its landmark judgments *Dassonville*<sup>121</sup> and *Cassis de Dijon*.<sup>122</sup> The principle of mutual recognition implies that a bank duly authorized in one Member State obtains a so-called *single passport*, through which it can freely provide its services in the rest of the EU, even without the harmonization of national banking regulations across the Union. A rapidly advancing EU financial integration led to deeper systemic interlinkages between the different domestic banking sectors of the Member States. Already by 2005, almost one fourth of all banking operations

---

<sup>120</sup> See Shawn Donnelly, ‘Power Politics and the Undersupply of Financial Stability in Europe’, *Review of International Political Economy* 21, no. 4 (2014): pp. 980–1005.

<sup>121</sup> See Judgment of 11 July 1974, Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* EU:C:1974:82.

<sup>122</sup> See Judgment of 20 February 1979, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (“*Cassis de Dijon*”) EU:C:1979:42.

in Europe were cross-border, largely exceeding the levels of integration seen in the US and Asian-Pacific financial sectors.<sup>123</sup>

Although domestic policies and decisions adopted by national supervisors of one Member State could affect (either positively or negatively) other Member States' jurisdictions, there was no robust framework for obligatory cross-border cooperation between national administrative authorities responsible for banking supervision. Those mechanisms which existed were primarily based on non-binding agreements (Memoranda of Understanding, MoUs), voluntary peer-to-peer reviews and information exchange in colleges of supervisors. The MoUs did not provide incentives for a home supervisor to adopt a more encompassing supervisory perspective on a cross-border banking group under its supervision.<sup>124</sup> This became particularly apparent during the global financial crisis. Rather than seeking common solutions for troubled banking groups through the established channels of supervisory cooperation, national supervisors sought unilateral, often nationally biased regulatory intervention which effectively led to the renationalization of the Single Market for banking services and made the solvency of individual institutions dependent on the budgetary capacities of individual Member States.<sup>125</sup>

---

<sup>123</sup> See Dirk Schoenmaker and Christiaan van Laecke, 'Current state of cross-border banking', *International Financial Instability: Global Banking & National Regulation*, World Scientific, Singapore (2007): pp. 39–63.

<sup>124</sup> See Martin Schüler, 'Incentive Problems in Banking Supervision-The European Case', *ZEW Discussion Papers No.03-62* (2003), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=467840](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=467840).

<sup>125</sup> See Pedro Gustavo Teixeira, '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): pp. 527–583.

These weaknesses of the supervisory cooperation framework thus contributed to the financial contagion across the Union because the rescues of and guarantees given to cross-border groups became solely dependent upon on the ability of their home country jurisdictions to provide a fiscal backstop. The lack of EU-wide administrative arrangements able to deal with cross-border crisis prevention and management of bank crises gave impetus to the construction of a new regulatory framework for EU banking supervision, which resulted in the creation of new EU administrative structures with an aim to intensify the integration of banking supervision across the Member States' jurisdictions.

The process of a further integration of EU banking supervision started with the establishment of the European System of Financial Supervision (ESFS) in 2010. The ESFS was set up in order to coordinate the policies of national authorities of the Member States which are responsible for banking, securities and insurance sector supervision (arrangements for micro-prudential supervision) as well as for the mitigation of systemic risks (arrangement for macro-prudential supervision). It was a historic reform: for the first time ever, it was agreed to allocate specific supervisory competences at the Union's level, although not in absolute terms,<sup>126</sup> due to the constitutional limitations imposed by the Treaties and the jurisprudence of the Court.<sup>127</sup>

---

<sup>126</sup> See Giuseppe Boccuzzi, *The European Banking Union: Supervision and Resolution* (Springer, 2016): p. 28.

<sup>127</sup> One of those limitations stems from the so-called "Meroni doctrine", which prohibits the delegation of discretionary powers on the units of EU public administrations other than EU institutions. On this aspect, see indicatively Merijn Chamon, *EU Agencies: legal and political limitations to the transformation of the EU*



Within the ESFS, three newly created European Supervisory Authorities, or the ESAs, including the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) became responsible for micro-prudential supervision. They were entrusted a range of regulatory and supervisory tasks. In the field of financial regulation, they have been tasked with building a single set of rules (the “Single Rulebook”) applicable to market participants (respectively banks (EBA), investment companies (ESMA) and insurance companies (EIOPA)) operating across the Single Market. In the field of financial supervision, they have been mandated to ensure consistent application of the Single Rulebook through the harmonization of national supervisory practices with an overall objective to “reduce the risk or incidence of future episodes of financial disruption and contribute to developing a European dimension of financial supervision to complete the Single Market for financial services”.<sup>128</sup> These policies, formulated by the ESAs in the financial sectors under their respective remits, are addressed to competent national authorities (of the banking, securities and insurance sectors) which remain however responsible for the application of these policies in their day-to-day supervisory activities.

The establishment of the “banking arm” of the European System of Financial Supervision (ESFS) in 2010 considerably altered the way in which banking

---

*administration* (OUP 2016); Michelle Everson, Cosimo Monda and Ellen Vos, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014).

<sup>128</sup> See European Commission, *Proposal for a Regulation of the European Parliament and the Council establishing a European Banking Authority: Impact assessment*, COM(2009) 501 final (Brussels, 2009), [http://ec.europa.eu/internal\\_market/finances/docs/committees/supervision/20090923/com2009\\_501\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/committees/supervision/20090923/com2009_501_en.pdf), accessed 01 December 2017.

supervision had been carried out across the EU. For the first time Member States agreed to confer upon the Union competences in banking supervision, although in a very limited form. However, it was only a halfway point in setting the conditions for a more integrated system of EU banking supervision.<sup>129</sup> Increasing the coordination between supervisors was indeed vital, but the crisis demonstrated that “mere coordination was not enough, in particular in the context of a single currency”.<sup>130</sup> The EU debt crisis, which unfolded between 2010 and 2012, made it clear that a highly systemically interconnected area, such as the euro area, requires a more centralized regulatory framework for banking supervision.

Deepening integration between banking sectors of its Member States made the euro area more prone to cross-jurisdictional contagion. In particular, there was a need to loosen the tight links existing between banks and sovereigns (famously referred to as the “vicious circle”), which negatively affected the credit supply to the real economy, as well as the possibilities to refinance public debt by governments in some of euro area Member States. Notably, in Greece and Italy high public deficits plagued banks as consequences of the strong domestic exposure in the banks’ bond portfolios.<sup>131</sup> In Ireland, Portugal and Spain, where failing banks added massive liabilities to the balance sheets of the sovereigns, the recapitalization of failing banks drew huge

---

<sup>129</sup> See Boccuzzi, *The European Banking Union: Supervision and Resolution* (above, n.126): p. 30.

<sup>130</sup> See Recital 5 of the ‘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: SSM Regulation’ (above, n. 72).

<sup>131</sup> See D. J. Elliot, *Key issues on European Banking Union: Trade-offs and some recommendations. Global Economy and Development at Brookings*, Working Paper 52; Benoît Coeuré, *Why the euro needs a banking union: Speech at Conference “Bank funding - markets, instruments and and implications for corporate lending and the real economy”* (Frankfurt am Main, 2012), [https://www.ecb.europa.eu/press/key/date/2012/html/sp121008\\_1.en.html](https://www.ecb.europa.eu/press/key/date/2012/html/sp121008_1.en.html), accessed 01 December 2017.

amounts of public resources. Deteriorating financial indicators of those euro area Member States provoked massive outflows of funds from their financial markets towards the euro area center. This was motivated by market fears about possible default on these Member States' national debts<sup>132</sup> and took place despite negative yields offered in central euro area Member States.<sup>133</sup>

As a result, diverging funding conditions for businesses across the euro area arose despite the same level of key interest rates being set centrally by the ECB. In these difficult circumstances, there existed a “natural” bias of national supervisors who aimed to ring-fence domestic banking sectors from the spread of contagion, both in euro area peripheral and central Member States.<sup>134</sup> These practices contributed to the accumulation of massive liabilities on banks and sovereigns balance sheets to secure the existence of national (banking) champions. National attempts to deal with weaker and undercapitalized banks only exacerbated the fragmentation of the Single Market along national borders<sup>135</sup> and constituted a clear signal that the monetary policy transmission mechanism had stopped to work efficiently across the euro area.<sup>136</sup> As argued by Vítor Constâncio, high degrees of financial integration, understood as diversification of assets and liabilities of financial institutions across

---

<sup>132</sup> See Elliot, *Key issues on European Banking Union: Trade-offs and some recommendations*. *Global Economy and Development at Brookings* (above, n. 131).

<sup>133</sup> Ibid.

<sup>134</sup> See Vítor Constâncio, *Towards a European Banking Union: Lecture held at the start of the academic year of the Duisenberg School of Finance* (Amsterdam, 2012), <https://www.ecb.europa.eu/press/key/date/2012/html/sp120907.en.html>, accessed 01 December 2017.

<sup>135</sup> See Guido A. Ferrarini and Luigi Chiarella, ‘Common banking supervision in the eurozone: strengths and weaknesses’, *ECGI-Law Working Paper*, no. 223 (2013).

<sup>136</sup> See European Central Bank, *Financial Integration in Europe*, <https://www.ecb.europa.eu/pub/pdf/other/financialintegrationineurope201204en.pdf>, accessed 01 December 2017.

the euro area, were essential for efficient monetary policies in a single currency area.<sup>137</sup>

Therefore, in order to restore the proper monetary policy transmission mechanism and robust functioning of the single currency area, the “vicious circle” between the banks and sovereigns had to be addressed. It became widely recognized among European politicians that a monetary union could work only with a stronger economic pillar,<sup>138</sup> notably including an integrated banking supervision.<sup>139</sup> In this context, on 26 June 2012, the President of the European Council presented a vision of a “stable and prosperous Economic and Monetary Union” which would rest on four building blocks, including an *integrated financial framework*. This framework entailed creating “a single European banking supervision system with a European and a national level” and elevating “responsibility for supervision to the European level”.<sup>140</sup> On 29 June 2012, euro area leaders reaffirmed that it was “imperative to break the vicious circle between banks and sovereigns”, and urged the European Commission to present respective proposals on the creation of a “single supervisory mechanism” for the euro area banking supervision.<sup>141</sup> They also invited the President of the European Council to develop a specific roadmap in line with the report

---

<sup>137</sup> See Constâncio, *Towards a European Banking Union* (above, n.134).

<sup>138</sup> See Herman van Rompuy, *Remarks by President of the European Council Herman Van Rompuy following the informal dinner of the members of the European Council: EUCO 93/12 EUCO 93/12 PRESSE 215 PR PCE 78* (2012): “Colleagues expressed various opinions on issues such as (...) more integrated banking supervision and resolution, and a common deposit insurance scheme.”

<sup>139</sup> See Coeuré, *Why the euro needs a banking union* (above, n. 131).

<sup>140</sup> See Herman van Rompuy, *Towards a Genuine Economic and Monetary Union: Report by President of the European Council Herman Van Rompuy*, EUCO 120/12 PRESSE 296 PR PCE 102 (Brussels, 2012).

<sup>141</sup> See van Rompuy, *Remarks by President of the European Council Herman Van Rompuy following the informal dinner of the members of the European Council* (above, n. 234).

submitted on 26 July. Against this background, on 12 September 2012 the European Commission released a “Roadmap towards a Banking Union”<sup>142</sup> accompanied by two draft legislative proposals.

The first legislative proposal provided for the establishment of a single supervisory mechanism transferring “to the European level and specifically to the European Central Bank a number of specific, key supervisory tasks for banks established in euro area Member States”<sup>143</sup> which was based on Article 127(6) of the Treaty on the Functioning of the European Union (TFEU).<sup>144</sup> The second legislative proposal envisaged limited changes to the functioning of the European Banking Authority in the context of the newly established Banking Union.<sup>145</sup>

Following the conclusions of the summit of the European Council on 26 June 2012, the President of the European Council subsequently presented a specific roadmap named “Towards a Genuine Economic and Monetary Union”.<sup>146</sup> On 13 December 2012, the Council reached an agreement among EU Member States on the final design of the basic legal framework governing the Single Supervisory Mechanism

---

<sup>142</sup> See European Commission, *Communication from Commission to the Parliament and the Council: A Roadmap towards a Banking Union*, COM(2012) 510 final (Brussels, 2012).

<sup>143</sup> See European Commission, *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 (Brussels, 2012)

<sup>144</sup> This legal basis provides for the special legislative procedure, in which the Council can decide unilaterally, outside the ordinary legislative procedure (normal co-decision procedure with the Parliament) on the creation of new supranational supervisory structures and foresees that “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”.

<sup>145</sup> See European Commission, *Proposal for a Regulation amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority)*, COM/2012/0512 final (Brussels, 2012).

<sup>146</sup> See Herman van Rompuy, *Towards a Genuine Economic and Monetary Union*, EUCO 120/12 PRESSE 296 PR PCE 102 (Brussels, 2012).

(SSM). The consensus reached considerably altered the original draft proposal presented by the EU Commission.<sup>147</sup> Instead of the initially proposed ECB direct supervision over all euro area credit institutions within the SSM, it was decided to carry out prudential supervision within the SSM in a “differentiated way and in a close cooperation with national supervisory authorities”.<sup>148</sup> Such an arrangement effectively instituted two distinct supervisory subsystems: one for large and systemic banks (significant ones) and another one for small and medium sized banks (less significant ones). Although the European Parliament was not empowered to be consulted according to the *special legislative procedure* set by Article 127(6) of the TFEU, it nevertheless managed to be heard on this proposal by leveraging its role as co-legislator in the context of the EU Commission’s legislative proposal – a regulation adapting the functioning of the EBA to coexistence with the SSM. On 19 March 2013, the Council and the Parliament reached a compromise on the final wording of the SSM draft regulation. The final version of the SSM Regulation was adopted by the Council on 15 October 2013 and entered into force on 4 November 2013. One year later, on 4 November 2014, the SSM became operational.

The SSM is the first and key pillar of the European Banking Union supplementing the existing Economic and Monetary Union. It is built around the ECB and the NCAs of the so-called “participating Member States”<sup>149</sup> which together “constitute a system

---

<sup>147</sup> See Council, *Council agrees position on bank supervision*, 17739/12 PRESSE 528 (Brussels, 2012).

<sup>148</sup> *Ibid.*, p. 2.

<sup>149</sup> According to Article 2(1) of the SSM Regulation, “participating Member States” are either Member States whose currency is the euro or Member States whose currency is not the euro which have established a close cooperation with the ECB in accordance with Article 7 (of that Regulation).

of financial supervision”.<sup>150</sup> This system rests on a more genuine allocation of supervisory tasks and competences related to both micro- and macro prudential supervision than the one existing within the “banking arm” of the ESFS. The participation in the SSM is obligatory for euro area Member States, but under certain conditions it also remains open to the participation of non-euro area Member States.<sup>151</sup>

In the realm of micro-prudential supervision, the ECB became exclusively competent to carry out key supervisory tasks in relation to all credit institutions headquartered in (SSM) participating Member States.<sup>152</sup> However, the ECB’s exclusive micro-prudential supervisory competence is exercised in a differentiated way that forms “a unique and unprecedented juxtaposition of European and national responsibilities which defies any clear definition or categorization”.<sup>153</sup> It includes the ECB’s responsibility for direct supervision of large and systemic euro area credit institutions and the NCAs’ responsibility for direct supervision of smaller and medium-sized euro area credit institutions, as well as the ECB’s oversight role over the efficient and consistent functioning of the system.<sup>154</sup> In the realm of macro-

---

<sup>150</sup> See Article 2(9) of the SSM Regulation.

<sup>151</sup> See Article 7 of the SSM Regulation.

<sup>152</sup> See Article 4(1) of the SSM Regulation

<sup>153</sup> See Teixeira, ‘Europeanising prudential banking supervision. Legal foundations and implications for European integration’ (above, n. 125): p.554.

<sup>154</sup> In its oversight role, the ECB may in particular issue regulations, guidelines or general instructions to the NCAs related to the performance of those tasks and to the adoption of supervisory decisions by the NCAs, request from the NCAs information (either ad-hoc or on continuous basis) related to the performance of their supervisory tasks on LSIs, make use of investigatory powers vis-à-vis LSIs conferred upon it by the SSM Regulation and, ultimately, decide to “exercise directly itself all relevant powers” over one or more less significant institutions “*where necessary to ensure consistent application of high supervisory standards*”. See Art. 6(5)(a)-(e) of the SSM Regulation.

prudential supervision, the competence to apply macro-prudential measures is shared between the ECB and the national macro-prudential designated authorities (NDAs) in a way that the ECB may only apply higher requirements than those set by the NDAs in respect of capital buffers or more stringent macro-prudential measures aiming at addressing systemic or risks if deemed necessary (top-up power).<sup>155</sup> Importantly, the ECB cannot preempt the NDAs in the exercise of their macro-prudential competence from imposing capital buffers on credit institutions operating in their jurisdictions.

For euro area Member States, their obligatory participation in the SSM entails a significant transfer of authority from the national to the supranational level in the policy area that governs credit allocation by banks in their economy.<sup>156</sup> Due to its extreme sensitiveness from a political economy perspective, this process has tremendous political-administrative implications. In terms of gravity, this can be compared with the transfer of euro area Member States' sovereign rights of creation and regulation of currency (*lex monetae*) to the Union, which took place when the euro was introduced. Given the largely bank-based financial structure of the European economy,<sup>157</sup> the introduction of the SSM has had a direct impact on the regulatory and institutional environment in which the main credit suppliers to the European economy operate.

---

<sup>155</sup> The regime for the exercise of macro-prudential powers in the SSM is set by Article 5 of the SSM Regulation.

<sup>156</sup> See Stefaan de Rynck, 'Banking on a union: the politics of changing eurozone banking supervision', *Journal of European Public Policy* 23, no. 1 (2016): pp. 119–135.

<sup>157</sup> See Sam Langfield and Marco Pagano, 'Bank bias in Europe: Effects on systemic risk and growth', *Economic Policy* 31, no. 85 (2016): pp. 51–106. One of the interviewees referred to the SSM's creation as a "huge game changer" for her home NCA, see also Informal interview with K (17 January 2016) in *Annex*.



This brief sketch of the institutional foundations of the EU's new administrative architecture of banking supervision allows for a number of preliminary remarks. In the light of such a complexity and multitude of layers, a comprehensive analysis of the new administrative arrangements has to inherently go beyond the legal wording which categorizes them as "single" or "uniform" systems. On the contrary, these newly created supervisory frameworks appear to be intricate systems between supranational administrative units and their national counterparts designed as multilevel and internally differentiated systems where administrative units at different levels "are linked together in the performance of tasks".<sup>158</sup> In the field of banking supervision, there exists an administrative system applicable to all EU Member States (the ESFS), and another system applicable to a subset of EU Member States (the SSM).<sup>159</sup> As a result, the post-crisis architecture of EU banking supervision exhibits a deeply plural composition which can be sketched in terms of "administrative pluralism" which is a far less developed theoretical phenomenon than constitutional pluralism.<sup>160</sup> These circumstances have at least two relevant implications.

Firstly, a multilevel nature of EU banking supervisory administration implies that supervisory tasks cannot be carried out without having recourse to national

---

<sup>158</sup> See Herwig C. H. Hofmann and Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences', *European Law Journal* 13, no. 2 (2007): pp. 253–271; Beate Kohler-Koch and Rainer Eising, *The transformation of governance in the European Union* (Psychology Press, 1999).

<sup>159</sup> That is, obligatory participation for euro area Member States, and opt-in possibility to non-euro area Member States.

<sup>160</sup> See Avbelj, 'Constitutional and Administrative Pluralism in the EU System of Banking Supervision' (above, n. 86).

authorities for the operational conduct of supervision.<sup>161</sup> As already pointed out, such a multilevel design may create centrifugal challenges and dilemmas at lower levels<sup>162</sup> and generate a question of whether lower level (national) supervisors are sufficiently incentivized to comply with the policy preferences and objectives of higher level (supranational) supervisors. This issue seems to be indeed fundamental to achieve the optimal institutional design of regulatory regimes characterized by the multilevelness.

Secondly, by distinguishing administrative arrangements applicable to the euro area alone, there exist different administrative structures binding different subsets of EU Member States within the same sector rather than among different sectors of public policy as the traditional concept of differentiated integration entails.<sup>163</sup> This, in turn, generates a question of whether the Single Market for banking services will remain truly single or whether the creation of the SSM strengthens a permanent split between euro area and non-euro area Member States.

Against this backdrop and line with the research design proposed in chapter two, the following two chapters construct two pillars for the analytical framework to be subsequently applied to the analysis of the phenomena of the Single Supervisory Mechanism.

---

<sup>161</sup> See Teixeira, 'Europeanising prudential banking supervision. Legal foundations and implications for European integration' (above, n. 125), p. 554.

<sup>162</sup> See *supra* n.99 **Error! Bookmark not defined.**

<sup>163</sup> See Edoardo Chiti, 'In the Aftermath of the Crisis—The EU Administrative System Between Impediments and Momentum', *Cambridge Yearbook of European Legal Studies* 17, no. 01 (2015): pp. 311–333.

# CHAPTER 4

## Organisational design of EU multilevel administration

### 4.1. Introductory remarks

This dissertation deems the organisational design of a given EU multilevel administrative arrangement to be the first structural condition which influences the lower level actor's likelihood to comply with the policy preferences and objectives of the higher level actor pertaining to that arrangement. This structural condition is primarily related to the systemic position of the higher and lower level actors within the multilevel regime. Under the assumptions of the Enforcement hypothesis, the organisational design of a given multilevel regime should provide for a strong systemic position of the higher level actor therein in order to promote higher levels of top-down compliance expectation. In the same vein, the Management hypothesis asserts that the existence of a strong shadow of the higher level actor's hierarchy therein positively influences top-down compliance expectation.

Against this backdrop, the purpose of this chapter is to build a typology of different models of EU multilevel administration, which would allow a determination of the systemic position of the higher level actor in relation to the lower level actor and of the correlated shadow of its institutional hierarchy. Developing such a framework is instrumental to initiating the first step in the testing of the Enforcement and

Management hypotheses in respect to the subsystems of SSM Direct and Indirect Supervision, which is conducted in chapter five.

## **4.2. Conceptual perspectives on EU multilevel administrative order**

Although a range of well-established concepts of public administration have been developed by the bureaucracy or new public management scholarship, they fail to cover the intricacies of the EU administrative realities which have grown beyond the architecture of the modern state.<sup>164</sup> It has been noted that the majority of studies on public administration are largely confined to the realm of national sovereignty, notwithstanding the fact that public policy formulation and application go beyond the borders of the state and increasingly involve such actors as the EU.<sup>165</sup> While it is true that recent administrative studies distinguish between a variety of typologies concerning EU multilevel administrative relations,<sup>166</sup> they are perhaps not the best choice to fully capture the intricacies of the new administrative regulatory frameworks established following the global financial crisis.

The administrative and constitutional character of the European Union is exceptional. As noted by Eva Heidbreder, “no genuine or coherent EU administrative system – or administrative space – can be discerned after some 60 years of legal

---

<sup>164</sup> See Benz, ‘Differentiating Multi-Level Administration: Patterns of Administrative Co-Ordination in the European Union’ (above, n. 93).

<sup>165</sup> See Rik Joosen and Gijs Jan Brandsma, ‘Transnational executive bodies: EU policy implementation between the EU and member state level’, *Public Administration* 95, no. 2 (2017): pp. 423–436; Stone and Ladi, ‘Global public policy and transnational administration’ (above, n. 89); Heidbreder, ‘Multilevel policy enforcement: innovations in how to administer liberalized global markets’ (above, n. 89).

<sup>166</sup> See Arthur Benz, ‘European public administration as a multilevel administration: a conceptual framework’, in *The Palgrave Handbook of the European Administrative System* (Springer, 2015), pp. 31–47.

integration”.<sup>167</sup> Devised as an international organization exercising powers delegated by its Contracting States, nowadays it increasingly resembles a “federal order of competences”,<sup>168</sup> or a “particular federation”.<sup>169</sup> The EU’s exceptionality is reflected in the fact that it encompasses of multiple complex and multilevel administrative systems, in which supranational and national (as well as sub-national) administrative apparatus “jointly exercise powers delegated to the EU in a system of shared sovereignty”.<sup>170</sup> Traditionally, this system was based on the assumption that general and abstract rules and policies in a given sector would be formulated at the EU level, while the application and enforcement of those rules and policies would take place at the national level (“executive federalism”).<sup>171</sup> However, recently one can observe a new trend concerning an increasing involvement of higher level (supranational) level actors in the application and enforcement of different EU policies across the Member States. This is evidenced by the fact that over the last 15 years the number of EU institutions, agencies and bodies vested with (more or less) direct application and enforcement competences have grown from one to seven.<sup>172</sup> As a result, currently there exists a plethora of new and more sophisticated

---

<sup>167</sup> See Heidebreder, ‘Multilevel policy enforcement: innovations in how to administer liberalized global markets’ (above, n. 89), p. 942.

<sup>168</sup> See Kalypso Nicolaidis and Robert Howse, *The Federal Vision* (Oxford University Press, 2001).

<sup>169</sup> See Loïc Azoulay, ed., *The question of competence in the European Union* (OUP Oxford, 2014); Armin von Bogdandy and Jürgen Bast, ‘The federal order of competences’, *Principles of European Constitutional Law*. Hart Publishing, Oxford (2010): pp. 275–307.

<sup>170</sup> See Herwig C. H. Hofmann, ‘Mapping the European administrative space’, *West European Politics* 31, no. 4 (2008): pp. 662–676.

<sup>171</sup> See Herwig C. H. Hofmann and Alexander Türk, *Legal challenges in EU administrative law: towards an integrated administration* (Edward Elgar Publishing, 2009).

<sup>172</sup> See Miroslava Scholten, ‘Mind the trend! Enforcement of EU law has been moving to ‘Brussels’’, *Journal of European Public Policy* (2017): pp. 1–19.

configurations between higher and lower level administrative actors interacting within different EU multilevel contexts across various fields of public policies.

The allocation of tasks and competences between the Union and national levels and the modalities of their exercise (in particular, how the Union's competences are exercised) can be regarded as decisive aspects determining the character of the EU administrative system. Furthermore, aspects such as the extent to which a Union-level administrative capacity is established independently from Member States' pre-existing administrative structures and the territorial applicability of the EU's administrative arrangement are also of importance. This links the discussion about EU administration to the theoretical accounts of federalism which consider the vertical attribution of authority across higher and lower levels as the pivotal element of studies on multilevel polities.

According to Daniel R. Kelemen, three basic criteria can be used to identify federal structures. These include i) the division of power between higher and lower levels, ii) the existence of some decision-making authority on each level in relation to respective issues, and iii) the existence of an authority which is competent to adjudicate disputes between both levels.<sup>173</sup> In the case of the European Union, all of these criteria are fulfilled. Firstly, due to the principle of conferral laid down in Article 5 of the Treaty of the European Union (TEU), the limits of the action of

---

<sup>173</sup> See R. Daniel Kelemen, 'The structure and dynamics of EU federalism', *Comparative Political Studies* 36, 1-2 (2003): pp. 184-208, p. 185.

higher (supranational) level are clearly delineated.<sup>174</sup> Secondly, Articles 3-6 of the Treaty on the Functioning of the European Union (TFEU) distribute authoritative decision-making powers in different EU policy areas between the higher (supranational) and lower (national) level administration.<sup>175</sup> Thirdly, based on Articles 263 and 267 of the TFEU, the Court of Justice of the European Union (CJEU) has competences to adjudicate disputes between the higher (supranational) and lower (national) level. It therefore follows that the EU can be considered as a federally structured polity according to the foregoing criteria. This assumption allows for drawing insights from the theory of federalism to inform the analysis of the organisational design of the EU multilevel administration.

To develop models of different EU administrative arrangements, a vertically-oriented perspective will be employed. This perspective would allow driving particular attention to the formal allocation of tasks and competences and between the higher level (supranational) and lower level (national) actors, as well as to the decision making modalities of each of these actors. It will be indicated that the EU administrative system exhibits a deeply pluralistic nature because the configurations of power balance between those actors may vary depending on the applicable administrative arrangements and the policy field. This would support the claim that the EU can not only be characterized by the coexistence of concurring legal orders

---

<sup>174</sup> According to Article 5(1) of the TEU “the limits of Union competences are governed by the principle of conferral (...)”. In addition, Article 5(2) of the TEU provides that “under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States”.

<sup>175</sup> Three basic groups of EU competences exist: exclusive competences (listed in Article 3 of the TFEU), shared competences (listed in Article 4 of the TFEU) and supporting competences (listed in Article 6 of the TFEU).

which may partially overlap (constitutional pluralism), but also by the coexistence of concurring regulatory structures which may also partially overlap (administrative pluralism).<sup>176</sup> Furthermore, it is assumed that there is a continuous “ebb and flow” of tasks and responsibilities between lower and higher levels of EU administration.<sup>177</sup>

To create a typology of the organisational models of the EU multilevel administrative arrangements, this study also accepts insights from the concepts of multilevel administration<sup>178</sup> and differentiated integration.<sup>179</sup> The multilevel administration (MLA) approach perceives the EU administrative order as a variety of arrangements situated between the “indirect” and “direct” systems of administration. In traditional regimes characterized by multilevelness, the higher level actor is expected to formulate common policy objectives and preferences which are subsequently applied and enforced by the lower level actors in a decentralized manner. This setting reflects the traditional division between the regulatory and implementation (i.e.

---

<sup>176</sup> See Nico Krisch, ‘The pluralism of global administrative law’, *European Journal of International Law* 17, no. 1 (2006): pp. 247–278; Luca de Lucia, ‘Administrative pluralism, horizontal cooperation and transnational administrative acts’, *Review of European Administrative Law* 5, no. 2 (2012): pp. 17–45; Moritz Hartmann, ‘Administrative constitutionalism and the political union’, *German LJ* 14 (2013): p. 695; Avbelj, ‘Constitutional and Administrative Pluralism in the EU System of Banking Supervision’ (above, n. 86).

<sup>177</sup> See John D. Donahue and Mark A. Pollack, ‘Centralization and its discontents: the rhythms of federalism in the United States and the European Union’, *The Federal Vision: Legitimacy and levels of governance in the United States and the European Union* 73 (2001): p. 131; Mikhail Filippov, Peter C. Ordeshook, and Olga Shvetsova, *Designing federalism: A theory of self-sustainable federal institutions* (Cambridge University Press, 2004).

<sup>178</sup> See Hofmann, ‘Mapping the European administrative space’ (above, n. 170) Morten Egeberg and Jarle Trondal, ‘Why strong coordination at one level of government is incompatible with strong coordination across levels (and how to live with it): The case of the European Union’, *Public Administration* (2015).

<sup>179</sup> See Frank Schimmelfennig, Dirk Leuffen, and Berthold Rittberger, ‘The European Union as a system of differentiated integration: interdependence, politicization and differentiation’, *Journal of European Public Policy* 22, no. 6 (2015): pp. 764–782; Katharina Holzinger and Frank Schimmelfennig, ‘Differentiated integration in the European Union: many concepts, sparse theory, few data’, *Journal of European Public Policy* 19, no. 2 (2012): pp. 292–305; Dirk Leuffen, Berthold Rittberger, and Frank Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan, 2012); Benjamin Leruth and Christopher Lord, ‘Differentiated integration in the European Union: a concept, a process, a system or a theory?’, *Journal of European Public Policy* 22, no. 6 (2015): pp. 754–763; Benjamin Leruth and Christopher Lord, *Differentiated Integration in the European Union* (Routledge, 2015); Christopher Lord, ‘Utopia or dystopia? Towards a normative analysis of differentiated integration’, *Journal of European Public Policy* 22, no. 6 (2015): pp. 783–798.



application and enforcement) stages of the policy cycle in the EU.<sup>180</sup> In recent years, this type of EU policy-making process has changed considerably and the emergence of new modes of policy application and enforcement can be identified. In some instances, EU policies have become increasingly implemented directly and autonomously on behalf of the higher level (supranational) administrative actors with the sole assistance of lower level (national) administrative actors. In other instances, EU policies remain implemented autonomously by the lower level administration, but under the oversight of the higher level administration. Finally, the application and enforcement of EU policies may be shared between different levels of territorial administration. Consequently, there exist different organisational models of EU multilevel administration which reflect the degree of control of the higher level administration over the process of day-to-day application and enforcement of common EU policies across Member States' jurisdictions.

As pointed out by Herwig Hofmann, the standard distinction between forms of either “direct” or “indirect” administration has become of small analytical relevance within the EU context.<sup>181</sup> This standard distinction assumes that the EU inherited the “indirect” administration approach from classical international organizations, in which policies formulated by international organizations (higher level actors) are subsequently implemented by signatory member states alone (lower level actors), without any interference from bodies owned by international organizations.<sup>182</sup> This

---

<sup>180</sup> See Scholten, ‘Mind the trend! Enforcement of EU law has been moving to ‘Brussels’ (above, n. 172).

<sup>181</sup> See Hofmann, ‘Mapping the European administrative space’ (above, n. 170), p. 667.

<sup>182</sup> Ibid., p. 670.

arrangement leaves however a considerable room for maneuver for the member states (and their administrative agencies) which may result in diverging applications across national jurisdictions.<sup>183</sup> Among the circumstances most accentuated in order to explain uneven implementation are the member states' institutional traditions, administrative capacities and political preferences.<sup>184</sup> The "indirect" system of administration grants national administration full authority with regard to the implementation (i.e. application and enforcement) of international (or supranational) policies. To reduce the possible negative consequences of such a type of regulatory fragmentation and to bring more harmonization into the implementation process, more "direct" forms of EU administration have been established over time.

From the outset provided by the Treaty of Rome, the "direct" system of EU administration was established to manage the core areas of European integration, including competition and internal trade, through supranational institutions such as the European Commission.<sup>185</sup> Gradually, the different fields of public policy have developed a range administrative arrangements in-between pure organisational

---

<sup>183</sup> See Oliver Treib, 'Implementing and complying with EU governance outputs', *Living reviews in European governance* 3, no. 5 (2008): pp. 1-30.

<sup>184</sup> See Ellen Mastenbroek and Michael Kaeding, 'Europeanization Beyond the Goodness of Fit: Domestic Politics in the Forefront', *Comparative European Politics* 4, no. 4 (2006): pp. 331-354; Paolo Graziano and Maarten Peter Vink, *Europeanization: New research agendas / edited by Paolo Graziano and Maarten P. Vink* (Basingstoke: Palgrave Macmillan, 2007), <http://www.loc.gov/catdir/enhancements/fy0662/2006049470-b.html>; Treib, 'Implementing and complying with EU governance outputs' (above, n. 183).

<sup>185</sup> See Francesca Bignami and Sabino Cassese, *The Administrative Law of the European Union*, vol. 1 (JSTOR, 2004).

model of EU “indirect” and “direct administration”.<sup>186</sup> Therefore, although the models of “direct” and “indirect” administrative arrangements are still important to classify dominant modes of policy implementation in the EU, they are not meant to be seen as purely centralized or decentralized forms of administrative action.<sup>187</sup> To account for this administrative evolution, two sets of arrangements which represent new organisational patterns of EU “direct” administration can be identified.

The first is an “intergovernmental European administration”,<sup>188</sup> in which higher level actors (EU administration) work closely with lower level actors (Member-State administrations) partly bypassing national ministries in the pursuit of public policies.<sup>189</sup> This occurs either because higher level actors need to pool administrative resources across EU Member States,<sup>190</sup> or because they need support from national governments.<sup>191</sup> In this setting, lower level actors (national administrative apparatus) may operate in a “double-hatted” manner, serving both as parts of member states’ structures and as parts of a Union administration.<sup>192</sup> Under the second hat, national

---

<sup>186</sup> See Herwig C. H. Hofmann and Alexander H. Türk, *EU administrative governance* (Edward Elgar Publishing, 2006).

<sup>187</sup> See Edoardo Chiti, ‘The administrative implementation of European Union law: a taxonomy and its implications’, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (2009): pp. 9–34.

<sup>188</sup> See Benz, ‘European public administration as a multilevel administration: a conceptual framework’ (above, n. 166).

<sup>189</sup> See Morten Egeberg and Jarle Trondal, ‘National agencies in the European administrative space: government driven, commission driven or networked?’, *Public Administration* 87, no. 4 (2009): pp. 779–790; Morten Egeberg, Jarle Trondal, and Nina M. Vestlund, ‘The quest for order: unravelling the relationship between the European Commission and European Union agencies’, *Journal of European Public Policy* 22, no. 5 (2015): pp. 609–629.

<sup>190</sup> See Nina M. Vestlund, ‘Pooling administrative resources through EU regulatory networks’, *Journal of European Public Policy* (2015): pp. 1–20.

<sup>191</sup> See Jarle Trondal, *Unpacking international organisations: The dynamics of compound bureaucracies* (Oxford University Press, 2010).

<sup>192</sup> See Morten Egeberg, *Multilevel union administration: the transformation of executive politics in Europe* (Springer, 2006); Jarle Trondal, ‘Domestic agencies in an emergent European executive order’, *European Integration* 33, no. 1 (2011): pp. 55–74; Tobias Bach and Eva Ruffing, ‘Networking for autonomy? National agencies in European networks’, *Public Administration* 91, no. 3 (2013): pp. 712–726.

administrative structures are directly networked with EU institutions and agencies, yet not via their ministerial superiors as is typical for indirect administration.<sup>193</sup> The trend towards instituting this particular set of organisational arrangement has been well-captured by the increasing “agencification” of the EU administrative system. In this context, EU “decentralized” agencies and bodies have a particular role to play in areas where the administrative powers of the Member States must be pooled to avoid overconcentration of powers at Union level.<sup>194</sup> On the other hand, national agencies organized at arm’s length from their parent ministerial departments are regarded as building blocks of a multilevel “direct” EU administration.<sup>195</sup> This specific setting constitutes a compromise between functional needs to create more regulatory capacity at the EU level in certain areas of public policy and EU Member States’ reluctance to transfer more tasks and competences to the EU institutions, agencies and bodies<sup>196</sup> which increasingly exercise administrative functions in the EU.<sup>197</sup>

The second is a “supranational European administration”,<sup>198</sup> in which higher level actors (EU administration) can pursue public policies without including lower level actors (national administration), although these decisions might be influenced by

---

<sup>193</sup> See Egeberg, *Multilevel union administration: the transformation of executive politics in Europe* (above, n. 192).

<sup>194</sup> See Michelle Everson, ‘A technology of expertise: EU financial services agencies’, *LEQS Paper*, no. 49 (2012), p. 14.

<sup>195</sup> See Egeberg and Trondal, ‘Why strong coordination at one level of government is incompatible with strong coordination across levels (and how to live with it): The case of the European Union’ (above, n. 274), p. 588.

<sup>196</sup> See Morten Egeberg and Jarle Trondal, ‘Agencification of the European Union Administration: Connecting the Dots’, *TARN WP Series 1* (2016), p. 1.

<sup>197</sup> See Herwig C. H. Hofmann, ‘Agencies in the European Regulatory Union’, *TARN WP Series 5* (2016).

<sup>198</sup> See Benz, ‘European public administration as a multilevel administration: a conceptual framework’ (above, n. 166), p.35.

interests communicated by the member-state administrative apparatus, since the lower level continues to play a significant role in the domestic implementation of said policies.<sup>199</sup> In the “supranational European administration”, by virtue of its position in hierarchical structure, a higher level actor holds the authority to impose decisions on lower level actors and is able to determine policy objectives, procedures, standards and expectations, but it can never implement these policies on its own.<sup>200</sup> This form of EU “direct” administration can be established if “the implementation by the institutions and other authorities of the Union takes place (...) when there is a clear constitutional basis conferring administrative functions on the as such”,<sup>201</sup> which includes the European Commission and the European Central Bank, but not necessarily EU “decentralized” agencies.<sup>202</sup> It follows that the concept of multilevel administration may be of support to elucidate the foundations, internal distribution of tasks and competences and inter-administrative relations between administrative actors operating within multilevel arrangements.

The differentiated integration (DI) approach has been surrounded by a great degree of conceptual ambiguity. It does not carry a single name, nor has it a meaning even to those which would be commonly agreed on.<sup>203</sup> This approach includes notably

---

<sup>199</sup> Ibid.

<sup>200</sup> See Oliver Treib, Holger Bähr, and Gerda Falkner, ‘Modes of governance: towards a conceptual clarification’, *Journal of European Public Policy* 14, no. 1 (2007): pp. 1–20; Ingeborg Tömmel and Amy Verdun, *Innovative governance in the European Union: the politics of multilevel policymaking* (Lynne Rienner Publishers, 2009).

<sup>201</sup> See Herwig C. H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, *Administrative law and policy of the European Union* (Oxford University Press, 2011), p. 11.

<sup>202</sup> Ibid. Of interest, Chiti classifies agencies as a grey zone between two ideal types of EU direct and indirect administration. See Edoardo Chiti, ‘Decentralisation and integration into the community administrations: a new perspective on European agencies’, *European Law Journal* 10, no. 4 (2004): pp. 402–438.

<sup>203</sup> See Helen Wallace and William Wallace, ‘Flying together in a larger and more diverse European Union’ (1995).

such concepts as multi-speed Europe, variable geometry Europe, Europe *à la carte*, or EU concentric circles. As such, around 30 forms of differentiated integration were identified along three dimensions of time, space and policy content.<sup>204</sup> For the purposes of this chapter, I will however rely on the most recent approach to understand the phenomenon of DI as proposed by Dirk Leuffen, Berthold Rittberger and Frank Schimmelfennig.<sup>205</sup> This approach considers the DI phenomenon as a three-dimensional configuration of supranational authority within the EU represented by (i) the level of its centralization, (ii) its functional scope, and (iii) its territorial extension.<sup>206</sup> The level of centralization accounts for the allocation of decision-making authority to the central level, the functional scope is determined by whether the authority is granted over one or more sectors of public policies, and the territorial extension expresses the authority's jurisdictional outreach. In particular, the third dimension of the DI concept provides an added value to the conceptual framework developed in this chapter since the MLA approach does not capture this dimension.

Based on the specific configurations of those three dimensions, one can distinguish vertical and horizontal differentiations.<sup>207</sup> The former refers to the level of centralization - that is the outreach of the authoritative decision-making at the

---

<sup>204</sup> See Alexander C-G Stubb, 'A categorization of differentiated integration', *JCMS: Journal of Common Market Studies* 34, no. 2 (1996): pp. 283-295.

<sup>205</sup> See Leuffen, Rittberger and Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (above, n.179).

<sup>206</sup> *Ibid.*, p. 8.

<sup>207</sup> See Schimmelfennig, Leuffen and Rittberger, 'The European Union as a system of differentiated integration: interdependence, politicization and differentiation' (above, n.179).

central (EU) level, and its functional scope – that is policy coverage limited to single or entire range of policies. In terms of the organisational design of EU “direct” administration, it follows that the vertical of aspect differentiation is directly connected to the “supranational” (as opposed to “intergovernmental”) type of European administration. Therefore, this dimension of the DI approach may be deemed overlapping with the MLA’s tenants. On the other hand, the latter (horizontal) differentiation refers to the territorial extension and reflects the fact that many administrative arrangements are not applicable in all EU Member States. In terms of the nature of the EU administrative system, it manifests the existence of “administrative pluralism”, in which there exists some arrangements, from which some EU Member States may choose to opt-out. Consequently, the concept of differentiated integration may shed some light on the internal distribution of tasks and competences and on the territorial applicability of multilevel administrative arrangements.

#### **4.3. Elements of the organisational design of EU multilevel administration**

Based on insights jointly derived from the concepts of federalism, multilevel administration and differentiated integration, it is suggested that four specific institutional elements may influence the organisational design of a given EU administrative arrangement: i) its constitutional foundations, ii) the vertical allocation of administrative tasks and competences therein and iii) the administrative interrelations between levels, as well as iv) its jurisdictional

(territorial) outreach. As a result of a specific configuration of the four abovementioned elements, this chapter proposes to differentiate three formal models of EU administration, which can be referred to as: i) EU centrifugal administration, ii) EU intervention-based administration, and iii) EU centripetal administration. Each of those models predicts different configurations of power balance between the higher and lower level actors pertaining to a given administrative arrangement.

#### 4.3.1. Constitutional foundations for an EU administrative arrangement

According to the principle of conferral laid down in Article 5 of the TEU, the Union may act only where relevant competences have been explicitly or implicitly attributed to it. It therefore follows that in order to establish an EU multi-level system vested with regulatory capacities at the Union level, there must exist a legal basis in the Treaty permitting supranational intervention in national legal and administrative orders and legitimizing the involvement of national administration in such a system. In this respect, two types of constitutional benchmarks authorizing the creation of such EU multi-level regulatory regimes can be distinguished within the Treaties.<sup>208</sup>

On the one hand, a Treaty legal basis can directly mandate the establishment of an EU multi-level administrative arrangement and directly attribute to the responsible unit of Union administration the corresponding competences necessary to pursue its

---

<sup>208</sup> See Pieter van Cleynenbreugel, *Market supervision in the European Union: integrated administration in constitutional context* (Martinus Nijhoff Publishers, 2014), p. 80.



objectives. Specific Treaty provisions like Articles 105 or 126(7) of the TFEU can be interpreted as an *explicit* constitutional mandate to develop supranational regulatory arrangements. Article 105 of the TFEU empowers the Commission to apply the Union's substantive rules on competition in relation to individual enterprises operating across the Single Market through a system of cooperation with national competition authorities established by the Regulation 1/2003. Article 127(6) of the TFEU sets a legislative procedure that authorizes the Council to attribute to the ECB competences to carry out certain tasks related to the prudential supervision of credit institutions, which has been operationalized through a system of cooperation with national competent authorities established by the SSM Regulation.

On the other hand, the Treaty's general or objective-related legal bases, such as for example the "internal market clause" encapsulated in Article 114<sup>7</sup>, have been interpreted as entailing an *implicit* mandate which enables the creation of an EU multi-level administrative arrangement vested with regulatory capacities at the Union level.<sup>209</sup> According to Article 114(1) of the TFEU, Union legislators are empowered to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

As recognized by the Court, the above legal basis can be used for the creation of administrative regulatory structures at the Union level insofar as the objectives and tasks of the unit of Union administration in question are closely linked to the subject

---

<sup>209</sup> Ibid., p.114-120.

matter of existing harmonising legislation, and are "likely to facilitate" the application of the harmonising legislation by supporting it and providing a framework for its implementation.<sup>210</sup> The functioning of the EU multi-level administration created on the basis of Article 114 of the TFEU is subject however to constraints imposed by the so-called "Meroni doctrine".

At its core, the "Meroni doctrine" embodies a set of the legal requirements concerning the admissibility of an attribution of discretionary competences to units of Union administration (notably to EU agencies and bodies) whose creation has not been explicitly foreseen by the Treaties (such as EU agencies and bodies created by means of Union secondary legislation).<sup>211</sup> The "Meroni Doctrine" prohibits such attribution of powers, especially in cases in which the use of discretion makes possible the execution of actual economic policy of the Union.<sup>212</sup> The attribution of

---

<sup>210</sup> See Judgment of 2 May 2006, Case C-217/04, *United Kingdom v. Parliament and Council, "ENISA"* [2006] ECR I-3789, para 44.

<sup>211</sup> See Everson, 'European Agencies in between Institutions and Member States' (supra n.127), pp. 40-41. The most succinct version of the Meroni doctrine is probably the one used by Madalina Busuic according to which "the Meroni doctrine (...) prohibits delegation of discretionary powers". See by Madalina Busuic, 'Accountability and control Busuic, M. (2009). Accountability, control and independence: the case of European agencies. *European Law Journal*, 15(5), 599-615.

<sup>212</sup> As noted by the Court, a delegation to a body outside of the Treaty framework involving "discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy" would imply an illegal transfer of responsibility. See Judgment of 13 June 1958, Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* EU:C:1958:7, p. 150, page 152.

Apart of this, the Meroni Doctrine sets out a number of institutional principles of procedural nature which must be observed for any delegation to be considered as legitimate. They include, inter alia, the following requirements: first, a delegating body cannot transfer more decision-making authority from that which it has itself received, or a different type thereof; 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; third, the delegating body must take an express decision transferring decision-making authority, which should be published; fourth, delegation can relate only to clearly defined executive powers, the use of which must be subject to the supervision of the delegating body; fifth, the delegating body has to retain the right to reconsider decisions granting delegations of authority, i.e. to decide to withdraw the delegation at any moment in time. See also Judgment of 26 May 2005, Case C-301/02 P *Carminio Salvatore Tralli v European Central Bank* EU:C:2005:306, para 43; Judgment of 23 September 1986, Case 5/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission*

discretionary powers to define the policy of the Union in a given field is allowed only to units of Union administration designated for this purpose by the Treaties. A unit of EU public administration not foreseen by the Treaties may be however empowered to adopt legally binding measures of an individual scope as long as its powers are not discretionary, in the sense that the exercise of those powers must result from the application of a given set of well-defined legal rules to a particular factual situation (objective criteria).<sup>213</sup>

In the light of those constitutional constraints, the use of direct or indirect Treaty bases to establish an EU multi-level administrative arrangement vested with regulatory capacities at the Union level may entail far reaching institutional implications regarding the scope and modalities of the exercise of supranational competences within that administrative system.<sup>214</sup>

---

of the European Communities EU:C:1986:328, paras 33 and 36; Judgment of 13 June 1958, Case 9/56 Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community EU:C:1958:7, pp. 133, 150-151; Judgment of 22 January 2014, C-270/12 United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union ("Short-selling case") EU:C:2014:18, para 39; Judgment of 23 September 1986, Case 5/85 AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities EU:C:1986:328, paras 33 and 36.

<sup>213</sup> See Judgment of 22 January 2014, C-270/12 United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union ("Short-selling case") EU:C:2014:18, para 41.

<sup>214</sup> On those aspects in the context of the creation of the European System of Financial Supervision (which is the first EU supranational administrative framework governing financial supervision), see . C.A. Touray, 'EU Regulatory Response After the Credit Crisis: Was Article 114 TFEU the right legal basis and does the Meroni Doctrine hinder the effectiveness of the European Banking Authority?'; Jacques Pelkmans and Marta Simoncini, 'Mellowing Meroni: Hows ESMA can help build the Single Market. CEPS Commentaries, 18 February 2014' (2014); Merijn Chamon, 'EU Agencies: does the Meroni doctrine make sense', Maastricht J. Eur. & Comp. L. 17 (2010): p. 281; Merijn Chamon, 'The empowerment of agencies under the Meroni Doctrine and Article 114 TFEU: comment on United Kingdom v. Parliament and Council (short-selling) and the proposed Single Resolution Mechanism', European Law Review 39, no. 3 (2014): pp. 380-403; Phedon Nicolaides and Nadir Prezios, 'Discretion and Accountability: The ESMA Judgment and the Meroni Doctrine. Bruges European Economic Research (BEER) Papers 30/2014' (2014).

#### 4.3.2. Vertical allocation of responsibilities between levels in an EU administrative arrangement

European integration has always been about the transfer of responsibility for the pursuit of common public policies from the national to the European level. The division of responsibilities, tasks and competences between the higher (supranational) and lower (national) level is the key principle governing federally organized polities.<sup>215</sup> It implies that the policy mandate, understood as a combination of responsibility and autonomous decision-making exercised by a public agent in order to pursue certain public policy goals,<sup>216</sup> is split between higher and lower levels of government or administration. In doing so, it “distributes the power of government between the center and the regions in such a way that each set of governmental institutions has a direct impact on the individual citizens and other legal persons within its area of competence”.<sup>217</sup> However, in federal systems which are based upon the rule of law, the competence of the central level (higher level actors) to pursue certain public policy tasks and objectives can only be exercised when there exists a legal basis to do so. In this sense, allocating the competences between both levels is considered as a means to constitutionally define the power balance between the higher (central) and lower (peripheral) levels of government and administration.

---

<sup>215</sup> See Jean Francois Aubert, ‘Traité de droit constitutionnel suisse’ (1967).

<sup>216</sup> See Jakub Gren, ‘The impact of the global financial crisis on central banks independence and mandate : cases of the US Fed, the ECB and the BoE’ (LLM thesis, CEU, 2013), p. 2.

<sup>217</sup> See Geoffrey Sawer, *Modern federalism* (Carlton, Vic.: Pitman, 1976).

Although the terms “power” and “competence” are often used interchangeably in different contexts, they are not equivalent, but rather constitute two sides of the same coin. While power refers to the capability of a public actor (e.g. government, administrative authority) to pursue public policies, the notion of competence refers to the reasons and limits to apply powers.<sup>218</sup> As a consequence, there may exist multilevel structures which favor either higher or lower level actors in terms of power balance, also providing checks and balances for the authority migration, either upwards or downwards.

#### 4.3.3. Administrative interactions between levels in an EU administrative arrangement

The notion of “level” refers to the existence of separate and relatively independent sets of administrative units with their own rules, apparatus, and financial resources.<sup>219</sup> As the EU administration has evolved beyond the architecture of the modern state, a higher (Union) level of administration is built upon existing national structures by adding the administrative capacities of EU institutions, agencies or bodies.<sup>220</sup> While the EU administration has often been referred to as a powerful Eurocratic machinery in national political debates, existing research has drawn a more nuanced picture and emphasized the interrelations and power sharing

---

<sup>218</sup> See Arthur Benz and Christina Zimmer, ‘The EU’s competences: The ‘vertical’ perspective on the multilevel system’, *Living reviews in European governance* Vol. 5, No. 1 (2010).

<sup>219</sup> See Trondal and Bauer, ‘Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system’ (above, n. 5).

<sup>220</sup> See Benz, ‘European public administration as a multilevel administration: a conceptual framework’ (above, n. 166).

between European and national bureaucracies.<sup>221</sup> In particular, due to the lack of the “state capacities” on the Union’s side, the EU administration cannot operate as a fully independent organisational structure, but rather constitutes a “fusion” of national and European administrative apparatus.<sup>222</sup> This necessarily implies that the pursuit of administrative tasks conferred upon the Union is carried out in a close cooperation among higher level bureaucrats based in EU institutions, agencies and bodies and their lower level equivalents in national ministries or agencies.<sup>223</sup> National public administration remains “strictly an area of national sovereignty, there cannot be any European *policy* since there is no community competence in this area”.<sup>224</sup> This paradoxical mix of independence and interdependence raises a delicate question concerning the modes of the interactions between higher and lower level actors in terms of the ability of the former to steer the application and enforcement of supranational public policies by the latter. In this context, Article 4 of the TFEU obliges the Union and the Member States to cooperate sincerely and assist each other when carrying out tasks which flow from the Treaties. This also applies to interactions between the higher Union level and the lower Member State level administrations. In addition, in some policy areas the duty to cooperate loyally is further backed by powers allowing the Union-level to impose coercive measures in

---

<sup>221</sup> Ibid.

<sup>222</sup> See Wolfgang Wessels, ‘Beamtengremien im EU-Mehrebenensystem—Fusion von Administrationen?’, in *Europäische Integration* (Springer, 2003), pp. 353–383.

<sup>223</sup> See Christoph Knill, *The Europeanisation of national administrations: Patterns of institutional change and persistence* (Cambridge University Press, 2001); Egeberg and Trondal, ‘Agencification of the European Union Administration: Connecting the Dots’ (above, n.196).

<sup>224</sup> See Michel Mangenot, Gérard Druesne, and Claude Wiseler, *Public Administrations and Services of General Interest: What kind of Europeanisation?* (European Institute of Public Administration Maastricht, 2005), p. 4.

case of non-compliance by the national level (such as instructions or conditionality).<sup>225</sup>

#### 4.3.4. Jurisdictional outreach of an EU administrative arrangement

The EU administration usually operates and is managed on the basis of European principles, rules and regulations uniformly enforced across the Member States.<sup>226</sup> In certain cases, there may however be a situation in which the jurisdiction of a new supranational regulatory administrative framework applies to fewer than 28 EU Member States. Such a state of affairs can be described as EU differentiated integration. This encapsulates a tension between two diverging moves: unity and differentiation. The first reflects the reinforcement of the administrative capacity of the EU as a whole, and the second, the creation of administrative arrangements applicable to a subset of EU Member States only (i.e. euro area Member States). As a result, the administrative structures of all Member States do not participate simultaneously in all components of EU administrative machinery. The co-existence of different administrative disciplines covering different sets of EU Member States may raise uneasy legal issues in the future. In particular, different EU capacities available within corresponding administrative arrangements are likely to develop different administrative practices, techniques, regulatory strategies and

---

<sup>225</sup> See Eva G. Heidbreder, 'Structuring the European administrative space: policy instruments of multi-level administration', *Journal of European Public Policy* 18, no. 5 (2011): pp. 709–727.

<sup>226</sup> See Francisco Cardona, 'Civil services for the European administrative space', *Public Management Forum* 2 (1999).

accountability instruments.<sup>227</sup> Importantly, this raises a question of appropriate balance between the unity and differentiation of the EU administrative system as a whole, including the “minimum degree of unity” which is needed to ensure its smooth and robust operation.<sup>228</sup>

#### **4.4. Organisational models of EU multilevel administration**

##### **4.4.1. EU centrifugal administration**

This organisational pattern can be described as an EU administrative arrangement, in which the distribution of responsibilities between the higher and lower levels in a certain area of public policies leans towards Member State administration rather than towards the Union one. Conceptually, it can be classified as the closest equivalent to the traditional design of EU multilevel regimes, in which the higher level (supranational) actor formulates public policies applicable within them and the lower level (national) actors are responsible for their decentralized implementation (application and enforcement). In administrative sciences scholarship, this is known as the “intergovernmental European administration” or the “EU indirect administration”.<sup>229</sup>

---

<sup>227</sup> See Chiti, ‘In the Aftermath of the Crisis–The EU Administrative System Between Impediments and Momentum’ (above, n. 163).

<sup>228</sup> Ibid.

<sup>229</sup> See Arthur Benz, ‘European public administration as a multilevel administration: A conceptual framework’, in *The Palgrave handbook of the European administrative system* (Springer, 2015), pp. 31–47.



This administrative arrangement is faced with inherent centrifugal pressures and dilemmas at the lower level,<sup>230</sup> which are reflected in a systemic tendency to “pull apart member states, to the point where the federal system fragments”, and which may reduce the authority of the Union’s administrative center.<sup>231</sup>

In organisational terms, higher level actors are vested with power to formulate common, “supranational” public policies in a given area, but their systemic position is rather weak. They have limited possibilities to formally steer the implementation of these policies by lower (national) level actors since direct application and enforcement remains the responsibility of the latter. They may however use persuasive techniques such as issuing guidance, application guides, communications and other soft law instruments to steer the behaviour of the lower level actors, who retain core decision-making powers characteristic to a particular public policy field. They enjoy “administrative sovereignty” as the emanations of EU Member States and the possibilities of the higher level (the Union) administration to control how specific public policies are implemented by the lower level (state) administration are limited. Rather than operating in the “shadow of hierarchy”, lower level actors find themselves in more peer-to-peer inter-administrative relationships vis-à-vis higher level actors.

---

<sup>230</sup> See Trondal, ‘Public Administration of the European Union’ (above, n. 99).

<sup>231</sup> See R. Daniel Kelemen, ‘Built to last? The durability of EU federalism’, *Making History: European Integration and Institutional Change at Fifty* 8 (2007): p. 51.

To promote compliance with supranational policies, higher level actors are likely to adopt the “mediating” administration approach<sup>232</sup> rather than developing legally binding ordinances and operational rules for national administrations. Since higher level actors’ possibilities to adopt “command and control” approaches are limited, they will take a more pragmatic and informal orientation, leaving room for bargaining in light of individual circumstances.<sup>233</sup>

#### 4.4.2. EU intervention-based administration

This organisational pattern can be described as an EU administrative arrangement in which the distribution of responsibilities between the higher and lower level actors in a certain area of public policies is relatively balanced. At its discretion, Union level administration may however unilaterally shift the power balance towards the higher level by assuming direct application and/or enforcement in emergency situations, especially where any of the elements of national implementation fails.<sup>234</sup> It does not have an equivalent amongst the types of EU multilevel administration distinguished by administrative science scholarship, thus the closest conceptual equivalent would constitute a tier between the “intergovernmental” and “supranational” European

---

<sup>232</sup> See Christoph Knill and Stephan Grohs, ‘Administrative styles of EU institutions’, in *The Palgrave Handbook of the European Administrative System* (Springer, 2015), pp. 93–107.

<sup>233</sup> Ibid.

<sup>234</sup> See Scholten, ‘Mind the trend! Enforcement of EU law has been moving to ‘Brussels’ (above, n. 172).

administration.<sup>235</sup> This study proposes to refer to it as the “intervention-based European administration”.<sup>236</sup>

In organisational terms, higher level administration retains power to formulate common, “supranational” public policies in a given area across the whole EU, but its systemic position is rather moderately strong. The higher level has limited possibilities to steer the implementation of these policies by lower (national) level administration by means of direct control. Lower level actors enjoy “administrative sovereignty” as the emanations of EU Member States, but there exist possibilities of administrative intervention by the Union regarding the ways in which specific public policies are carried out by means of binding instructions or procedural regulations. The Union’s intervening styles may be characterized by rather adversarial interaction patterns, whereas their consensual relations with lower level actors will be predominantly mediating in nature.<sup>237</sup> At the highest level of escalation, there will be also ‘nuclear options’ at the higher level administration’s disposal, whose activation would tip the equilibrium of powers within the regime in favor of the high level actor.

---

<sup>235</sup> See Benz, ‘European public administration as a multilevel administration: a conceptual framework’ (above, n. 166).

<sup>236</sup> This is inspired by the contribution of Pierre Schammo who coined this notion to capture the scope of the ESMA’s supervisory powers. According to him in ‘an intervention-based model day-to-day supervision continues to rest with Member State authorities, but the ESAs are able to monitor the actions of competent authorities and if necessary intervene in their activities and exceptionally in the activities of market actors’. See Pierre Schammo, ‘EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision?’, *Oxford Journal of Legal Studies* 32, no. 4 (2012): pp. 771–797.

<sup>237</sup> See Frans van Waarden, ‘Persistence of national policy styles: A study of their institutional foundations’, *Convergence or diversity* (1995): pp. 333–372; Knill, *The Europeanisation of national administrations: Patterns of institutional change and persistence* (above, n. 223).

#### 4.4.3. EU centripetal multilevel administration

This organisational pattern can be described as an arrangement in which the distribution of responsibilities between the higher and lower level in a certain area of public policies leans towards the Union administration rather than towards the Member States'. Conceptually, it can be classified as an exception to the traditional design of EU multilevel regimes, in which the higher level (supranational) actor formulates public policies and the lower level (national) actors are responsible for their decentralized implementation (application and enforcement).<sup>238</sup> In this case, the higher level (the Union) is heavily involved in both the formulation and implementation of public policies across EU Member States. In administrative sciences scholarship, this is known as the “supranational European administration”, or the “EU direct administration”.<sup>239</sup> This arrangement is characterized by a tendency to tip the internal power balance towards the Union's level by reducing the autonomy of the EU Member States' administrative structures in a longer term.<sup>240</sup>

In organisational terms, the systemic position of the higher level administration is strong. It has not only power to formulate common, “supranational” public policies in a given policy area, but also to apply and enforce these policies directly or to formally steer their implementation by lower (national) level administration by means of binding instructions and procedural regulation. Lower level actors are

---

<sup>238</sup> For a long time the Union level was expected to be involved in only certain areas of public policies such as EU competition policies.

<sup>239</sup> See Benz, 'European public administration as a multilevel administration: a conceptual framework' (above, n. 166).

<sup>240</sup> See Kelemen, 'Built to last? The durability of EU federalism' (above, n.231).

expected to assist higher level actors in the exercise of their tasks and competences and have limited autonomous decision-making powers. They find themselves in a rather subordinated and auxiliary position vis-à-vis higher level actors. In this context, the principles of direct effect and primacy of the Union law set aside the principle of respect for national constitutional/administrative identity and full national administrative autonomy.<sup>241</sup>

To promote compliance with supranational policies, higher level actors tend to rely on their own resources and to adopt the “enforcing administration” approach.<sup>242</sup> They do so by adopting sector-specific ordinances (regulations) for national administrative structures and operational rules on how to perform particular tasks within the multi-level system.<sup>243</sup> These ordinances may include explicit “intentional binding or non-binding rules that about administrative functions, structure, organization, practices and behaviour” or implicit “unintentional byproducts of realizing policy goals whose implementation entails adaptations of domestic administrations”.<sup>244</sup> Although lower level actors retain “administrative sovereignty” as the emanations of EU Member States, they are also deployed at higher level actors’ disposal in pursuit of specific public policies. The lower level actors operate in the shadow of hierarchy, which however does not necessarily entail that higher level

---

<sup>241</sup> See Heidebreder, ‘Structuring the European administrative space: policy instruments of multi-level administration’ (above, n. 100), p. 721.

<sup>242</sup> See Knill and Grohs, ‘Administrative styles of EU institutions’ (above, n. 232).

<sup>243</sup> See Heidebreder, ‘Structuring the European administrative space: policy instruments of multi-level administration’ (above, n. 100), p. 713.

<sup>244</sup> Ibid., p. 712.

actors do not use other interaction techniques in inter-administrative relations other than command and control, such as persuasion.

Organisational model	Main features	Conceptual equivalents
<b>EU centripetal administration</b>	Operational primacy of higher (EU) level administration over lower (national) level administration in terms of supranational policies implementation across participating EU Member States.	“supranational European administration”, EU direct administration
<b>EU centrifugal administration</b>	Operational primacy of lower (national) level administration over higher (EU) level administration in terms of supranational policies implementation across participating EU Member States.	“intergovernmental European administration”, EU indirect administration
<b>EU intervention-based administration</b>	Operational primacy of lower level administration over higher level administration in terms of supranational policies implementation across participating EU Member States, which can be changed by unilateral action of the latter in particular circumstances.	between “supranational European administration” and “intergovernmental European administration”

Figure 5 Analytical tools for the inquiry on the organisational design of the SSM

# CHAPTER 5

## Operational design of EU multilevel administration

### 5.1. Introductory remarks

This dissertation deems the operational design of a given EU multilevel administrative arrangement to be the second structural condition which influences the lower level actor's likelihood to comply with the policy preferences and objectives of the higher level actor pertaining to that arrangement. This structural condition is primarily related to the functioning of internal mechanisms designed to address possibly conflicting preferences and objectives of both actors. Under the assumptions of the Enforcement hypothesis, the operational design of a given multilevel regime should provide credible capacity for the higher level actor's control over the lower level actor's actions in order to increase level of the formal top-bottom compliance expectation. On the other hand, the Management Hypothesis asserts that operational design of a given multilevel regime should ensure credible cooperation capacity between the higher and lower level actors in order positively influence the formal top-down compliance expectation.

Against this backdrop, the purpose of this chapter is to explain why the Principal-Agent approach is a suitable analytical framework to study internal mechanisms designed to address possibly conflicting preferences and objectives of between the higher level (the principal) and lower level (the actor) actors operating in a

multilevel context. This exercise is necessary to proceed to the second step in the testing of the Enforcement and Management hypotheses in respect to the subsystems of SSM Direct and Indirect Supervision conducted in chapter six.

## 5.2. The Principal-Agent perspective on top-bottom compliance

This section advocates that the Principal-Agent framework, which is an analytical device for the application of the agency theory,<sup>245</sup> is a suitable approach to conduct the analysis of two following operational aspects of multilevel administrative arrangements: the capacity for the higher level actor control over the lower level actor, and the capacity for cooperation between them. It starts with the presentation of the origins and assumptions of the agency theory, and of two different Principal-Agent perspectives (II.4.2). Subsequently, it reviews the applications of Principal-Agent models to the analysis of politico-administrative phenomena in national, supranational and international contexts (II.4.3).

### 5.2.1. Origins

The foundations of the agency theory are linked to the emergence of the school of “new institutional economics”.<sup>246</sup> This school was a direct response to the inability to recognize the importance of the structural (or institutional) context for economic

---

<sup>245</sup> It is also referred to as the “delegation theory”.

<sup>246</sup> The term “new institutional economics” was coined by Oliver Williamson, see Oliver E. Williamson, *Markets and Hierarchies: A study in the Economics of Internal Organization* (New York: Free Press, 1975); Oliver E. Williamson, ‘A comparison of alternative approaches to economic organization’, *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft* (1990): pp. 61–71. In addition to the agency theory, the school consists of three other branches: transaction costs theory, property rights theory and public choice theory. These strands are however not in the analytical focus of this study. In political science, public choice theory has been applied as a ‘thin’ rationalist approach that minimizes the importance of institutions.



activity by traditional neoclassical economic accounts.<sup>247</sup> In essence, new institutional economics rests on two pillars: (i) any activity (whenever economic, political, professional or private) of actors operating in a given setting is informed by “bounded rationality”,<sup>248</sup> which however is not open-ended, but (ii) constrained by a specific institutional context.<sup>249</sup> By virtue of these basic assumptions, the new institutional economics school has become an interdisciplinary academic powerhouse combining economics, law, organization theory, political science, sociology and anthropology to understand social, political and commercial institutions.<sup>250</sup> The economic accounts of the agency theory typically explore the relations between company management and its shareholders, between managers and workers, between retailers and suppliers, between acquisition and diversification strategies or between ownership and financing structures.<sup>251</sup>

Although originally developed to explain economic phenomena, the analytical tools offered by the agency theory were “neither by natures nor by definition” solely

---

<sup>247</sup> The roots for neoclassical economics accounts can be traced back to the works of Adam Smith and David Ricardo. See Adam Smith, ‘An Inquiry into the Nature and Causes of the Wealth of Nations vol. 2’ (1786); David Ricardo, *On the principles of political economy, and taxation* (John Murray, 1821).

<sup>248</sup> Their rationality is ‘bounded’ because of accompanying uncertainty. This follows Simon’s interpretation of a human action as “intendedly rational, but only limitedly so”. See Herbert A. Simon, *Administrative behavior* (Simon and Schuster, 2013).

<sup>249</sup> Peter Klein distinguishes between the background constraints, or “rules of the game”, that guide individuals’ behaviour) and institutional arrangements (specific guidelines designed by partners to facilitate particular interactions), see Peter G. Klein, ‘New institutional economics’ (2000). On the classic definition of the institutions as ‘rules of the game’, see North, *Institutions, institutional change and economic performance* (above, n. 159).

<sup>250</sup> It has developed into three main branches: transaction cost theory, property rights theory and already mentioned agency theory.

<sup>251</sup> For a brief overview of economic applications, see Kathleen M. Eisenhardt, ‘Agency theory: An assessment and review’, *Academy of management review* 14, no. 1 (1989): pp. 57–74.

restricted to the economic domain.<sup>252</sup> As noted by Terry Moe, there were no impediments to apply them to explore the intricacies of politico-administrative relations:

*“Democratic politics is easily viewed in Principal-Agent terms. Citizens are principals, politicians are their agents. Politicians are principals, bureaucrats are their agents. Bureaucratic superiors are principals, bureaucratic subordinates are their agents. The whole of politics is therefore structured by a chain of Principal-Agent relationships, from citizen to politician, from politician to bureaucratic superior, from bureaucratic superior to bureaucratic subordinate and on down the hierarchy of government to the lowest-level bureaucrats who actually deliver the services directly to the citizens.”*<sup>253</sup>

In the realm of political science, the usefulness of the agency theory has been recognized as early as in the mid-1980s when a growing number of rational choice scholars started to draw fruitful analytical tools<sup>254</sup> derived from the new institutional economics to the study of political phenomena.<sup>255</sup> It has become widely known as new institutionalism in rational choice theory, or in simpler terms, as rational choice institutionalism.

---

<sup>252</sup> See Jonas Tallberg, *European governance and supranational institutions: making states comply* (Routledge, 2004), p. 17.

<sup>253</sup> See Terry M. Moe, ‘The new economics of organization’, *American journal of political science* (1984): pp. 739–777, pp. 765–766.

<sup>254</sup> Such as the importance of property rights, rent-seeking, and transactions costs to the operation and development of political institutions.

<sup>255</sup> See, in particular, the contributions of Terry M. Moe, ‘The new economics of organization’, *American journal of political science* (1984): pp. 739–777; and Barry R. Weingast and William J. Marshall, ‘The industrial organization of Congress; or, why legislatures, like firms, are not organized as markets’, *Journal of Political Economy* 96, no. 1 (1988): pp. 132–163.

Similarly to other forms of institutional analysis, rational choice institutionalism strives to provide answers to two fundamental inquiries: how the structures in which actors operate shape their political, economic and social behaviour, and these structures originate, persist and change. In particular, the Principal-Agent framework addresses the consequences of complexities of political, economic and societal realities from a specific angle: notwithstanding an increasingly specialized world, an individual actor (the so-called “principal”), who lacks specific resources, can still achieve its objectives when it concludes an agreement (the so-called “agency”, or “delegation contract”) with another actor with specific know-how (the so-called “agent”) who is made responsible for the pursuit of specific tasks in order to fulfill the objectives of the principal.<sup>256</sup>

Such a contractual relation is however far from unproblematic since the transfer of certain responsibilities to the agent may not only imply benefits, but also costs for the principal. These costs may be produced by a divergence in preferences regarding the carry-out of these responsibilities and information asymmetry between the principal and its agent.<sup>257</sup> The principal cannot control completely all actions undertaken by the agent in the fulfillment of responsibilities under the agency contract since too strict control is costly and may undo the benefits of that

---

<sup>256</sup> As explained by Roderick Kiewiet and Mathew McCubbins, “tremendous gains accrue if tasks are delegated to those with the talent, training, and inclination to do them”. See D. Roderick Kiewiet and Mathew D. McCubbins, *The logic of delegation* (University of Chicago Press, 1991), p. 24.

<sup>257</sup> See Delreux and Adriaensen, ‘The Principal Agent Model and the European Union’ (above, n. 71).

transfer.<sup>258</sup> This adds a layer of uncertainty to the position of the principal who cannot gauge whether its agent undertakes only such actions which are in line with its preferences.<sup>259</sup> The state of uncertainty is additionally inflected by an inherently incomplete nature of their contract.<sup>260</sup>

### 5.2.2. Assumptions

As already highlighted, the agency theory deals with situations where “one individual depends on the action of another”<sup>261</sup> or, more specifically, where one actor (the principal) engages another actor (the agent) to carry out a task on its behalf.<sup>262</sup> In doing so, they conclude a more or less formalized agency contract<sup>263</sup> of a fiduciary nature.<sup>264</sup> Transferring, or delegating the responsibility by the principal to the agent to autonomously carry out certain tasks is the core constitutive feature of a

---

<sup>258</sup> These uneasy dynamics were famously the object of inquiry in the Hegelian dialectical analysis of relations between the master and servant. The master is not able to control completely the servant while in the same time remains dependent on the services of the latter, see Georg Wilhelm Friedrich Hegel, *Enzyklopädie der philosophischen Wissenschaften im Grundrisse* (1830) (Meiner Verlag, 1991), par. 433-435.

<sup>259</sup> As famously noted by Ludwig von Mises, the uncertainty of the future is already implied in the very notion of action. That man acts and that the future is uncertain are by no means two independent matters. They are only two different modes of establishing one thing. See Ludwig von Mises, *Human action: A treatise on economics* (Fox&Wilkes, 1966), chapter six.

<sup>260</sup> According to Olivier Williamson, all contracts are invariably incomplete since it would be impossible or imply very high costs to spell out explicitly all the specificities of precise obligations of all the parties throughout the period of the contract. See Oliver E. Williamson, *The economic institutions of capitalism* (Simon and Schuster, 1985).

<sup>261</sup> See Richard J. Zeckhauser and John W. Pratt, *Principals and agents: The structure of business* (Harvard Business School Press Boston, 1985), p. 2.

<sup>262</sup> According to Stephen Ross' celebrated formula, it is a relationship “between two (or more) parties when one of these, designated the agent, acts on behalf of or as representative for the other, the principal”, see Stephen A. Ross, ‘The economic theory of agency: The principal's problem’, *The American Economic Review* 63, no. 2 (1973): pp. 134-139, p.134.

<sup>263</sup> See Eisenhardt, ‘Agency theory: An assessment and review’ (above, n. 251).

<sup>264</sup> See Giandomenico Majone, ‘Two logics of delegation: agency and fiduciary relations in EU governance’, *European Union Politics* 2, no. 1 (2001): pp. 103-122.

Principal-Agent relationship.<sup>265</sup> In line with its rational choice origin, the main assumption is that the principal – a rationally bounded actor<sup>266</sup> – decides to enter into such an agreement for efficiency (self-welfare maximizing) reasons since it expects that the agent is likely to achieve better outcomes than the principal would on its own. This is in accordance to the principal's interests as a rationally bounded actor.

However, the principal cannot be sure that its autonomous agent actually achieves the expected outcomes because the agent may minimize the effort it exerts when pursuing the principal's interests and may also pursue its own rationally-driven interests which may not be fully aligned with those of its principal.<sup>267</sup> In this context, the agent is considered to be an opportunist,<sup>268</sup> and may even go as far as to engage "behaviour in ways inimical to the preferences of the principal"<sup>269</sup> if it considers that such a course of action will produce more self-welfare than following the preferences of its principal. These uneasy dynamics between the principal and the agent are further aggravated by the already mentioned information asymmetry and essential

---

<sup>265</sup> See Darren G. Hawkins, David A. Lake, Daniel L. Nielson et al., 'Delegation under anarchy: states, international organizations and Principal-agent theory', edited by Darren G. Hawkins, David A. Lake, Daniel L. Nielson et al., in *Delegation and agency in international organizations* (Cambridge University Press, 2006), pp. 3–38.

<sup>266</sup> Bounded rationality expresses the institutionalist approach to rational choice. It recognizes that decisions of rational actors are constrained (bounded) by a number of factors, such as their cognitive limitations or notably structures of the environment in which they operate. See, for example, Ugo Pagano, 'Bounded rationality and institutionalism', *The Evolution of Economic Institutions: A Critical Reader*, Edward Elgar (2007): pp. 19–33.

<sup>267</sup> See Hawkins et al., 'Delegation under anarchy: states, international organizations and Principal-agent theory' (above, n. 364), p. 8.

<sup>268</sup> See Williamson, *Markets and Hierarchies: A study in the Economics of Internal Organization* (above, n. 246), p. 47.

<sup>269</sup> See Mark A. Pollack, 'Delegation, agency, and agenda setting in the European Community', *International Organization* 51, no. 01 (1997): pp. 99–134.

incompleteness of their contact which may provide the agents with incentives to use the informational and contractual gaps to pursue own preferences.<sup>270</sup>

Consequently, the principal is faced with the problem of how to ensure that the agent takes all the effort to respect the principal's interests and undertakes only such an action which follows its preferences and interests in a situation, where the agent knows more about its own preferences and interests than its principal.<sup>271</sup> Such informational advantage on the agent's side places the principal in an essentially asymmetric position and may contribute to "agency slack", which occurs when the agent acts opportunistically and takes independent actions which are undesired by the principal.<sup>272</sup>

Thereby, the question of instituting dedicated mechanisms to incentivize the agent to maximize their efforts in pursuing the principal's agenda and better align its possibly heterogeneous preferences constitutes the overwhelming analytical focus of Principal-Agent research. The most of Principal-Agent accounts treat incentive incompatibility between the principal and the agent as "an inherent feature of their contracting relationships".<sup>273</sup> The challenge is to put in place such safeguards which would provide incentives for the agent to proactively pursue the principal's

---

<sup>270</sup> See Fabrizio Gilardi, *Principal-agent models go to Europe: Independent regulatory agencies as ultimate step of delegation*, ECPR General Conference, Canterbury (UK) (Citeseer, 2001).

<sup>271</sup> See Ross, 'The economic theory of agency: The principal's problem' (above, n. 262); Bengt Hölmstrom, 'Moral hazard and observability', *The Bell journal of economics* (1979): pp. 74–91.

<sup>272</sup> See Tom Delreux and Johan Adriaensen, 'Introduction. Use and Limitations of the Principal-Agent Model in Studying the European Union', edited by Tom Delreux and Johan Adriaensen, in *The Principal Agent Model and the European Union* (Cham: Springer International Publishing, 2017), pp. 1–34; D. Roderick Kiewiet and Mathew D. McCubbins, *The logic of delegation* (University of Chicago Press, 1991).

<sup>273</sup> See Thomas J. Doleys, 'Member states and the European Commission: theoretical insights from the new economics of organization', *Journal of European Public Policy* 7, no. 4 (2000): pp. 532–553.

objectives and to align its preferences with those of the principal,<sup>274</sup> and thereby minimize the possibility of agency loss on the principal's side.<sup>275</sup>

(i) The “conservative” Principal-Agent perspective

The traditional and conservative perspective on Principal-Agent relations sees the agent as a “self-interest seeker with guile”<sup>276</sup> who is apt to pursue their own agendas at the expense of the principal. The solution for this problem lies in the construction of adequate control mechanisms by the principal over the agent. The agent's autonomy and the principal's control are thus considered to be two sides of the same coin. Through the use of those mechanisms, the principal is expected to carry out regular compliance-checks on the agent's performance and impose sanctions when the agent's transgression has been detected. In particular, the so-called congressional school of dominance<sup>277</sup> takes Principal-Agent-inspired thought to its outermost possible reaches and insists on setting up of a range of sophisticated monitoring devices, which include the development of *ex ante* and *ex post* control procedures by the principal.<sup>278</sup> In this sense, the traditional Principal-Agent approach perceives the transfer of the responsibilities to the agent by the principal

---

<sup>274</sup> See Jean-Jacques Laffont and David Martimort, *The theory of incentives: the principal-agent model* (Princeton university press, 2009).

<sup>275</sup> See Williamson, *Markets and Hierarchies: A study in the Economics of Internal Organization* (above, n. 246).

<sup>276</sup> See Oliver E. Williamson, ‘Opportunism and its critics’, *Managerial and decision economics* 14, no. 2 (1993): pp. 97–107.

<sup>277</sup> This school focuses on the functioning and role of institutions in the US Congress. Among its prominent representatives one can place Kenneth Shepsle, Roderick Kiewiet, Matthew McCubbins, Barry Weingast, Roger Noll, Thomas Schwartz, William Marschall and Talbot Page.

<sup>278</sup> See Mark A. Pollack, *The engines of European integration: delegation, agency, and agenda setting in the EU* (OUP Oxford, 2003), p. 27.

and the assurance of the principal's control over its agent as issues which are inextricably linked to each other.<sup>279</sup>

On the one hand, the purpose of the *ex-ante* procedures is to make the expected course of action clearer to the agent by defining the scope and modalities of the agency (framing agreement). The *ex-ante* procedures may also fix general performance expectations, applicable procedural requirements to govern decision-making in situations where the agency contract is insufficiently specified as well provide rulebooks and manuals which the agents is expected to follow. The *ex-ante* safeguards may be more or less restrictive and modified in response to the occurrence of agency loss by the principal or (also) by the third party like judicial or administrative authority. Such limitations come however at the cost of the agent's flexibility and comprehensiveness of action.<sup>280</sup> This, in turn, may diminish the agent's overall capacity to achieve better outcomes within the agency contact.

On the other hand, installing the *ex-post* procedures allows the principal to oversee the agent's behaviour from a backward-looking perspective. They contribute to the reduction of the information asymmetry on the principal's side, as well as influence

---

<sup>279</sup> See Delreux and Adriaensen, 'Introduction. Use and Limitations of the Principal-Agent Model in Studying the European Union' (above, n.272); Tom Christensen and Per Lægveid, 'Regulatory agencies—The challenges of balancing agency autonomy and political control', *Governance* 20, no. 3 (2007): pp. 499–520.

<sup>280</sup> See, notably, Mathew D. McCubbins and Talbot Page, 'A theory of congressional delegation', *Congress: Structure and policy* Vol. 409 (1987); Pollack, 'Delegation, agency, and agenda setting in the European Community' (above, n. 269); Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, 'Administrative procedures as instruments of political control', *Journal of Law, Economics, & Organization* 3, no. 2 (1987): pp. 243–277; Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, 'Structure and process, politics and policy: Administrative arrangements and the political control of agencies', *Virginia Law Review* (1989): pp. 431–482.



the agent through the imposition of positive and negative sanctions.<sup>281</sup> The typology proposed by Mathew McCubbins and Thomas Schwartz distinguishes between two types of oversight mechanisms: “police-patrols” and “fire-alarms”.<sup>282</sup>

By using the first group of mechanisms, the principal engages in continuous vigilance of the agent’s actions on its own. The principal’s aim is to “detect and remedy any violations of legislative goals, and by its surveillance, to discourage such violations”.<sup>283</sup> Among the “police-patrols” one can list such monitoring measures as public hearings, field observations and inspections and regular reporting.<sup>284</sup> It implies that they usually have a centralized, proactive and direct dimension.<sup>285</sup> However, these features make them also costly to activate and, as such, their full deployment may be problematic for the principal.

Unlike the “police-patrols”, the second group of mechanisms is considered to have a decentralized, reactive and indirect dimension.<sup>286</sup> By installing the “fire-alarms”, the principal monitors the agent’s activities through third parties, which may be citizens, media, markets, organized interest groups, other administrative authorities, or ultimately courts. From the principal’s perspective, the potential advantages of the “fire-alarms” are twofold: they would target specific violations possibly also affecting

---

<sup>281</sup> See Pollack, ‘Delegation, agency, and agenda setting in the European Community’ (above, n.269), pp. 108-9.

<sup>282</sup> See Mathew D. McCubbins and Thomas Schwartz, ‘Congressional oversight overlooked: Police patrols versus fire alarms’, *American journal of political science* (1984): pp. 165-179.

<sup>283</sup> Ibid.

<sup>284</sup> See Pollack, ‘Delegation, agency, and agenda setting in the European Community’ (above, n. 269).

<sup>285</sup> See Jonas Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (Jonas Tallberg, Department of Political Science, Lund University, Sweden, 1999), p. 61.

<sup>286</sup> Ibid.

the third party which allows for (partial) outsourcing of the monitoring costs to them.<sup>287</sup>

As the “fire-alarm” mechanisms would only cover a specific subset of the agent’s action, it is likely that the agent’s transgressions outside of this subset would remain undetected by these oversight mechanisms.<sup>288</sup> In addition, a political-legal environment in which a number of agencies which are assigned overlapping tasks is regarded as a particular variation of the “fire-alarms”.<sup>289</sup> Such a setting creates a number of institutional checks which can be installed to ensure that although the principal does not directly control the agent, the agent nevertheless remains under control.<sup>290</sup>

Positive (rewards) or negative (punishment) sanctions affect the agent’s behaviour by making compliance more beneficial and non-compliance more costly.<sup>291</sup> By these means, the principal has the opportunity to incentivize the agent to follow the principal’s interests. Whereas the economic literature tends to focus on rewards, studies in political science stress sanctions.<sup>292</sup> In this context, it should be noted that neither rewards nor sanctions necessarily take a pecuniary form. They can also be of

---

<sup>287</sup> McCubbins and Schwartz, ‘Congressional oversight overlooked: Police patrols versus fire alarms’ (above, n. 282), pp. 426-434.

<sup>288</sup> See Terry M. Moe, ‘An assessment of the positive theory of congressional dominance’, *Legislative Studies Quarterly* (1987): pp. 475-520.

<sup>289</sup> See Kiewiet and McCubbins, *The logic of delegation* (above, n.272), p. 33-34.

<sup>290</sup> See Terry M. Moe, ‘Political institutions: The neglected side of the story’, *Journal of Law, Economics, & Organization* 6 (1990): pp. 213-253.

<sup>291</sup> See Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (above, n. 285), p. 62.

<sup>292</sup> See, for example, Michael C. Jensen and William H. Meckling, ‘The nature of man’ (1994); Kenneth J. Arrow, ‘Informational structure of the firm’, *The American Economic Review* 75, no. 2 (1985): pp. 303-307; Zeckhauser and Pratt, *Principals and agents: The structure of business* (above, n. 261).

a non-pecuniary nature and entail positive (appraisals) or negative (naming-and-shaming) effects on the agent's reputation.<sup>293</sup> Once the agent's non-compliance has been detected, the principal may decide to impose negative sanctions on the agent.<sup>294</sup> As political science scholarship suggests, typical sanctions would aim to rectify the agent's compliance and prevent the reoccurrence of non-compliance. Sanctions potentially include such measures as agency reorganization (possibly limiting the agency contract), a decrease in funding, the adoption of new legislation (reshaping the agency contract), or challenging the agent in court.<sup>295</sup>

The abovementioned insights suggest that the conservative Principal-Agent approach develops a rather "punitive" understanding of the principal which has at its disposal various centralized monitoring and sanctioning mechanisms to cope with the agent's non-compliance. However, the recourse to these mechanisms is not without costs for the principal. As noted by McNollgast,<sup>296</sup> "not only the magnitude of sanctions for non-compliance is limited, but also create costs for political principals".<sup>297</sup> This may undermine the credibility of the principal's commitment to

---

<sup>293</sup> See Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (above, n. 285), footnote 103.

<sup>294</sup> See Pollack, 'Delegation, agency, and agenda setting in the European Community' (above, n. 269), p. 112.

<sup>295</sup> See, for example, McCubbins and Schwartz, 'Congressional oversight overlooked: Police patrols versus fire alarms' (above, n. 282), p. 166; McCubbins, Noll and Weingast, 'Structure and process, politics and policy: Administrative arrangements and the political control of agencies' (above, n. 280), pp. 248-249.

<sup>296</sup> McNollgast is the nom de plume of coauthors Mathew McCubbins, Roger Noll, and Barry Weingast.

<sup>297</sup> See McCubbins, Noll and Weingast, 'Administrative procedures as instruments of political control' (above, n. 280), p. 252.

impose these sanctions vis-à-vis its agent and may give the agent the impression that non-compliance increases its welfare.<sup>298</sup>

Another twist to the “punitive” principal model is added when the principal contracts more than one agent. As concluded by Armen Alchian and Harold Demsetz, the agent gets extraordinary incentives to engage in non-compliance when it operates as a team of agents since the principal can only oversee the performance of the group as a whole.<sup>299</sup> This problem is commonly referred to as free-riding.<sup>300</sup> In such conditions, designing an optimal agency contract remains challenging. To establish and operate a kind of monitoring and sanctioning mechanism which would fully eliminate the potential of agency loss would be “either impossible or prohibitively costly”.<sup>301</sup> In such an environment, the principal faces a difficult trade-off: a potential agency loss against higher agency costs<sup>302</sup> surrounded by the conditions of uncertainty, information asymmetry and incomplete contracting. Overall, the conservative Principal-Agent approach suggests that agents need not in fact be perfect proxies of their principals.<sup>303</sup>

---

<sup>298</sup> See Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (above, n. 285), p. 63.

<sup>299</sup> See Armen A. Alchian and Harold Demsetz, ‘Production, information costs, and economic organization’, *The American Economic Review* 62, no. 5 (1972): pp. 777–795.

<sup>300</sup> On the other hand, there might be also certain advantages for the principal from having multiple agents since the agents may also monitor the performance of each other and report to the principal on the other agents’ transgression. By this token, the principal can gain additional information about its agents’ efforts by comparing their performance. See David E. M. Sappington, ‘Incentives in principal-agent relationships’, *The Journal of Economic Perspectives* (1991): pp. 45–66.

<sup>301</sup> See Hölmstrom, ‘Moral hazard and observability’ (above, n. 271), p. 74.

<sup>302</sup> See Sean Gailmard, ‘Accountability and Principal-Agent Theory’, edited by Mark Bovens, Robert E. Goodin, and Thomas Schillemans, in *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014).

<sup>303</sup> Ibid.

## (ii) The “liberal” Principal-Agent perspective

More recent and more liberal perspectives on the Principal-Agent relations take note of an increasing interdependence between the principal and the agent, especially where the agent is a subset of the collective principal and effectively participates in the principal’s preference formation and decision-making.<sup>304</sup> There might be also instances, in which the principal is more closely involved in the activities of the agent which may blur a distinction between the principal and agent.<sup>305</sup> Furthermore, in environments characterized high interdependence and policy-making complexity, inherent information asymmetry and incompleteness of the agency contacts is not only detrimental for the principal, but may also for the agent.<sup>306</sup> There is no real incentive for the agent to cheat on the agreement,<sup>307</sup> especially where the principal and the agent cannot manage these complexities properly without soliciting resources from one another.<sup>308</sup>

In those specific contexts, lower levels of the agent’s compliance with the preferences and objectives of its principal might not be the result of their deliberate choice to pursue their particular preferences, but stem from the complexity their

---

<sup>304</sup> See, for example, Ludger Schuknecht, ‘EU fiscal rules: issues and lessons from political economy’ (2004); Waltraud Schelkle, ‘The Political Economy of Fiscal Policy Co-ordination in EMU: From Disciplinary Device to Insurance Arrangement’, *JCMS: Journal of Common Market Studies* 43, no. 2 (2005): pp. 371–391; Dermot Hodson, ‘The European Central Bank as a reluctant EU institution: A principal-agent perspective’ (2009).

<sup>305</sup> See Delreux and Adriaensen, ‘Introduction. Use and Limitations of the Principal-Agent Model in Studying the European Union’ (above, n.272).

<sup>306</sup> See Evelyn Coremans and Bart Kerremans, ‘Agents as Information Asymmetry Managers in EU Trade Policy-Making’, edited by Tom Delreux and Johan Adriaensen, in *The Principal Agent Model and the European Union* (Cham: Springer International Publishing, 2017), pp. 227–253.

<sup>307</sup> See Alter, ‘Do international courts enhance compliance with international law?’ (above, n.29), p.55.

<sup>308</sup> See Howard E. Aldrich and Jeffrey Pfeffer, ‘Environments of organizations’, *Annual review of sociology* 2, no. 1 (1976): pp. 79–105; Pieter Bouwen, ‘Corporate lobbying in the European Union: the logic of access’, *Journal of European Public Policy* 9, no. 3 (2002): pp. 365–390; Jeffrey Pfeffer, *Organizations and organization theory* (Pitman Boston, MA, 1982).

(still incomplete) agency contract.<sup>309</sup> This renders the contract ambiguous and open for different (possibly even equally plausible) interpretations, both by the principal and agent.<sup>310</sup> Additionally, where agency contracts are highly elaborated, decreasing compliance levels may also result from the agents' limited capacities (expertise, manpower, technology) to carry out complex tasks for their principals.<sup>311</sup> One may therefore concede that in those settings non-compliance may also be the result of inadvertence since the agents may take sincerely intended actions and expect to follow the agency contract as an explicit calculation of costs and benefits for every decision on whether to comply or not is itself costly<sup>312</sup>, but nonetheless fail to meet the principal's expectations.<sup>313</sup>

Under such conditions, the principals are likely to base their behaviour on a combination of both rational anticipation, trust and the desire for consensus by deciding to engage in close cooperation with their agents rather than control.<sup>314</sup> Similarly, the agents may also opt for closer cooperation with their principals. Reducing the informational advantage over the principal is in their strategic interest

---

<sup>309</sup> See, notably, Chayes and Chayes, *The new sovereignty: Compliance with International Regulatory Agreements* (above, n. 25); Chayes, Chayes and Mitchell, 'Managing compliance: a comparative perspective' (above, n. 149); Michael Zürn and Christian Joerges, *Law and governance in postnational Europe: compliance beyond the nation-state* (Cambridge University Press, 2005); Robert D. Putnam, 'Diplomacy and domestic politics: the logic of two-level games', *International Organization* 42, no. 03 (1988): pp. 427–460.

<sup>310</sup> See Falkner et al., 'Non-Compliance with EU directives in the Member States: Opposition through the Backdoor?' (above, n. 152), p. 463.

<sup>311</sup> See Tallberg, 'Paths to compliance: Enforcement, management, and the European Union' (above, n. 153), p. 612.

<sup>312</sup> See Raustiala and Slaughter, 'International law, international relations and compliance' (above, n. 49).

<sup>313</sup> See Mitchell, *Compliance theory: an overview* (above, n.38), p. 12.

<sup>314</sup> See Tom Delreux, *The EU as international environmental negotiator* (Ashgate Publishing, Ltd, 2013), p. 184.

and it enhances their own ability to “adapt to the respective context”.<sup>315</sup> Thus, it follows that both the principal and agent may have incentives to cooperate mutually in order to reduce information asymmetries and generate the consensus as to what constitutes the compliance.

To exploit the agent’s apparent interest in mutual collaboration, the principal - as a rationally-bounded actor - is therefore expected to establish by routine, non-confrontational and informal processes involving the participation the agents, for example with the aim to foster a “problem-solving approach”.<sup>316</sup> In particular, the principal would expected to develop “carrot” strategies to induce the levels of the agents’ compliance,<sup>317</sup> which could include technical assistance and know-how (i.a. sharing of best practices)<sup>318</sup> necessary for the fulfillment of their contractual obligations.<sup>319</sup>

The above overview of the main features of the Principal-Agent framework reveals the existence of a correlation between the theoretical pillars underpinning two main schools of compliance introduced in section 2.2 of chapter two<sup>320</sup> and two Principal-Agent perspectives discussed in this section. On the one hand, the traditional and conservative perspective on Principal-Agent relations fits neatly into the

---

<sup>315</sup> See Uwe Puetter, ‘Informal circles of ministers: a way out of the EU’s institutional dilemmas?’, *European Law Journal* 9, no. 1 (2003): pp. 109–124.

<sup>316</sup> See Chayes and Chayes, *The new sovereignty: Compliance with International Regulatory Agreements* (above, n. 25), p. 3.

<sup>317</sup> See Tanja A. Börzel and Rachel A. Cichowski, *The State of the European Union, 6: Law, Politics, and Society* (Oxford University Press, 2003), p. 200.

<sup>318</sup> See Versluis, ‘Compliance Problems in the EU What potential role for agencies in securing compliance?’ (above, n. 142), p. 9.

<sup>319</sup> See Börzel and Cichowski, *The State of the European Union, 6: Law, Politics, and Society* (above, n. 317).

<sup>320</sup> See subsection 2.2.1 for the enforcement school and subsection 2.2.2 for the management school.

underpinnings of the enforcement school of compliance. On the other hand, the recent and more liberal perspectives on Principal-Agent relations are closely linked to the main tenants of the management school of compliance. This indicates that the emergence of more cooperative, egalitarian and horizontal relations between political actors does not necessarily render the application of the Principal-Agent framework to the analysis of such phenomena, but requires a relaxation of its initial assumptions. It confirms the utility of the Principal-Agent framework a rather heuristic tool, which can be “applied liberally”, in the same time needs to be “handled with care”.<sup>321</sup> As observed by Jonas Tallberg, in real life both enforcement and management paths to compliance are “complementary and mutually reinforcing, not discrete alternatives”.<sup>322</sup> Similarly, in a Principal-Agent situation, it is not only instrumental for the principal to formally monitor and sanction its agents where necessary, but also it is equally important to engage into informal cooperation with them.<sup>323</sup>

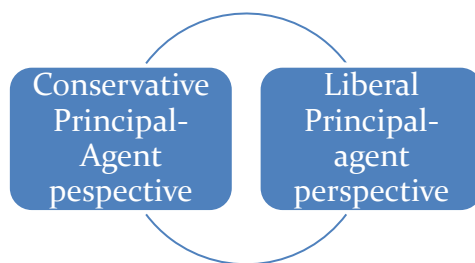


Figure 6 Analytical tools for the inquiry on the operational design of the SSM

<sup>321</sup> See Imelda Maher, Stijn Billiet, and Dermot Hodson, ‘The principal-agent approach to EU studies: Apply liberally but handle with care’, *Comparative European Politics* 7, no. 4 (2009): pp. 409–413.

<sup>322</sup> See Tallberg, ‘Paths to compliance: Enforcement, management, and the European Union’ (above, n. 153), p. 610.

<sup>323</sup> See Delreux, *The EU as international environmental negotiator* (above, n.314), p. 184.



### 5.3. Review of Principal-Agent applications to study of inter-institutional relations

This section offers a brief detour on the most relevant applications of the Principal-Agent framework to the studies of inter-institutional contexts<sup>324</sup> where one unit of public administration (the principal) relies on other unit of public administration (the agent) to carry out certain delegated administrative activities in order to achieve certain public policy objectives as favoured by the latter. This usually takes form of delegation of tasks responsibilities and authority, either explicit or implicit. In principle, one can distinguish three clusters of Principal-Agent analysis in such politico-administrative contexts.

The first one focuses on the relations between the majoritarian bodies,<sup>325</sup> which are either directly elected or are managed by elected policy-makers, and various independent regulatory agencies operating within the boundaries of the nation state.<sup>326</sup> The second one can be regarded as extending the focus of the Principal-Agent research one step further to cover the intricacies of transfer public authority to supranational and international institutions, bodies and fora by sovereign states. In those Principal-Agent studies, the development of regimes transcending boundaries of nation states is considered to be “the next step of delegation”

---

<sup>324</sup> One caveat is in order. It is important to highlight that the qualification as “the most relevant applications” is subjected to the author’s best scholarly judgment and by no means implies that it may constitute an exhaustive overview.

<sup>325</sup> Representing the voters as the voters considered to be the primordial principals.

<sup>326</sup> Importantly, in this context, there exist another two important dimensions of Principal-Agent studies: (i) the chain of delegation between voters and legislators and (ii) between members of parliaments and governments. See Gilardi, *Principal-agent models go to Europe: Independent regulatory agencies as ultimate step of delegation* (above, n. 369), section 2.1. On the concept of a chain of delegation, see Roland Vaubel, ‘Principal-agent problems in international organizations’, *The Review of International Organizations* 1, no. 2 (2006): pp. 125–138.

characterized by delegation from multiple (Member-State) principals.<sup>327</sup> Finally, a recently inaugurated, third cluster of the Principal-Agent studies aims to address the complexities of policy-making in an increasingly globalized environment by drawing Principal-Agent relations in inter-institutional context, where supranational bodies take recourse to other technocratic bodies (located at national or supranational level) to carry out responsibilities delegated to them by majoritarian actors; or to (further) sub delegate to other party parts of these delegated responsibilities.

#### 5.3.1. Relations between majoritarian and non-majoritarian actors in national contexts

With respect to this cluster of Principal-Agent applications, the earliest prominent works are linked to American rational choice institutionalist school focusing on the modalities of vertical interactions between the US Congress, considered as representation of elected policymakers, and non-elected federal bureaucratic agencies and offices. The issues concerning the emancipation of the federal administration from the control of its “customers”, the legislature and government were explored by Anthony Downs<sup>328</sup> and William Niskanen<sup>329</sup> already in the late 1960s and 1970s, however without the explicit references to Principal-Agent relationships. They challenged the basic assumptions of the Weberian model of bureaucracy acting as the trustee and guardian of legal and professional rules. Instead they perceived the bureaucratic actors as utility maximizers who aim, in

---

<sup>327</sup> See Torbjörn Bergman, ‘The European Union as the next step of delegation and accountability’, *European Journal of Political Research* 37, no. 3 (2000): pp. 415–429.

<sup>328</sup> See Anthony Downs and Rand Corporation, *Inside bureaucracy* (Little, Brown Boston, 1967).

<sup>329</sup> See Niskanen, *Bureaucracy and representative government* (above, n. 132).

particular, to maximize the budgets of their bureaus. The main question was whether the principals can indeed manage to assume control. It was also observed that the US Congress might have not been necessarily good at minding its own interests when deciding to institute bureaucratic bodies with such a great room for maneuver.<sup>330</sup> Lack of control might ultimately result in so-called “bureaucratic drift” illustrating a discrepancy between the principal and agent’s ultimate objectives.

The concept of a “bureaucratic drift”<sup>331</sup>, seen as a variation of agency loss, has become one of the main building blocks of the Principal-Agent studies in the US context. It revealed that the US Congress had reached a point of abdicating its responsibilities to govern by proliferating the creation of one new bureaucracy after another, mandating them no more than to “go forth and do good”.<sup>332</sup> This research trend was followed by the pioneering works of Kenneth Shepsle challenging the traditional view of an impotent US Congress unable to control its technocratic agents which was further reinforced by the approach which subsequently came to be called the congressional school of dominance.<sup>333</sup> The main research question the school poses is how the US Congress can assert control over its bureaucratic agents. In particular, the school offers a very penetrating interpretation of the range of instruments

---

<sup>330</sup> See Morris P. Fiorina, *Congressional control of the bureaucracy: A mismatch of incentives and capabilities*.

<sup>331</sup> See McCubbins, Noll and Weingast, ‘Structure and process, politics and policy: Administrative arrangements and the political control of agencies’ (above, n.280).

<sup>332</sup> See, notably, Hecla Hugh, ‘A government of strangers’, *Washington, DC: Brookings Institution* (1977); Theodore J. Lowi, ‘The end of liberalism: The second republic of the United States’ (1979).

<sup>333</sup> The school is perhaps best represented by scholarly contributions of the McNollgast trio, Roderick Kiewiet and Thomas Schwartz.

available to the Congress to influence choices made by bureaucratic agencies.<sup>334</sup> As already discussed, Mathew McCubbins and Thomas Schwartz distinguish two types of monitoring tools: centralized “police patrols” and decentralized “fire alarms”<sup>335</sup> which can be adopted by the principal (the Congress). In the latter case, the Congress surveillance over its bureaucratic agencies may take an indirect form where the third parties monitor their performance in liaison with the Congress. However, as Arthur Lupia and Mathew McCubbins indicate such “fire-alarms” can be only useful when they are considered as credible.<sup>336</sup>

There exists also a group of American political scientists which extends the Principal-Agent analysis beyond the traditional legislative-bureaucratic dynamics. For instance, John Ferejohn explores the relationship between the Congress and the courts.<sup>337</sup> Sean Gailmard and John Patty are not only interested in the relations between the Congress and bureaucracy, but also between the President and

---

<sup>334</sup> In this context, Barry Weingast indicates that the Congress possesses numerous control mechanisms with which it is able to influence bureaucratic behaviour. See Barry R. Weingast, ‘The congressional-bureaucratic system: a principal agent perspective (with applications to the SEC)’, *Public choice* 44, no. 1 (1984): pp. 147–191

<sup>335</sup> See *supra* n. 287.

<sup>336</sup> See Arthur Lupia and Mathew D. McCubbins, *The Democratic Dilemma: Knowledge, Deception, and the Foundations of Choice* (New York: Cambridge University Press, forthcoming, 1997). During the 1990s, US Principal-Agent scholarship started to ask even more nuanced questions about the political and administrative dynamics surrounding US policymaking. Joel Aberbach pays special attention to the strategic choice regarding the the US Congress should attempt to control the bureaucracy. In this context, David Spence argues that legislators may lack the foresight to implement effective controls. David Epstein and Sharyn O’Halloran demonstrate that Congress is likely to delegate more authority to executive agencies under unified government, and more authority to independent agencies and commissions under unified government. Taking the congressional school of dominance as a point of departure, Matthew Potoski finds mixed evidence for the effectiveness of the principal’s control mechanisms, arguing that policymakers are not able to “stack the deck” in favour of preferred interest groups. Finally, Gary Cox and Mathew McCubbins have attempted to shift the emphasis away from Congressional committees toward the way in which political parties structure deliberations.

<sup>337</sup> See John Ferejohn, ‘Law, legislation, and positive political theory’, *Modern political economy: Old topics, new directions* (1995): pp. 191–215.

bureaucracy.<sup>338</sup> Interestingly, they structure the Principal-Agent relationship in terms of accountability which brings a new valuable insight to the agency literature. For them public accountability becomes a function of the capabilities of principals to judge the performance of their agents.<sup>339</sup> All these contributions have stimulated a lively debate about the capacity of the Congress to exert control over its bureaucratic agencies and indicate that the research on legislative and executive relations with public administration seems to constitute the singularly most important application of the Principal-Agent framework in the American legal-political science scholarship. In European context, the creation of independent and specialized administrative agencies operating in many European countries beyond the control of majoritarian institutions gave further impetus to the development of the Principal-Agent analysis.<sup>340</sup> This phenomenon was captured by Giandomenico Majone's concept of the emergent "regulatory state", which in response to the challenges resulting from complex socio-economic realities of the modern world increasingly engages in regulatory activities.<sup>341</sup> In research on "regulatory state", two broad groups of independent administrative authorities exercising delegated public authority can be essentially distinguished.

---

<sup>338</sup> See Sean Gailmard and John W. Patty, *Learning while governing: Expertise and accountability in the executive branch* (University of Chicago Press, 2012).

<sup>339</sup> See Sean Gailmard, 'Accountability and Principal-Agent Theory' (above, n. 401).

<sup>340</sup> See Mark Thatcher, 'Delegation to independent regulatory agencies: Pressures, functions and contextual mediation', *West European Politics* 25, no. 1 (2002): pp. 125-147.

<sup>341</sup> See Giandomenico Majone, 'The rise of the regulatory state in Europe', *West European Politics* 17, no. 3 (1994): pp. 77-101.

The first comprises of utility (“economic-welfare”) regulators tasked with preventing unfair competition, such as anti-trust authorities and telecommunications, electricity, consumer protection, financial services supervisors. The second can be regarded as “social-welfare” regulators pursuing other objectives than competition such as environment, water, food and work safety, human rights protection and equality. These agencies effectively enjoy a semi-detached status<sup>342</sup> and often operate at „arm’s length from elected politicians”.<sup>343</sup> They are usually vested with a plethora of competences (supervisory, regulatory and executive)<sup>344</sup> to the extent that some authors have started to refer to them as the “fourth branch of government”.<sup>345</sup>

Although a political choice to establish independent agencies may be somewhat puzzling since it is in the principal’s interest to ensure that his agent does not engage in a form of bureaucratic drift, this type of institutional design has long been justified by the argument that complex areas of public policy are best governed by administrative technocratic authorities insulated from short-term political influence.<sup>346</sup> Among the benefits of delegation which the elected policymakers can reap, one can mention: minimizing transaction costs, resolving credible

---

<sup>342</sup> See Morten Egeberg, ‘European government (s): Executive politics in transition?’, *West European Politics* 31, 1-2 (2008): pp. 235-257.

<sup>343</sup> This means that these agencies are purposely designed (to a certain extent) as independent from political influences. This is reflected in its founding legislation which sets various aspects of the agency’s status. Usually, the agency independence is analyzed in four dimensions: political (including term of office, appointment and dismissal procedures), functional (relationship with government and parliament) and financial and organisational (budget, internal organisation, staff). See Majone, ‘The rise of the regulatory state in Europe’ (above, n. 440).

<sup>344</sup> Such as: standards setting, issuing licenses, monitoring, and enforcement of legal requirements.

<sup>345</sup> See Michelle Everson, ‘Independent agencies: hierarchy beaters?’, *European Law Journal* 1, no. 2 (1995): pp. 180-204.

<sup>346</sup> See Frank Vibert, *The rise of the unelected: democracy and the new separation of powers* (Cambridge University Press, 2007).

commitment issues, avoiding market failure, overcoming informational asymmetries in technical areas of governance, enhancing efficiency in policy-making, locking in “distributional” benefits as well as shifting blame for unpopular decisions.<sup>347</sup>

On the one hand, these benefits can only be realized when principals grant discretion to their agents by means of sharing some of their constitutional authority. On the other hand, the principles of constitutional democracy demand that such authority-sharing with non-majoritarian units, whose decisions might be politically salient and entail a redistributive effect, is accompanied by a clear system of controls over an independent agency to hold it accountable for deviating from its objectives.<sup>348</sup>

Therefore, the issue of delegating just the right amount of authority without the necessity to exceedingly limit the agent’s discretion remains the main focus of the Principal-Agent analyses applied to the study of independent regulatory and administrative agencies. For the Principal-Agent analysis, the agent should not be fully controlled as it would diminish the benefits of delegation, but nevertheless the agent should remain under a degree of control in order to prevent it becoming an uncontrollable “center of arbitrary power”.<sup>349</sup> This only confirms one of key

---

<sup>347</sup> See, notably: Mark Thatcher and Alec Stone Sweet, *The politics of delegation* (Routledge, 2003); Majone, ‘The rise of the regulatory state in Europe’ (above, n. 440); Giandomenico Majone, ‘The regulatory state and its legitimacy problems’, *West European Politics* 22, no. 1 (1999): pp. 1–24; David Epstein and Sharyn O’Halloran, *Delegating powers: A transaction cost politics approach to policy making under separate powers* (Cambridge University Press, 1999); Michelle Egan, ‘Regulatory strategies, delegation and European market integration’, *Journal of European Public Policy* 5, no. 3 (1998): pp. 485–506; Jonathan Bendor, Amihai Glazer, and Thomas Hammond, ‘Theories of delegation’, *Annual Review of Political Science* 4, no. 1 (2001): pp. 235–269; Gary J. Miller, ‘The political evolution of principal-agent models’, *Annu. Rev. Polit. Sci.* 8 (2005): pp. 203–225.

<sup>348</sup> See Majone, ‘The regulatory state and its legitimacy problems’ (above, n. 347).

<sup>349</sup> See Everson, ‘Independent agencies: hierarchy beaters?’ (above, n. 345).

assumptions of the Principal-Agent literature that political principals tend to rely more on decentralized fire-alarm controls than on centralized police-patrol controls when it comes to monitoring their agents.<sup>350</sup>

Against this backdrop, it may be worth pointing out at a sample of important comparative works in the area of political science and economy. In particular, Mark Thatcher and Fabrizio Gilardi successfully applied the Principal-Agent framework to explain delegation across sectors in a number of European countries using a comparative approach. One of Thatcher's analyses covering the functioning of various independent regulators in the United Kingdom, France, Germany and Italy demonstrates that the elected policy-makers as the principals do not tend to use their control mechanisms over their agents to limit agency loss.<sup>351</sup> These are interesting findings in light of what the traditional Principal-Agent accounts are likely to suggest. Using the Principal-Agent models, Gilardi has made an important contribution to the study of the formal independence of regulatory authorities by refining an "independence index",<sup>352</sup> previously elaborated by scholars measuring that of central banks.<sup>353</sup>

Given the research focus of this study, it is worth mentioning that national variations of monetary and banking supervision policies have been also subject to the

---

<sup>350</sup> See *supra* n. 285.

<sup>351</sup> See Mark Thatcher, 'The third force? Independent regulatory agencies and elected politicians in Europe', *Governance* 18, no. 3 (2005): pp. 347-373.

<sup>352</sup> See Fabrizio Gilardi, 'Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis', *Journal of European Public Policy* 9, no. 6 (2002): pp. 873-893; Fabrizio Gilardi and Martino Maggetti, '14 The independence of regulatory authorities', *Handbook on the Politics of Regulation* 201 (2011).

<sup>353</sup> See Vittorio Grilli, Donato Masciandaro, and Guido Tabellini, 'Political and monetary institutions and public financial policies in the industrial countries', *Economic Policy* 6, no. 13 (1991): pp. 341-392.



Principal-Agent analysis. In central banking literature (both of European and American origin), they however largely represent economic accounts which are mostly notably related to the so-called time inconsistency problem in monetary policy. The seminal applications of the Principal-Agent insights to central banking come from Alberto Alesina and Lawrence Summers who champion the idea of designing an optimal incentive scheme by the political principals for the monetary agent which solves the time-inconsistency problem on the one hand, while full flexibility is retained on the other.<sup>354</sup> In the same way, Torsten Persson and Guido Tabellini borrow the assumptions of the agency contract theory to develop a targeting monetary policy approach, in which the political principals of the central bank impose an explicit inflation target and make the central bank leadership (agent) explicitly accountable for its success in meeting this target.<sup>355</sup> This approach is followed by Carl Walsh, who applies the Principal-Agent toolbox to determine how a central banker's incentives as of a contracted agent should be structured to induce the socially optimal policy.<sup>356</sup> Michelle Fratiani *et al.* find out that central bank independence and performance contracts are the best solutions to cope with the inflation and stabilization bias regarded as an agency problem.<sup>357</sup> More generally, Gauti Eggertsson and Eric Le Borgne accept insights from the agency theory to explain why, and under what circumstances, a politician endogenously gives up rent

---

<sup>354</sup> See Alberto Alesina and Lawrence H. Summers, 'Central bank independence and macroeconomic performance: some comparative evidence', *Journal of Money, Credit and Banking* 25, no. 2 (1993): pp. 151-162.

<sup>355</sup> See Torsten Persson and Guido Tabellini, *Designing institutions for monetary stability* (Elsevier, 1993).

<sup>356</sup> See Carl E. Walsh, 'Optimal contracts for central bankers', *The American Economic Review* (1995): pp. 150-167.

<sup>357</sup> See Michele Fratianni, Jürgen von Hagen, and Christopher Waller, *Central banking as a political principal-agent problem*, CEPR Discussion Papers.

and delegates monetary policy tasks to an independent central bank.<sup>358</sup> Using the same Principal-Agent device, Alan Blinder suggests that the potential principal (legislature or government) may however be lacking the incentive to enforce the agency contract.<sup>359</sup> This stance is followed in works of Bennett McCallum who argues that delegation by a Principal-Agent contract fails to eliminate, but merely relocates the time-inconsistency problem.<sup>360</sup>

In realm of banking supervision, the Principal-Agent studies are less common but still existent. Among the significant contributions one can find the following. Martin Schüler conducts a Principal-Agent analysis of the incentive problems of the bank supervisors acting as agents of national taxpayers.<sup>361</sup> This approach is followed by the very recent and already mentioned study by Elena Carletti, Giovanni Dell’Ariccia and Robert Marquez.<sup>362</sup> In a series of political economy contributions, Donato Masciandaro uses insights from the Principal-Agent literature to explain the policy-makers choices on the institutional design of bank supervision in the EU and around the world.<sup>363</sup> Together with Maria Nieto and Henriette Priast he also offers a Principal-Agent perspective on the financing of banking supervision where the

---

<sup>358</sup> See Gauti B. Eggertsson and Eric Le Borgne, ‘A political agency theory of central bank independence’, *Journal of Money, Credit and Banking* 42, no. 4 (2010): pp. 647–677.

<sup>359</sup> See Alan S. Blinder, ‘Distinguished lecture on economics in government: What central bankers could learn from academics--and vice versa’, *The Journal of Economic Perspectives* 11, no. 2 (1997): pp. 3–19.

<sup>360</sup> See Bennett T. McCallum, *Two fallacies concerning central bank independence*, National Bureau of Economic Research; Bennett T. McCallum, ‘Crucial issues concerning central bank independence’, *Journal of Monetary Economics* 39, no. 1 (1997): pp. 99–112.

<sup>361</sup> See Schüler, ‘Incentive Problems in Banking Supervision-The European Case’ (above, n. 124).

<sup>362</sup> See Elena Carletti, Giovanni Dell’Ariccia, and Robert Marquez, ‘Supervisory incentives in a banking union’ (2016).

<sup>363</sup> See Donato Masciandaro, ‘Unification in financial sector supervision: The trade-off between central bank and single authority’, *Journal of Financial Regulation and Compliance* 12, no. 2 (2004): pp. 151–169.

taxpayers act as the principal and the banking supervisory authority as the agent.<sup>364</sup>

Finally, together with Lucia Dalla Pellegrina, he also takes recourse to the Principal-Agent tools when addressing the degree of consolidation of powers in financial supervision.<sup>365</sup>

### 5.3.2. Relations between national and supranational/international actors

Developments in of European integration can be regarded as a research area where this cluster of the Principal-Agent analysis has been applied more extensively to explain the functioning of international regimes. In particular, the issues related to organization of competences transferred vertically to the Union, not by single but multiple Member State-principals has been a long-lasting focus on scholars looking at the EU through these analytical lenses. At the risk of oversimplification, the main reasons for this can be explained by two of the following factors.

Firstly, for a long time EU institutions were not among the top priorities in the EU studies research agenda. As James Caporaso and John Keeler note, “despite the seeming importance of the EC’s (EU’s) institutional components, with few exceptions institutions have played a scant role theoretically in accounts of European integration”.<sup>366</sup> Yet, with EU institutions gaining new competences in an increasing number of policy domains, over time the focus of EU studies has also naturally

---

<sup>364</sup> See Donato Masciandaro, Maria J. Nieto, and Henriette Prast, ‘Who pays for banking supervision? Principles and trends’, *Journal of Financial Regulation and Compliance* 15, no. 3 (2007): pp. 303–326.

<sup>365</sup> See Lucia Dalla Pellegrina and Donato Masciandaro, ‘Politicians, central banks, and the shape of financial supervision architectures’, *Journal of Financial Regulation and Compliance* 16, no. 4 (2008): pp. 290–317.

<sup>366</sup> See James A. Caporaso and John T. S. Keeler, ‘The European Community and regional integration theory’, edited by Carolyn Rhodes and Sonia Mazey, in *The State of the European Union Vol. 3. Building a European Polity?* (Boulder: Lynne Rienner).

shifted to them.<sup>367</sup> Secondly, as more and more scholars have become convinced that the phenomenon of European integration may be successfully explained and understood by analytical tools offered by general political science scholarship,<sup>368</sup> and especially its rational choice accounts, the demand for the analytical methods offered by this family has increased.

Among the earliest relevant works on European integration which employed the Principal-Agent approach supported by the insights coming from the theory of contracts, was the analysis of the EU's legal system and the role of the Court of Justice of European Union (CJEU) conducted by Geoffrey Garrett and Barry Weingast.<sup>369</sup> The Principal-Agent studies on the Union's legal order are supplemented by a historical perspective offered by Karen Alter, Alec Stone Sweet, James Caporaso and Bernadette Kilroy on the CJEU's centripetal role in the context of European integration.<sup>370</sup> The European Parliament's role as the agenda setter was

---

<sup>367</sup> See Jonas Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (Jonas Tallberg, Department of Political Science, Lund University, Sweden, 1999), p. 67.

<sup>368</sup> See, notably, Andrew Moravcsik, 'Preferences and power in the European Community: a liberal intergovernmentalist approach', *JCMS: Journal of Common Market Studies* 31, no. 4 (1993): pp. 473–524; Simon Hix, 'The study of the European Union II: the 'new governance' agenda and its rival', *Journal of European Public Policy* 5, no. 1 (1998): pp. 38–65.

<sup>369</sup> See Geoffrey Garrett, 'International cooperation and institutional choice: the European Community's internal market', *International Organization* 46, no. 02 (1992): pp. 533–560; Geoffrey Garrett and R. Barry Weingast, 1993: Ideas, Interests, and Institutions: Constructing the European Community's Internal Market', *Judith Goldstein and Robert o. Keohane (eds) Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*: pp. 173–206.

<sup>370</sup> See Karen Alter, 'Explaining national court acceptance of European Court jurisprudence: A critical evaluation of theories of legal integration', *The European court and national courts doctrine and jurisprudence: Legal change in its social context* (1998): pp. 227–252; Alec Stone Sweet and James A. Caporaso, 'From free trade to supranational polity: The European Court and integration', *European integration and supranational governance* (1998): pp. 92–133; Bernadette Kilroy, *Member state control or judicial independence: The integrative role of the European Court of Justice, 1958-1994*, Annual meeting of the American Political Science Association (Chicago, 1995).

also scrutinized through the Principal-Agent lens in a series of publications released by George Tsebelis and his fellows.<sup>371</sup>

In parallel, Andrew Moravcsik's comprehensive accounts on liberal intergovernmentalism cross-fertilize the Principal-Agent logic of European integration which can be used to encompass all instances where EU Member States decide to delegate sovereign competences to the supranational level.<sup>372</sup> He clarifies that "delegating sovereignty establishes a Principal-Agent relationship between member state governments (multiple principals) and supranational officials, judges and representatives (multiple agents)".<sup>373</sup> For Moravcsik however, this phenomenon is a reflection of the member states' interests which operate under the conditions of economic interdependence and, as such, constitutes the basis for his intergovernmentalist approach.<sup>374</sup>

In addition to this work, the Principal-Agent approach to the study of European integration gained further momentum with Mark Pollack's work on the European Commission and its uneasy relations with its member-state principals in a series of

---

<sup>371</sup> See George Tsebelis, 'The power of the European Parliament as a conditional agenda setter', *American Political Science Review* 88, no. 01 (1994): pp. 128–142; Amie Kreppel and George Tsebelis, 'Coalition formation in the European Parliament', *Comparative Political Studies* 32, no. 8 (1999): pp. 933–966; George Tsebelis and Geoffrey Garrett, 'Agenda setting power, power indices, and decision making in the European Union', *International Review of Law and Economics* 16, no. 3 (1996): pp. 345–361.

<sup>372</sup> See Moravcsik, 'Preferences and power in the European Community: a liberal intergovernmentalist approach' (above, n. 467).

<sup>373</sup> See Andrew Moravcsik, 'Liberal intergovernmentalism and integration: a rejoinder', *JCMS: Journal of Common Market Studies* 33, no. 4 (1995): pp. 611–628.

<sup>374</sup> See Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (above, n. 367), p. 71.

highly influential contributions.<sup>375</sup> His works stand out as truly pioneering as he clearly demonstrates that the Principal-Agent toolbox, as developed by the finest theorists of the congressional school of dominance, serves well to explain the scope of supranational influence. He also demonstrates an open-ended nature of the Principal-Agent framework which moves beyond the concurring interpretations of traditional intergovernmentalism and neofunctionalism regarding the scope of supranational autonomy and influence.<sup>376</sup>

Another wave of supranational Principal-Agent applications is related to the studies of different aspects of Economic and Monetary Union (EMU). In this regard, it has been employed to analyze the supranational position of the European Central Bank by Robert Elgie and Dermot Hodson.<sup>377</sup> Elgie adopts a Principal-Agent model to analyze the relations between euro area Member States and the European Central Bank, with the focus on how the ECB ensures the Euro Area's policy choices in monetary affairs. Hodson uses the tools of the Principal-Agent approach to better understand the ECB's position as a *sui generis* supranational actor that is reluctant to embrace a pro-integrationist approach. More recently, David Howarth and Anna-Lena Högenauer use the Principal-Agent framework to support their analysis of the

---

<sup>375</sup> See Mark A. Pollack, 'Delegation, agency, and agenda setting in the European Community', *International Organization* 51, no. 01 (1997): pp. 99–134; Mark A. Pollack, 'The Commission as an agent', in *At the Heart of the Union* (Springer, 1997), pp. 109–128; Mark A. Pollack, 'The Engines of Integration? Supranational Autonomy and Influence in the European', edited by Wayne Sandholtz and Alec Stone Sweet, in *European integration and supranational governance* (OUP Oxford, 1998), p. 217; Mark A. Pollack, 'Delegation, agency and agenda setting in the Treaty of Amsterdam' (1999).

<sup>376</sup> See Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (above, n. 367), p. 73.

<sup>377</sup> See Robert Elgie, 'The politics of the European Central Bank: principal-agent theory and the democratic deficit', *Journal of European Public Policy* 9, no. 2 (2002): pp. 186–200; Hodson, 'The European Central Bank as a reluctant EU institution: A principal-agent perspective' (above, n. 403).

democratic implications of the ECB's unorthodox monetary policies adopted since 2010.<sup>378</sup>

The study of international regimes other than the European Union is another academic venue where Principal-Agent models have been widely applied and where the issue of control has been also identified the main principal's problem. As Roland Vaubel points out, international organizations and fora are however special and may suffer more from agency problems since the chain of delegation is more extended in their case.<sup>379</sup> Therefore, the extent of member-state control over international organizations and fora and its variation remain the focal point of a comparative Principal-Agent analysis in the emblematic book edited by Darren Hawkins, David Lake and Daniel Nielson.<sup>380</sup>

Furthermore, there exists also a range of sophisticated contributions targeting a plethora of very specific international contexts. In this regard, Manfred Elsig analyses the WTO within a principal-agent framework by focusing on the relationship between contracting parties' representatives and the WTO Secretariat.<sup>381</sup> Merih Agnin uses the same framework to analyze the functioning of the International Monetary Fund, and in particular the impact of the relations between the IMF Executive Board and IMF staff and those between the IMF staff and borrower

---

<sup>378</sup> See Anna-Lena Högenauer and David Howarth, 'Unconventional Monetary Policies and the European Central Bank's Problematic Democratic Legitimacy', *Zeitschrift für öffentliches Recht* 71, no. 2 (2016): pp. 1–24.

<sup>379</sup> See Vaubel, 'Principal-agent problems in international organizations' (above, n. 425).

<sup>380</sup> See Darren G. Hawkins, David A. Lake, Daniel L. Nielson et al., *Delegation and agency in international organizations* (Cambridge University Press, 2006).

<sup>381</sup> See Manfred Elsig, 'Principal-agent theory and the World Trade Organization: Complex agency and 'missing delegation'', *European Journal of International Relations* 17, no. 3 (2011): pp. 495–517.

country on the loan features.<sup>382</sup> Laurence Helfer and Timothy Mayer look through Principal-Agent lens at the International Law Commission's attempts to codify and progressively develop international law.<sup>383</sup>

Using some of the Principal-Agent tools to supplement their constructivist analysis, David Howarth and Tal Sadeh trace the emancipation of the OECD's Committee on Capital Movements and Invisible Transactions (CMIT) from its member-state principals' control.<sup>384</sup> Manuela Moschella explores the key institutional features of the Financial Stability Board and finds out that the Principal-Agent model does not necessarily explain the scope of discretion assigned to this body and its membership.<sup>385</sup> Finally, Yf Reykers and Niels Smeets go so far as to apply a Principal-Agent framework to the analysis of the Russian important vote abstentions in the UN Security Council.<sup>386</sup>

Despite concentrating on the different stages of delegation, the fundamental claim of the Principal-Agent analysis holds also for its European applications, both in national and supranational contexts: delegation tends to be accompanied by certain control mechanisms, whether direct or indirect, aiming to reduce agency loss for

---

<sup>382</sup> See Merih Agnin, *How Does IMF Lending Operate? A Two-Level Principal-Agent Model*, ECPR General Conference (Glasgow, 2014).

<sup>383</sup> See Laurence R. Helfer and Timothy Meyer, 'The evolution of codification: a principal-agent theory of the International Law Commission's influence' (2015).

<sup>384</sup> See David Howarth and Tal Sadeh, 'In the vanguard of globalization: The OECD and international capital liberalization', *Review of International Political Economy* 18, no. 5 (2011): pp. 622–645.

<sup>385</sup> See Manuela Moschella, 'Designing the Financial Stability Board: a theoretical investigation of mandate, discretion, and membership', *Journal of International Relations and Development* 16, no. 3 (2013): pp. 380–405.

<sup>386</sup> Yf Reykers and Niels Smeets, 'Losing control: A principal-agent analysis of Russia in the United Nations Security Council's decision-making towards the Libya crisis', *East European Politics* 31, no. 4 (2015): pp. 369–387.



principals.<sup>387</sup> Viewed in this light, it seems that the Principal-Agent framework has a potential to offer fruitful comparative and empirical analyses of European public policies.

### 5.3.3. Relations between non-majoritarian actors exercising attributed tasks and competences in an increasingly globalized environment

The third cluster of Principal-Agent applications concerns the modalities of intra-institutional relations between non-majoritarian actors. These contributions have been largely developed in the context of intricacies governing the functioning of EU administrative machinery. In this regard, one can distinguish (reversed) vertical and horizontal contexts.

In the (reversed) vertical context, Principal-Agent relations have been constructed between an EU supranational agent as the principal; and EU Member States' administrative structures necessary for the implementation of Union policies as the agents. By reversing the Principal-Agent dynamics from the supranational to the national level, these contributions constitute one of few exceptions to the usual treatment of the member state governments as the (collective) principal and a unit of Union administration as its agent. In this case, EU Member States *largo sensu* would therefore operate as domestic agents of supranational principals. This peculiar

---

<sup>387</sup> See Gilardi, *Principal-agent models go to Europe: Independent regulatory agencies as ultimate step of delegation* (above, n. 270), p. 8.

situation gives rise to specific Principal-Agent problems which however are still massively under-researched.<sup>388</sup>

Among pioneering works applying the reversed Principal-Agent approach in this constellation, one ought to highlight pioneering contributions of Jonas Tallberg who almost twenty years ago developed a Principal-Supervisor-Agent model to capture the relations between the Member State governments (multiple principals), the Commission and the Court (supervisors) and individual member states (multiple agents) in the area of EU law enforcement.<sup>389</sup> Later, the reversed Principal-Agent models have also become widely applied in the field of studies on EU economic governance. Notably, Ludger Schknecht used to get better understanding of the Stability and Growth Pact (SGP) understood as an agency contract between the ECOFIN as the collective principal and individual Member States as its agents.<sup>390</sup> Waltraud Schelkle looks at EU fiscal policy coordination similarly and treats national governments the agents of the ECOFIN.<sup>391</sup> In the same way, the EU-Member State relations under the “E” pillar of the EMU are the focus of the Principal-Agent analysis of the SGP reform and the Lisbon Strategy implementation undertaken by Dermot Hodson who perceives the infringements of the EMU rules on fiscal

---

<sup>388</sup> See Bergman, ‘The European Union as the next step of delegation and accountability’ (above, n. 327), p. 423.

<sup>389</sup> See Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (above, n. 367); Tallberg, *European governance and supranational institutions: making states comply* (above, n. 252).

<sup>390</sup> See Schuknecht, ‘EU fiscal rules: issues and lessons from political economy’ (above, n. 403).

<sup>391</sup> See Schelkle, ‘The Political Economy of Fiscal Policy Co-ordination in EMU: From Disciplinary Device to Insurance Arrangement’ (above, n. 304).

discipline as an example of the agency loss on the EU's (principal) side.<sup>392</sup> James Savage accepts insights from the Principal-Agent framework to analyze the politics of asymmetric information in the so-called European Semester by looking at the collection of budgetary and economic statistics.<sup>393</sup>

More recently, Jakub Gren, Dawid Howarth and Lucia Quaglia have applied the Principal-Agent approach to shed some light on the ECB's political control over national supervisors in the newly created Single Supervisory Mechanism.<sup>394</sup> In the same fashion, but from an economic perspective, Elena Carletti, Giovanni Dell'Ariccia and Robert Marquez analyze incentives for the local supervisors (the agents) to submit supervisory information to the central supervisory agency (the principal) within the centralized supervisory regime set out in the Banking Union.<sup>395</sup> Interestingly, they found out that the local supervisor's incentives to collect information decreases relative to when it operates interdependently: that means outside of the Banking Union. Similarly, Tobias Tröger argues from a legal-institutional perspective that national supervisors may not necessarily always follow the supervisory policies defined by the ECB in a hub-and-spokes setting of the

---

<sup>392</sup> See Dermot Hodson, 'Reforming EU economic governance: A view from (and on) the principal-agent approach', *Comparative European Politics* 7, no. 4 (2009): pp. 455–475.

<sup>393</sup> See David Howarth and John Savage, *Enforcing the European Semester: The Politics of Asymmetric Information in the Excessive Deficit and Macroeconomic Imbalance Procedures*, SGEU ECPR Conference (June).

<sup>394</sup> See David Howarth, Lucia Quaglia, and Jakub Gren, 'Supranational banking supervision in Europe: The construction of a credible watchdog', *Journal of Common Market Studies* 53, s1 (2015): pp. 181–199.

<sup>395</sup> See Carletti, Dell'Ariccia and Marquez, 'Supervisory incentives in a banking union' (above, n.362).

SSM.<sup>396</sup> The analysis of legal fragilities embedded in the SSM's multilevel design by Giorgio Monti and Ann Petit Christy appears to corroborate his findings.<sup>397</sup>

In the horizontal context, Principal-Agent relations have been drawn between EU actors located at the same level. In particular, EU's external policies and international negotiations can be highlighted as a prominent area for its application. This group is however characterized by a specific peculiarity: the authors tend to relax the basic, conservative Principal-Agent assumptions and offer to perceive the dynamics between the principal and agent in terms of cooperation. As they suggest, the most recent evidence "refines our theoretical understanding of the politics of delegation and discretion in the EU".<sup>398</sup>

Tom Delreux applies a "liberal" Principal-Agent model to better understand the EU's participation in international environmental negotiations and finds convincing evidence that it is not only characterized by informational benefits favouring the agents (as the orthodox accounts would suggest), but also by informational benefits for the principals.<sup>399</sup> By applying the Principal-Agent framework supported by some insights from resource dependence theory, Bart Kerremans and Evelyn Corremans suggests that the agents may decide to reduce their informational advantage over the principal and choose proactive cooperation when operating in environments

---

<sup>396</sup> See Tobias H. Tröger, '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 (EBOR)* 15, no. 4 (2014): pp. 449–497.

<sup>397</sup> See Giorgio Monti and Ann Petit Christy, *The Single Supervisory Mechanism: legal fragilities and possible solutions*, Ademu Working Paper Series WP 2016/016 (2016).

<sup>398</sup> See Delreux and Adriaensen, 'Introduction. Use and Limitations of the Principal-Agent Model in Studying the European Union' (above, n.272).

<sup>399</sup> See Delreux, *The EU as international environmental negotiator* (above, n. 314), chapter three.

characterized by informality such as EU's international trade negotiations.<sup>400</sup> When discussing the functioning of the European External Action Service, Hylke Dijkstra looks at situations where delegation of tasks is non-exclusive and the principal retains some decision-making competences constitute a challenge for the overall rationale for delegation and the hierarchical relationship between principals and agents. He also doubts whether in such a context EU diplomats are capable of building up information surpluses, thus challenging the more typical assumptions regarding information asymmetries of the Principal-Agent approach.<sup>401</sup>

---

<sup>400</sup> See Coremans and Kerremans, 'Agents as Information Asymmetry Managers in EU Trade Policy-Making' (above, n. 306).

<sup>401</sup> See Hylke Dijkstra, 'Non-exclusive delegation to the European External Action Service', edited by Tom Delreux and Johan Adriaensen. In *The Principal Agent Model and the European Union* (Cham: Springer International Publishing, 2017), pp. 55-81.

**PART III.  
COMPLIANCE  
EXPECTATION WITHIN  
THE SINGLE  
SUPERVISORY  
MECHANISM (SSM)**

**(INSTITUTIONAL  
ANALYSIS)**

# CHAPTER 6

## Organisational design of the Single Supervisory Mechanism (SSM)

### 6.1. Introductory remarks

This chapter analyses the organisational design of multilevel supervisory subsystems pertaining to the SSM with a view to determine the systemic position of the higher level actor – the ECB (supervisory apparatus) and its corresponding shadow of hierarchy therein. This exercise constitutes the first phase of testing of the Enforcement and Management hypotheses on the formal top-down compliance expectation in the subsystem of SSM Direct and Indirect Supervision.

The analysis will be conducted on the basis of the analytical criteria set in section three of chapter four (II.4.3) which include: the constitutional foundations of the SSM (section two, III.6.2); the distribution of supervisory responsibilities within the SSM (section three, III.6.3); the modalities of administrative interactions between the higher and lower level actors within the SSM as regards the conduct of operational supervision (section four, III.6.4) and the territorial applicability of the SSM (section five, III.6.5).<sup>402</sup> Section six presents the outcomes of the analysis and classifies respective SSM supervisory subsystems as reflecting one of the models of EU administration (section six, III.6.6) as identified in section four of chapter four

---

<sup>402</sup> The analytical tools provided in chapter four (the Principal-Agent framework) will not be used to investigate the organisational design of the SSM conducted in this chapter, but the operational design in chapter six.

(II.4.4.). This exercise will provide insights into the structure of the first condition which is expected to affect the formal top-down compliance expectations within the SSM and will feed into the analysis of the operational design of the SSM which forms the second phase of testing of the Enforcement and Management hypotheses. In that phase, the analysis will focus on the credibility of the formal control and cooperation capacity of ECB-based supervisory apparatus (seen as the principal) in respect of NCA-based supervisory apparatus (seen as the agent) by means of the application of the Principal-Agent framework to the subsystems of SSM Direct and Indirect Supervision.

## **6.2. Constitutional foundations of the SSM**

In line with the model delineated in chapter three, the constitutional foundations of an administrative arrangement are considered to be the first element which is regarded instrumental in characterizing its nature. The SSM, as an EU administrative arrangement, was founded on a direct constitutional mandate provided by the Treaties. The enabling clause (also referred to as the “sleeping beauty clause”,<sup>403</sup> or the “last resort clause”<sup>404</sup>) encapsulated in Article 127(6) of the TFEU allows for the establishment of a supranational regulatory regime for prudential supervision. By activating this clause, the Union “can endow the ECB with bank supervisory tasks of

---

<sup>403</sup> See Christos Gortsos, *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) (ECEFIL, 2013).

<sup>404</sup> See Tommaso Padoa-Schioppa, *EMU and banking supervision*, Lecture by Tommaso Padoa-Schioppa Member of the Executive Board of the European Central Bank at the London School of Economics, Financial Markets Group on 24 February 1999



its own through rather than swift, although weighty legislative action”,<sup>405</sup> and authorize supranational interference into national constitutional orders. The activation of this clause alters the basic constitutional distribution of competences between the Union and its Member States laid down by Articles 3-6 of the TFEU underpinned by the principle of conferral of powers, enshrined in the Article 5(2) of the TEU.<sup>406</sup>

According to the 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”*.

Although this provision appears to be somewhat vague and open-ended as it refers to *“conferring tasks (...) concerning policies relating to prudential supervision (...)”*, it is nevertheless widely considered as a sound constitutional basis which allows the ECB to carry out activities (“tasks”), provided that these are connected to, or stemming from prudential policies.<sup>407</sup> In this respect, it was argued that the

---

<sup>405</sup> See René Smits, *The European Central Bank: Institutional aspects*, International banking and finance law series v.5 (The Hague, London: Kluwer Law International, 1997), p. 357.

<sup>406</sup> It 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 shall remain with the Member States. It should be read in conjunction with the Article 4(1) of the TEU which stipulates that “competences not conferred upon the Union in the Treaties remain with the Member State”.

<sup>407</sup> See Tröger, ‘The Single Supervisory Mechanism–Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement’ (above, n.396);

reference to “policies” was introduced to limit the possibilities to engage the ECB in actual day-to-day supervision.<sup>408</sup> However, these arguments are not universally shared since the potential involvement of the ECB in areas of public policies other than monetary policy has been fiercely disputed since the creation of the EMU. The first time, when an EU-wide discussion on the scope of the ECB’s banking supervisory mandate took place, was in the context of preparatory work on the Maastricht Treaty and the framework for a future Economic and Monetary Union. There were two major camps in this debate.

On the one side, many national central bank governors were in favor of attributing to the ECB responsibilities in the field of banking supervision. At that time, significant involvement of central banks in various operational tasks related to banking supervision was also the national supervisory model present in the large majority of EU Member States in the late 1980s and early 1990s. That predominant model followed the traditional understanding of central bank’s mandate as not only preserving price stability, but also ensuring sound banking.<sup>409</sup> Consequently, the initial proposal presented by the Committee of Governors in 1990 explicitly designated the prospective monetary authority of the Union (the ECB) as one of competent supervisory authorities. The Governors’ proposal envisaged that “*the ECB may formulate, interpret and implement policies relating to the prudential supervision*

---

Eddy Wymeersch, ‘The Single Supervisory Mechanism or ‘SSM’, Part One of the Banking Union’, *National Bank of Belgium Working Paper*, no. 255 (2014).

<sup>408</sup> Ibid., p. 18.

<sup>409</sup> See Vera Constance Smith, *The rationale of central banking* (PS King London, 1936).

*of credit and other financial institutions for which it is designated as competent authority.*"<sup>410</sup>

The attribution of supervisory functions to the ECB was opposed by Member State governments, some banking supervisors, the Bundesbank as well as some academics.<sup>411</sup> Mario Sarcinelli expressed a view that the merits of entrusting bank supervision as among statutory tasks to a newly created monetary authority "should be carefully examined, because, while the activity is globalizing, supervisory responsibilities risk remaining fragmented and creating externalities to the detriment of this or that national supervisory system".<sup>412</sup> Otmar Issing, an influential economist based in the Bundesbank at the time and later the ECB's chief economist, continuously advocated for a "clear and limited mandate" of price stability for a new EU monetary authority,<sup>413</sup> and strongly opposed attributing it banking supervisory "because of potential conflicts with monetary policy, and the dangers of being involved in politics".<sup>414</sup> Under his tenure at the ECB, this view was also a dominant ECB stance. The ECB argued that "the introduction of the euro has implied an institutional separation of monetary jurisdiction (the euro area) and supervisory

---

<sup>410</sup> See Draft text proposed by the Committee of Governors transmitted to the President of the ECOFIN Council on 27 November 1990. Europe, Document No. 1669/1679. Quoted from Teixeira, 'Europeanising prudential banking supervision. Legal foundations and implications for European integration' (above, n. 125 ).

<sup>411</sup> See Harold James, *Making the European monetary union* (Harvard University Press, 2012), p. 313.

<sup>412</sup> See Mario Sarcinelli, 'La Banca Centrale Europea: istituzione concettualmente evoluta o all'inizio della sua evoluzione?', *Moneta e Credito* 45, no. 178 (1992).

<sup>413</sup> See Otmar Issing, 'Should we have faith in central banks?', *IEA Occasional Paper*, no. 125 (2002).

<sup>414</sup> See Otmar Issing and Jan-Pieter Krahnen, *Transcript of a hearing before Members of the House of Lords (UK) in Frankfurt on Genuine Economic and Monetary Union and its Implications for the UK*, Policy Letter No. 21 (2013), [http://safe-frankfurt.de/uploads/media/House\\_of\\_Lords\\_Hearing\\_Issing\\_Krahnen.pdf](http://safe-frankfurt.de/uploads/media/House_of_Lords_Hearing_Issing_Krahnen.pdf), accessed 01 December 2017, p. 9.

jurisdiction (domestic institutions and markets)".<sup>415</sup> Nineteen years later, a similar approach was also taken in the "De Larosière Report" which presented six arguments against transferring banking supervision to the ECB.<sup>416</sup>

Finally, as a result of intensive negotiations between Member States, it was agreed that banking supervision should not belong to the basic tasks of the ECB and its involvement was reduced to the advisory function.<sup>417</sup> In the realm of banking supervision, the ECB would exercise an ancillary role by "contributing" to supervision by other (national) authorities.<sup>418</sup> It was reported that at the personal insistence of Tommaso Padoa-Schioppa,<sup>419</sup> it was however decided that a transfer of bank supervisory competences to the ECB level should not be blocked in the future in case "the interaction between the Eurosystem and national supervisory authorities turned out not to work effectively".<sup>420</sup> This arrangement was incorporated in Article 103 of the TEC (that became Article 127(6) of the TFEU as a result of the Lisbon Treaty reform), notably without recourse to the burdensome (ordinary) Treaty amendment procedure laid down in Article 48 of the TUE.<sup>421</sup>

---

<sup>415</sup> See European Central Bank, *The role of central banks in prudential supervision*, [https://www.ecb.europa.eu/pub/pdf/other/prudentialsupcbrole\\_en.pdf](https://www.ecb.europa.eu/pub/pdf/other/prudentialsupcbrole_en.pdf), accessed 01 December 2017, p. 8.

<sup>416</sup> See Jacques de Larosière, L. Balcerowicz, O. Issing et al., *The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière—Report* (Brussels, 2009).

<sup>417</sup> See Smits, *The European Central Bank* (above, n. 405), p. 335-337.

<sup>418</sup> See Helmut Siekmann, *The Legal Framework for the European System of Central Banks*, White Paper No. 26 (2015).

<sup>419</sup> Rosa María Lastra, 'Reflections on Banking Union, lender of last resort and supervisory discretion', in *ECB Legal Conference 2015*, pp. 154-173.

<sup>420</sup> See Padoa-Schioppa, *EMU and banking supervision* (above, n. 404).

<sup>421</sup> This amendment procedure requires an intergovernmental conference, ratification by national parliaments, sometimes even a national referendum.

In 2012, political agreement was reached on the need to elevate the responsibility for banking supervision to the European level. Despite the existence of alternative constitutional bases for the creation of supranational structures governing EU financial supervision, it was decided to resort to the “sleeping beauty clause” encapsulated in Article 127(6) of the TFEU which explicitly authorizes the conferral of Member States’ supervisory competences upon the Union, but limits the institutional choice exclusively to the ECB.

Among other constitutional possibilities allowing creating new EU supervisory regime one can point out at a possible recourse to indirect Treaty basis in the form encapsulated in Article 114 of the TFEU (“internal market clause”). This option was however ruled out since adoption of individual supervisory measures may entail elements of policy judgment going far beyond a mere legal or technical assessment of facts based on objective criteria and therefore would be prohibited in the light of the “Meroni Doctrine”.

To set the SSM in motion, a special act of general application (SSM Regulation,)<sup>422</sup> which rests on the constitutional authorisation provided by Article 127(6) of TFEU, was adopted by the Council. It confers upon the ECB a number of “*specific tasks concerning policies relating to the prudential supervision of credit institutions, with a view to contributing to the safety and soundness of credit institutions and the stability*

---

<sup>422</sup> 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: SSM Regulation’ (above, n. 72).

of the financial system within the Union (...).<sup>423</sup> Since Article 127(6) of the TFEU solely regulates procedural aspects related to the conferral of banking supervisory competences upon the ECB, substantive aspects of the conferral had to be set out by a Council legal act. In this sense, the SSM Regulation can be regarded as a basic act of the new supranational supervisory regime, which is at the top of legal framework governing the SSM and which provides a “constitutional” basis for the adoption of subsequent legal instruments regulating the functioning of the SSM administrative system, such as *inter alia* already mentioned the SSM Framework Regulation,<sup>424</sup> the ECB Regulation ECB/2015/13,<sup>425</sup> or the ECB Regulation ECB/2016/4.<sup>426</sup>

The SSM Regulation, although forming a single act of Union law, does not however establish a single administrative arrangement. As pointed out above, the SSM supervisory framework exhibits a deeply pluralistic nature and distinguishes two distinct administrative arrangements.<sup>427</sup> The first one, the subsystem of SSM Direct Supervision, applies to these credit institutions which are considered as significant in accordance with the specific quantitative and qualitative criteria (“significance criteria”). Those criteria include: (i) size,<sup>428</sup> (ii) economic importance,<sup>429</sup> (iii)

---

<sup>423</sup> See Article 1 of SSM Regulation.

<sup>424</sup> See ‘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): SSM Framework Regulation’ (above, n. 73).

<sup>425</sup> See ‘Regulation (EU) 2015/534 of the ECB of 17 March 2015 on reporting of supervisory financial information (ECB/2015/13)’ (above, n. 74).

<sup>426</sup> See ‘Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4)’ (above, n. 74).

<sup>427</sup> See Figure 2 Case study table.

<sup>428</sup> According to the methodology provided in the 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 GDP of the

significance of cross-border activities,<sup>430</sup> (iv) receiving public financial assistance,<sup>431</sup> and (v) being among the three most important banks in local jurisdiction.<sup>432</sup> The second arrangement, the subsystem of SSM Indirect Supervision, applies to those credit institutions which do not fulfill one of the significance criteria and are therefore considered as less significant.<sup>433</sup>

### 6.3. Allocation of supervisory responsibilities within the SSM

The second element that is instrumental in the analysis of the organisational design of EU multilevel administration concerns the internal allocation of administrative responsibilities between the higher and lower level actors. To generate particular legal consequences upon an individual that result from the pursuit of particular administrative tasks, an organ of a public administration needs to be attributed a corresponding competence to do so. In the EU context, the question related to

---

participating Member State of establishment exceeding 20 %, unless the total value of its assets is below EUR 5 billion.

<sup>429</sup> According to the methodology provided in the Article 6(4) of the SSM Regulation, this criterion is understood as importance for the economy of the Union or any participating Member State.

<sup>430</sup> According to the methodology provided in the 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 methodology sets this criterion as the total value of its assets exceeds €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%.

<sup>431</sup> According to the methodology provided in the 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 EFSF or the ESM. They shall not be considered less significant.

<sup>432</sup> According to the methodology provided in the Article 6(4) of the SSM Regulation, this criterion is an obligation for 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.

<sup>433</sup> See Article 6(7) of the SSM Regulation: (...) national competent authorities shall carry out and be responsible for the tasks referred to in points (b), (d) to (g) and (i) of Article 4(1) and adopting all relevant supervisory decisions with regard to the credit institutions referred to in the first subparagraph of paragraph 4 of this Article, within the framework and subject to the procedures referred to in paragraph 7 of this Article.

distribution of tasks and competences becomes even more relevant since it sets the extent, to which traditional Westphalian state administrative monopoly to influence legal status of an individual within their territory may be limited or complemented by administrative activities of supranational regulatory structures.

### 6.3.1. The exercise of administrative tasks in the SSM

Within the Single Supervisory Mechanism, administrative responsibilities of public administration are related to a specific area of public policy: “prudential supervision of credit institutions”.<sup>434</sup> The SSM Regulation contains however no definition of what “prudential supervision” entails. Instead, it includes a list of key prudential supervisory tasks that may be considered as the core activity of any prudential supervisor.<sup>435</sup> According to Article 4(1) of the SSM Regulation, the following (micro-prudential) supervisory tasks have been conferred upon the ECB (“SSM supervisory tasks”):

- (1) Granting and withdrawal of authorisation of a credit institution;<sup>436</sup>
- (2) Supervision of cross-border entities;<sup>437</sup>
- (3) Assessment of changes in the shareholder structure of supervised entities;<sup>438</sup>

---

<sup>434</sup> See Article 1 of the SSM Regulation: This Regulation confers on the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions (...). ”.

<sup>435</sup> See; Wymeersch, ‘The Single Supervisory Mechanism or ‘SSM’, Part One of the Banking Union’ (above, n. 407), p. 13.

<sup>436</sup> See Article 4(1)(a) of the SSM Regulation: to authorize credit institutions and to withdraw authorizations of credit institutions subject to Article 14. This task stems from the Articles 8-18 and 21 of the CRDIV.

<sup>437</sup> 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 shall have under the relevant Union law. This task stems from the Articles 35 and 39 of the CRDIV.



- (4) Ensuring the compliance of supervised entities with key micro-prudential requirements;<sup>439</sup>
- (5) Ensuring the compliance of supervised entities with other micro-prudential requirements;<sup>440</sup>
- (6) Conduct of supervisory reviews (“Supervisory Review and Evaluation Processes”, SREPs) and stress tests on supervisees;<sup>441</sup>
- (7) Supervision of banking groups on a consolidated basis;<sup>442</sup>
- (8) Supplementary supervision of financial conglomerates;<sup>443</sup>

---

<sup>438</sup> 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 the Articles 22-27 of the CRDIV.

<sup>439</sup> 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, securitization, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters. Accordingly, the obligation to ensure compliance with own funds (capital) requirements and securitization stems from the Articles 25-386 and 404-410 of the CRR; the obligation to ensure compliance with limits on large exposures stems from the Articles 387-403 of CRR; the obligation to ensure compliance with liquidity requirements stems from the Articles 411-426 of CRR; the obligation to ensure compliance with public disclosure of information on these matters (Pillar 3) stems from the Articles 431-455 of the CRR.

<sup>440</sup> 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 the Articles 74-75 and 88-96 of the CRDIV; the obligation to ensure effective ICAAP stems from the Articles 76-87 of the CRDIV.

<sup>441</sup> See Article 4(1)(f) of the SSM Regulation: (f) to carry out supervisory reviews, including where appropriate in coordination with EBA, 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 the Articles 97-101 of the CRDIV. The imposition of ad hoc additional requirements is governed by the Articles 102-107 of the CRDIV.

<sup>442</sup> 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 national competent authorities in those colleges as observers, in relation to parents not established in one of the participating Member State. This obligation stems from the Articles 111-118 of the CRDIV.

<sup>443</sup> 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 the Directive 2002/87/EC.

(9) “Leaning against the resolution” of supervised entities.<sup>444</sup>

The abovementioned supervisory tasks are carried out vis-à-vis “credit institutions” in the meaning of Union law,<sup>445</sup> and two categories of holding companies: “financial holding companies”<sup>446</sup> (in the context of consolidated supervision of banking groups) and “mixed financial holding companies”<sup>447</sup> (in the context of supplementary supervision of financial conglomerates).<sup>448</sup> 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” in the meaning of the SSM Regulation.

Prudential supervision of financial market participants other than credit institutions is out of the SSM jurisdictional remit and remains exclusively under national responsibility, in spite of the fact that some of participants may be of systemic relevance to banking system. This notably includes financial institutions such as

---

<sup>444</sup> See Article 4(1)(i) of 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 the Articles 5-9 of the BRRD. Early intervention measures available to competent supervisors are governed by the Articles 27-30 of the BRRD.

<sup>445</sup> 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”.

<sup>446</sup> See Article 4(1)(g)(h) of the SSM Regulation. According to Article 4 point 19 of the Directive 2006/48/EC, 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.

<sup>447</sup> See Article 4(1)(g)(h) of the SSM Regulation. According to Article 2 point 15 of the Directive 2002/87/EC, 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.

<sup>448</sup> 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 the Directive 2002/87/EC.

leasing, factoring and credit companies, central counterparties,<sup>449</sup> payment institutions,<sup>450</sup> investment firms,<sup>451</sup> or UCITS management companies.<sup>452</sup> It should be noted that Article 127(6) of the TFEU does not however exclude the possibility of transferring the prudential supervision of the abovementioned entities to the ECB in the future since it also refers to “other” financial institutions. This would however be subject to the Council’s approval. The only explicit restriction concerns insurance undertakings,<sup>453</sup> over which the ECB is constitutionally banned from assuming supervisory tasks. Therefore, without the Treaty change, it would be impossible to submit all financial institutions under the SSM supervisory jurisdiction.

Although the foregoing tasks can be considered as pertaining to the core of prudential supervision, they cannot be regarded as the exhaustive list of all prudential tasks. It therefore follows that they might be areas of prudential supervision of credit institutions which have not been conferred upon the ECB, which remain within the remit of national competence. In this respect, the SSM Regulation lists a number of prudential supervisory tasks regarding credit

---

<sup>449</sup> See Article 1 of the SSM Regulation, second paragraph. Central counterparty is a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer. See Article 2(1) of the Regulation (EU) No 648/2012 (“EMIR”).

<sup>450</sup> Payment institution is a legal person that has been granted authorization to provide and execute payment serviced across the EU. See Article 4 para 4 of the Directive 2007/64/EC.

<sup>451</sup> An investment firm is any legal person whose regular occupation or business is the provision of one or more ‘investment services’ to third parties, and/or the performance of one or more ‘investment activities’ on a professional basis. In turn, ‘investment services and activities’ are defined as meaning any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I of the MiFID I. See Article 4 par. 1 point 1 of the Directive 2004/39/EC.

<sup>452</sup> UCITS is an undertaking (i) with the sole object of collective investment in transferable securities or in other liquid financial assets of capital raised from the public and which operates on the principle of risk-spreading, and with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings’ assets. See Article 2 par. 1 point(b) of the Directive 2009/65/EC.

<sup>453</sup> An insurance undertaking is a direct life or non-life insurance undertaking which has received official authorization in accordance with Article 6 of the Directive 73/239/EEC or Article 6 of the Directive 79/267/EEC.

institutions, which remain within the exclusive competence of the NCAs (non-SSM supervisory tasks) regardless of their significance status. They include:<sup>454</sup>

- (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;<sup>455</sup>
- (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;
- (8) Ensuring consumer protection.

It follows that the micro-prudential supervision within the SSM is governed by the principle of conferral which fulfills a twofold role: firstly, it sets the legal boundaries for the Union's action in the field of micro-prudential supervision and, secondly, it provides foundations for the legitimate exercise of competences by the Union in relation to supervised entities. Moreover, the attribution to the ECB of overwhelming, but not exhaustive number of tasks concerning prudential

---

<sup>454</sup> See, indicatively, Recital (25) of the SSM Regulation which lists a number of supervisory tasks not conferred on the ECB that should remain with the national authorities.

<sup>455</sup> Importantly, this includes specialized French financial institutions which under national law may be considered credit institutions without receiving deposits from public.

supervision of credit institutions follows also the principles of proportionality, which sets the scope and depth of conferral to the extent necessary to achieve the objectives set by the SSM Regulation. This is in line with an approach that the distribution of tasks and competences between EU and national level in specific policy field is usually better organized on a case-by-case basis in light of the political, economic and social factors of a sector at stake.<sup>456</sup> Lastly, the implementation of supervisory tasks in the SSM is underpinned by the principle of decentralization. This is reflected in the regime established by Articles 6(4)-(6) of the SSM Regulation delineating the personal scope of supervised entities, over which the ECB exercises its supervisory tasks directly (SSM Direct Supervision); over which the exercise of the ECB's supervisory tasks is legislatively attributed to the NCAs but under the ECB oversight (SSM Indirect Supervision).

The first arrangement, the subsystem of SSM Direct Supervision, applies to credit institutions established in any of participating Member States that are classified as significant in accordance with the criteria laid down in Article 6(4) of the SSM Regulation. For this group of entities, the ECB is exclusively competent to carry out all SSM supervisory tasks listed in the Article 4(1) of the SSM Regulation.<sup>457</sup> Although the ECB is exclusively responsible and accountable for the exercise of these tasks, the

---

<sup>456</sup> See Miroslava Scholten and Annetje Ottow, 'Institutional Design of Enforcement in the EU: The Case of Financial Markets', *Utrecht Law Review* 10, no. 5 (2014): pp. 80–91 (p. 91).

<sup>457</sup> See *supra* n. 436–447.

NCAAs remain responsible for assisting the ECB in the preparation and implementation of any supervisory acts related to them.<sup>458</sup>

The second arrangement, the subsystem of SSM Indirect Supervision, applies to credit institutions established in any of participating Member States deemed less significant. For this group of entities, the NCAs are legislatively attributed the responsibility to carry out supervisory tasks conferred upon the ECB that are listed in Article 4(1) of the SSM Regulation,<sup>459</sup> with three notable exceptions: (i) granting and (ii) withdrawal of authorisation of a credit institution,<sup>460</sup> and (iii) assessments of changes in the shareholder's structure of a supervised institution.<sup>461</sup> 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 involvement of NCAs in the preparatory work ("common procedures" regime).<sup>462</sup> The reminder of SSM supervisory tasks in relation to less significant institutions is carried out by the NCAs under (multi-dimensional) oversight of the ECB.<sup>463</sup> The exercise of other supervisory tasks vis-à-vis, both significant and less significant, supervised entities which were

---

<sup>458</sup> See Article 6(3) of the SSM Regulation.

<sup>459</sup> See Article 6(4) of the SSM Regulation: "In relation to the tasks defined in Article 4 except for points (a) and (c) of paragraph 1 thereof, the ECB shall have the responsibilities set out in paragraph 5 of this Article and the national competent authorities shall have the responsibilities set out in paragraph 6 of this Article, within the framework and subject to the procedures referred to in paragraph 7 of this Article".

<sup>460</sup> See *supra* n.436.

<sup>461</sup> See *supra* n. 438.

<sup>462</sup> For the applicable regime, see Article 14- 15 of the SSM Regulation.

<sup>463</sup> See Article 6(5)(b) of the SSM Regulation.

not conferred upon the ECB,<sup>464</sup> remains within a competence of the relevant national authorities.<sup>465</sup>

### 6.3.2. The exercise of administrative competences in the SSM

To carry out their supervisory tasks and responsibilities, both the ECB and NCAs need to be attributed relevant powers (competences) which would make them capable of adopting acts producing legal consequences vis-à-vis supervised entities. Although the terms of powers and competences are often used interchangeably, they are not conceptually equivalent. Whereas the notion of power refers to capability of a public actor (government, administrative authority) to pursue public policies and is considered as an attribute of a State, the competence expresses the idea of limits and designates the “scope of application of power, and not the power itself”.<sup>466</sup> 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.<sup>467</sup> Since the Union is not a State, the exercise of the exercise of any “power” attributed to it needs to follow the principle of conferral stating that it “shall act only within the limits of the competences conferred upon it”.<sup>468</sup>

Another aspect which needs to be highlighted is a divide between the Union’s regulatory and supervisory competences related to prudential policies. Prior to the

---

<sup>464</sup> See *supra* n.454.

<sup>465</sup> See Article 1 of the SSM Regulation: This Regulation is without prejudice to the responsibilities and related powers of the competent authorities of the participating Member States to carry out supervisory tasks not conferred on the ECB by this Regulation.

<sup>466</sup> See Combacau, J. (2005) ‘Conclusions generales’ in *Les compétences de l’Etat en droit International*, Colloque de Rennes 2005, Paris: Pedone, p. 308.

<sup>467</sup> See Beaud, ‘The Allocation of Competences in a Federation—A General Introduction’ (above, n.90), p. 31.

<sup>468</sup> See Article 5(2) of the TEU.

crisis, it was widely accepted that regulation and supervision is closely interrelated that practically form two sides of the same coin. Given the elusive nature of both terms, they were often used (and are still being used by some commentators)<sup>469</sup> interchangeably.<sup>470</sup> Even today, competent authorities are sometimes referred to as bank regulators and sometimes as bank supervisors. However, during the crisis, attempts to formally distinguish both activities were undertaken. As the de Larosière report pointed out:

*“Regulation is the set of rules and standards that govern financial institutions; their main objective is to foster financial stability and to protect the customers of financial services. Regulation can take different forms, ranging from information requirements to strict measures such as capital requirements. On the other hand, supervision is the process designed to oversee financial institutions in order to ensure that rules and standards are properly applied. This being said, in practice, regulation and supervision are intertwined (...).”*<sup>471</sup>

The abovementioned differentiation equates regulation to rule-making and supervision to the implementation (application and enforcement) of these rules. The main reason for this was to ensure the applicability of a single set of common banking rules (the Single Rulebook) to all credit institutions in EU Members States

---

<sup>469</sup> Notably in the Anglo-American legal scholarship. Here, regulation refers to the exercise of control or direct government intervention into an otherwise autonomous sphere of the market and is frequently opposed to competition. For an overview, see for example, Stephen G. Breyer, *Regulation and its Reform* (Harvard University Press, 2009).

<sup>470</sup> See Rosa María Lastra, *International financial and monetary law* (Oxford University Press, 2015), p. 112.

<sup>471</sup> See Larosière et al., *The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière—Report* (above, n. 416), para 38.



in order to avoid regulatory fragmentation and maintain institutional balance between EU institutions, agencies and bodies which gained new regulatory and supervisory competences over banking sector. Notwithstanding these attempts to provide more conceptual clarity by introducing objective-based differentiation between both concepts, the borders between them remain rather blurred in terms of the actual effects on the conduct of market participants operating in the banking sector. Both the regulation (rule-making) and the supervision (application of these rules) may entail direct or indirect supervisory consequences<sup>472</sup> and sometimes the *vice versa*.<sup>473</sup> Nevertheless, when analyzing the exercise of competences in the SSM, this section will distinguish between their regulatory and supervisory type.

### 6.3.3. In particular: the exercise of administrative regulatory competences in the SSM

The actual scope of the ECB's regulatory competence to set the rules for banking market participants has been debated in the academic literature, primarily in relation to the horizontal distribution of powers between different supranational actors.<sup>474</sup> It has been envisaged that the assignment to the ECB general rulemaking powers would upset the institutional balance with the European Commission and with the EBA, and would introduce a new non-level playing field within the EU since

---

<sup>472</sup> To illustrate this relation, consider provisions introducing options and national discretions with explicitly defined procedures regarding their exercise. These procedures may have an effect on established supervisory practices of competent authorities which by definition belong to the supervisory dimension of their activities.

<sup>473</sup> To illustrate this relation, consider internal handbooks issued by competent authorities on how to apply certain provisions of applicable banking regulation (i.a. setting procedures, conditions, methodologies and other specifications which institute a certain interpretation of these provisions in a given jurisdiction).

<sup>474</sup> See Danny Busch and Guido Ferrarini, *The European Banking Union* (Oxford: Oxford University Press, 2015).

the outreach of the SSM jurisdiction does not cover the entire Single Market.<sup>475</sup> That is why the SSM Regulation emphasizes that the ECB is bound by EU-wide rules when carrying out its supervisory tasks. To this end, the ECB is obliged to apply relevant Union law<sup>476</sup>, in particular legal acts which constitute the Single Rulebook for banking services, such as EU binding legislative acts (notably Regulation and Directives).<sup>477</sup> As the Union cannot bypass the Member States in the transposition of Directives,<sup>478</sup> the ECB has to apply national legislation transposing those Directives.<sup>479</sup> This rule has been formulated by jurisprudence of the CJEU and is known as the prohibition on horizontal direct effect of directives.<sup>480</sup> Furthermore, the ECB also applies delegated and implementing acts of the European Commission<sup>481</sup> based on draft technical standards developed by the EBA in accordance with the Articles 10-15 of the EBA Regulation (Level 2 acts),<sup>482</sup> as well as

---

<sup>475</sup> See Wymeersch, 'The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union' (above, n.407), pp.12-13.

<sup>476</sup> See Article 4(3) of the SSM Regulation: For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options (...)"

<sup>477</sup> See Article 289 of the TFEU.

<sup>478</sup> Notably, even when a provision of a directive is clear and sufficiently precise and constitutes the condition for direct applicability (in line with the case law of the CJEU). See Judgment of 19 January 1982, Case C-8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* EU:C:1982:7, para 25.

<sup>479</sup> For these reasons, national law provisions implementing directives governing prudential supervision of credit institutions shall be also considered as a part of "relevant Union law" in this context.

<sup>480</sup> See Judgment of 26 February 1986, Case C-152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* EU:C:1986:84, para 48.

<sup>481</sup> See Article 290 and 291 of the TFEU.

<sup>482</sup> See 'Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC: (EBA Regulation)', in *OJ L 331, 15.12.2010*.

guidelines and recommendations of the EBA based on the Article 16 of the EBA Regulation (Level 3 acts).

(i) Regulatory powers in the subsystem of SSM Direct Supervision

To efficiently and consistently apply the Single Rulebook to supervised entities, the ECB may issue different legal instruments,<sup>483</sup> including binding legal acts of general application, such as Regulations albeit limited to the extent necessary in order to organize or specify the modalities for carrying out its supervisory tasks.<sup>484</sup> These legal acts ought to be issued in conformity with the Single Rulebook legislation, as well the EBA Single Supervisory Handbook.<sup>485</sup> The question essentially lies on whether the ECB's competence to adopt directly applicable Regulations is restricted to purely organisational arrangements for the carrying out of the tasks conferred on the ECB under the SSM Regulation, or can be functionally extended to ensure that "Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner".<sup>486</sup> Under Article 132 of the TFEU, the ECB is empowered to "make regulations to the extent necessary to implement", among others, the tasks concerning policies related to prudential supervision.<sup>487</sup> Seen from this perspective, some authors have interpreted that the notion of policies

---

<sup>483</sup> Including Decisions (individual or without addresses) pursuant to Article 4(3) of the SSM Regulation, second subpara; as well as Guidelines pursuant to Article 12(1) of the ECB/ESCB Statute and Recommendations pursuant to Article 132 par. 1 of the TFEU in conjunction with the Article 34 of the ECB/ESCB Statute (Protocol No. (4) to the Treaties on the Statute of the European System of Central Banks and of the European Central Bank).

<sup>484</sup> See Article 4(3) of the SSM Regulation.

<sup>485</sup> According to Article 1 of the EBA Regulation, the EBA has a task to develop and maintain up to date (...) a European supervisory handbook on the supervision of financial institutions in the Union as a whole, which sets out supervisory best practices for methodologies and processes.

<sup>486</sup> See Recital (11) of the SSM Regulation.

<sup>487</sup> See Article 25 (2) of the ESCB/ECB Statute.

could “no doubt include some rule-making powers in the areas of prudential supervision that the Council could very well specify in its mandate to the ECB when grounding the SSM”.<sup>488</sup>

The issue whether the ECB can also engage in *regulatory supervision* of credit institutions became very sensitive in the context of the exercise of so-called options and national discretions (ONDs) granted to competent authorities by European and national supervisory legislation. In particular, the Level 1 acts (notably the CRR and the CRDIV) and the Level 2 acts (delegated and implementing acts issued by the Commission), which form the Single Rulebook, contain a high number of material provisions which allow either to choose from alternative treatments for supervised institutions (“options”) or not to apply certain provisions (“discretions”) to their supervision.<sup>489</sup> Such room for maneuver was left to Member States and their competent supervisors by the EU legislators partly to facilitate the transition to a new regulatory regime (Basel III) and to accommodate existing diverging domestic regulatory and supervisory approaches.<sup>490</sup> The national exercise of ONDs creates significant discrepancies in the way the relevant Union law is applied nationally

---

<sup>488</sup> See Guido A. Ferrarini, ‘Single Supervision and the Governance of Banking Markets’, *ECGI-Law Working Paper*, no. 294 (2015), p. 33.

<sup>489</sup> ONDs affect every part of the prudential framework and range from the progressive phase-in of new standards and definitions to more permanent exemptions from the general rules. They can have a general, jurisdiction-specific outreach, or require a case-by-case assessment based on individual requests by banks – such is the case of capital or liquidity waivers for instance. See Danièle Nouy, *Introductory statement: Second ordinary hearing in 2015 of the Chair of the ECB’s Supervisory Board at the European Parliament’s Economic and Monetary Affairs Committee* (Brussels, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151019.en.html>, accessed 01 December 2017.

<sup>490</sup> See Ignazio Angeloni, *Exchange of views on supervisory issues with the Finance and Treasury Committee of the Senate of the Republic of Italy* (Rome, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150623.en.html>, accessed 01 December 2017.

since in extreme scenario 19 different national banking acts varying from a word-by-word transposition of European norms to national gold-plating could persist.<sup>491</sup> In such a situation, it could become impossible for a single supranational supervisor (ECB) to ensure equal treatment of credit institutions and consistent supervisory approach, which would impede basic objectives of the Banking Union.<sup>492</sup>

For these reasons, it might be argued that the ECB enjoys *implicit* regulatory powers to formulate common policies for credit institutions operating in participating Member States, including harmonization of supervisory approaches and perspectives which also go beyond options and national discretions. Such an understanding would be based on the functional interpretation which relies on the inseparability of supervisory and regulatory powers in the context of pursuing objectives of the Banking Union and could be supported by a joint reading of Articles 127(6), 132 of the TFEU and Recital 34 of the SSM Regulation.<sup>493</sup>

## (ii) Regulatory powers in the subsystem of SSM Indirect Supervision

In addition, the ECB has been attributed specific regulatory powers to set the rules related to the functioning of the subsystem of SSM Indirect Supervision. For the

---

<sup>491</sup> See Sabine Lautenschläger, *Looking ahead - Closing Remarks at the ECB Forum on Banking Supervision: Closing remarks at the SSM Banking Supervision Forum* (Frankfurt, 2015), [https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151104\\_1.en.html](https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151104_1.en.html), accessed 01 December 2017.

<sup>492</sup> It should be clearly recognized that inconsistent application of national discretions, especially when leading to cross-border discrepancies in the level and the quality of capital, increases the potential reliance of banks on external support in certain constituencies relative to others. In this context, see *inter alia* Recital (12) of the SSM Regulation (coherent and effective supervision), Article 1 of the SSM Regulation (equal treatment of credit institutions with a view to preventing regulatory arbitrage).

<sup>493</sup> See Marco Lamandini, David Ramos Muñoz, and Javier Solana, 'Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection', *Quaderni di Ricerca Giuridica*, no. 79 (2015): pp. 1–119.

purpose of ensuring the consistency of supervisory outcomes in the SSM, Article 6(5)(a) of the SSM Regulation provides the ECB with a possibility to issue binding regulations, guidelines and general instructions to the NCAs which may relate to the performance of supervisory tasks and to the adoption of supervisory decisions by them. In this respect, the ECB may undertake regulatory action covering such areas of prudential supervision of less significant institutions, as supervision of cross-border entities, ensuring the compliance of a supervised institution with micro-prudential requirements provided by the Single Rulebook (for example: own funds (capital) requirements and securitization, liquidity requirements, leverage, public disclosure, robust governance arrangements, internal capital and liquidity adequacy assessment processes, conducting of supervisory reviews (SREPs), stress tests, supervision of banking groups on a consolidated basis, supplementary supervision of financial conglomerates, recovery planning of a credit institution and early intervening. In particular, the ECB can issue general instructions to NCAs concerning groups or categories of credit institutions focusing on the way how supervisory decisions on LSIs are adopted.<sup>494</sup> This may cover such aspects as capital requirements, restoring general compliance with supervisory requirements, business model, risk profile, liquidity requirements, governance, disclosure requirements as well as removal of managers.

Crucially, to achieve level playing field in the SSM, the ECB's powers to regulate the supervisory regime governing the subsystem of SSM Indirect Supervision should be

---

<sup>494</sup> *A contrario*, the ECB cannot instruct the NCAs on the supervision of individual institutions.

regarded as instrumental to ensure that the options and discretions for competent authorities as provided in relevant Union law and national laws transposing directives are applied consistent both amongst LSIs and between SIs and LSIs. Diverging exercise of ONDs by the ECB and NCAs across the SSM could jeopardize level playing field for both groups of institutions. Ultimately, inconsistent application of ONDs across the SSM could potentially impact on the comparability of prudential requirements across credit institutions. As a result, gauging the overall capital adequacy and compliance with prudential requirement by credit institutions would prove to be difficult for market participants and the general public.<sup>495</sup>

#### 6.3.4. In particular: the exercise of administrative supervisory competences in the SSM

In the micro-prudential sense, supervision is a process which starts with the entry on the banking market of an individual entity to the termination of its banking activities, either caused ordinary (e.g. mergers, discontinuation of the banking business, lapsing of authorisation) or extraordinary circumstances (e.g. resolution, insolvency). It can be understood a continuous process, which consists of four stages: (1) entity's entry into banking market, (2) supervision *stricto sensu* over entity,<sup>496</sup> (3) sanctioning and imposition of penalties on an entity in case of its non-

---

<sup>495</sup> See European Central Bank, *Public consultation on a draft Guideline and Recommendation of the ECB on the exercise of options and discretions available in Union law for less significant institutions: Explanatory Memorandum* (November), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/ond\\_lsi/ond\\_lsi\\_em.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/ond_lsi/ond_lsi_em.en.pdf), accessed 01 December 2017; see also Informal interview with N (03 November 2016) in *Annex*.

<sup>496</sup> Understood in terms of the oversight over banks' conduct (in particular risks monitoring, asset quality, capital adequacy, liquidity, governance). It has a forward-looking dimension in the sense that at this stage, a supervisor can impose the measures if discovers a likeness possibility of any non-compliance with prudential requirements in the foreseeable future.

compliance with prudential requirements, and finally (4) crisis management, including possible resolution or liquidation of an entity.<sup>497</sup> In the SSM, the ECB (either directly or indirectly via the NCAs) is exclusively competent to carry out specific supervisory tasks laid down in Article 4(1) of the SSM Regulation for each of these stages of the supervisory process. These tasks are carried out primarily on a case-by-case basis in a preventive and forward-looking manner, aiming not only at ensuring that individual supervised entities meet the formal requirements stipulated in the relevant Union law, but ultimately to ensure their safety and soundness and the stability of the financial system within the Union and each Member State.<sup>498</sup>

Relevant Union law attributes to competent authorities a range of supervisory powers to intervene in the activity of credit institutions which are necessary to carry out their tasks<sup>499</sup> and which cover monitoring and enforcement of applicable banking rules vis-à-vis their supervisees. The scope of powers conferred upon the ECB as a bank supervisor is regulated primarily by the SSM Regulation. In this respect, it provides that “the ECB should have appropriate supervisory powers (...) and should have the powers conferred upon competent authorities by Union law (...)”<sup>500</sup> in order to carry out supervisory tasks conferred upon it. To large extent, these supervisory powers mirror the powers prior attributed under the CRR/CRDIV

---

<sup>497</sup> See Lastra, *International financial and monetary law* (above, n.470), p. 115.

<sup>498</sup> See Article 1(1) of the SSM Regulation.

<sup>499</sup> See Article 64(1) of the CRDIV in conjunction with Article 2 of the CRR. The former provides that “competent authorities shall be given all supervisory powers to intervene in the activity of institutions that are necessary for the exercise of their function, including in particular the right to withdraw an authorization in accordance (...) and the powers set out in Articles 104 and 105” whereas the latter extends it ensuring compliance with CRR (“for the purposes of ensuring compliance with this Regulation, competent authorities shall have the powers and shall follow the procedures set out in Directive 2013/36/EU”).

<sup>500</sup> See Recital 45 of the SSM Regulation.



framework to the competent authorities of the Member States. In this respect, Member States are instructed to grant their competent authorities a specified set of “at least the following powers”<sup>501</sup> and the powers “at least in respect of”<sup>502</sup> in their national transpositions of the CRDIV. It may therefore occur that in some jurisdictions national law goes beyond the minimum requirements stipulated in the CRDIV and attributes to competent authorities broader administrative supervisory powers.

The ECB does not however exercise all its supervisory powers listed in the SSM Regulation directly over all credit institutions, despite the fact that it became exclusively competent to carry out specific supervisory tasks laid down in Article 4(1) of that Regulation. Firstly, in the fulfillment of the supervisory tasks conferred upon the ECB and under the ECB’s oversight,<sup>503</sup> the NCAs continue to exercise their supervisory powers of competent authorities in relation to less significant institutions.<sup>504</sup> They are legislatively authorized to do so as long as the ECB has not decided to “exercise directly itself all the relevant powers for one or more” less significant credit institutions.<sup>505</sup> Secondly, it remains unclear whether the ECB is competent to make use of the supervisory powers attributed to competent

---

<sup>501</sup> In this respect, see for example Article 104 of the CRDIV.

<sup>502</sup> In this respect, see for example Article 66 of the CRDIV.

<sup>503</sup> See Article 6(5)(c) of the SSM Regulation: the ECB shall exercise oversight over the functioning of the system, based on the responsibilities and procedures set out in this Article (...).

<sup>504</sup> By virtue of Article 6(6) of the SSM Regulation, but with exception to the tasks related to authorizations and approvals (“common procedures”).

<sup>505</sup> See Article 6(5)(c) of the SSM Regulation. Furthermore, it remains unclear whether the ECB is competent to make use of the supervisory powers attributed to competent authorities by national law that are not explicitly required by the minimum set listed in the CRDIV.

authorities by national law that are not explicitly required by the minimum set listed in the CRDIV.

To better understand power dynamics in the SSM, the following sections will analyze supervisory competences available to the ECB and NCAs to carry out their respective supervisory responsibilities over credit institutions operating in participating Member States. Following the understanding of micro-prudential supervision a process, the following subsections look at the exercise of competences within the SSM that relate to the guardianship of the banking market's access (authorisations and approvals powers); to the supervision *stricto sensu* that include the use of investigatory and early intervention powers; and to the use of sanctioning and enforcement powers vis-à-vis supervised entities.

### (iii) Authorisations and approvals in SSM (common procedures regime)<sup>506</sup>

The SSM Regulation established a special supervisory regime – “common procedures” – that governs the “birth, maturity and death” of credit institutions. It covers to the following three supervisory activities: (i) granting of a bank license to entities willing to operate on the banking markets (“authorisations”),<sup>507</sup> (ii) managing the exit of credit institutions from banking markets irrespective of a cause (“withdrawals of authorisations”)<sup>508</sup> and (iii) approving significant changes in banks’

---

<sup>506</sup> It is noted that this subsection does not cover approvals related to fit and proper assessments. This is due to the fact it not a separate competence under SSM Regulation, but rather stems from national transpositions of the CRDIV.

<sup>507</sup> See Article 4(a) of the SSM Regulation: “to authorize credit institutions and to withdraw authorizations of credit institutions subject to Article 14”.

<sup>508</sup> Ibid.

shareholding structures (“acquisitions of qualifying holdings”).<sup>509</sup> In those three foregoing cases, the ECB is exclusively competent to adopt supervisory decisions in relation to both significant and less significant institutions and the principle of differentiated supervision reflected by the division between SSM Direct and Indirect Supervision does not apply. Instead, a two-stage procedure that involves contribution from both national and supranational supervisory apparatus is foreseen.

The reason why licensing (authorizing) a bank requires direct supranational involvement in the Banking Union stems from the fact that it is the first and crucial step in the supervisory process. Since the funding of EU economy predominantly relies on banks, it is of the utmost importance to ensure that only such entities which have viable and sustainable business models enter into the banking business. To limit the possibility of an easier access to the European Single Market for banking services resulting from possible supervisory leniency in certain domestic jurisdictions, applicable procedures ought to be rule-based<sup>510</sup> with the conditions maximally harmonized across different Member States. This is of particular importance since credit institutions incorporated in one Member State may also operate in other Member States based on the freedom of establishment and freedom to provide cross-border services (the single passport). In the SSM, the licensing process begins when an NCA acknowledges the receipt of a request for the

---

<sup>509</sup> See Article 4(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”.

<sup>510</sup> See Lastra, *International financial and monetary law* (above, n.470), *Ibid.* p. 116.

authorisation from the applicant. It subsequently assesses whether the applicant complies with all conditions of authorisation as provided by national transpositions of the relevant CRDIV provisions<sup>511</sup> which include: the entry capital requirements,<sup>512</sup> the programme of activities (i.e. business plan) and an internal organization that will be able to manage the implementation of the business plan,<sup>513</sup> the existence of effective leadership of the business and suitability,<sup>514</sup> the existence of a link between the activities and the Member State where the license is to be granted,<sup>515</sup> the suitability of a management body,<sup>516</sup> the suitability of significant shareholders,<sup>517</sup> the absence of close links with other legal or natural persons which would prevent effective supervision<sup>518</sup> as well as membership in the deposit guarantee scheme.<sup>519</sup>

Having initially assessed a licensing application, the NCAs have two options. If the applicant does not comply with the CRDIV requirements for obtaining the authorisation laid down in national banking laws, the NCA can autonomously decide to reject the application and close authorisation procedure at this stage<sup>520</sup> and without submitting it to the ECB.<sup>521</sup> If the applicant does comply with the

---

<sup>511</sup> See Articles 8-21 of the CRDIV.

<sup>512</sup> See Article 12 of the CRDIV.

<sup>513</sup> See Article 10 of the CRDIV.

<sup>514</sup> See Article 13(1) of the CRDIV.

<sup>515</sup> See Article 13(2) of the CRDIV.

<sup>516</sup> Ibid.

<sup>517</sup> See Article 14 of the CRDIV.

<sup>518</sup> See Article 14(3) of the CRDIV.

<sup>519</sup> See Article 4(3) of the DGSD ('Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes', in *OJ L 173*, 12.6.2014).

<sup>520</sup> See Article 15 of the CRDIV.

<sup>521</sup> See Laura Wissink, Ton Duijkersloot, and Rob Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', *ULR 10*, no. 5 (2014): pp. 92-115, p. 96).

authorisation requirements, the NCA prepares a draft authorisation decision proposing to grant a bank license and submits in to the ECB in line with the deadline set in applicable laws. The NCA may also propose to attach recommendations, conditions and restrictions imposing additional requirements in accordance with national and EU law.

A significant supranational involvement is also foreseen in the context of subsequent expansion, mergers or other transformations of credit institutions. In the Banking Union, only suitable entities - whether natural or legal persons - can be allowed to hold significant stakes (“qualifying holdings”) in credit institutions in order to promote public trust in banking system and prevent any disruptions to the smooth functioning of the banking system. Common procedures related to acquisitions of qualifying holdings go through the same two-stage process since they also constitute a form of (secondary) entry in the banking market.

In those cases, the NCAs serve as a point of entry for the notifications and they conduct initial assessment of the applicants based on the harmonized criteria set out in national transpositions of the CRDIV that include the reputation of the acquirer,<sup>522</sup> suitability of management bodies which will direct the business of a credit institution as a result of the acquisition,<sup>523</sup> financial soundness of the

---

<sup>522</sup> See Article 23(1)(a) of the CRDIV: the reputation of the proposed acquirer.

<sup>523</sup> See Article 23(1)(b) of the CRDIV: the reputation, knowledge, skills and experience, as set out in Article 91(1), of any member of the management body and any member of senior management who will direct the business of the credit institution as a result of the proposed acquisition.

acquirer,<sup>524</sup> ability to comply with relevant prudential requirements by the credit institution,<sup>525</sup> money laundering and terrorist financing issues.<sup>526</sup> The national stage of qualifying holding assessment is finished when the NCAs prepare a draft decision whether to oppose or not to oppose to the acquisition of a qualifying holding that is subsequently submitted to the ECB. In the second stage, the ECB evaluates the assessment conducted by the NCAs in accordance with relevant requirements of applicable Union law and makes final supervisory decisions.

The common procedures regime constitutes “a mix of advisory and decisive roles for both national and EU authorities” governed by the “four eyes principle” in a sense supranational supervisors double-check the assessment prepared by their national counterparts. As such may be regarded as an example of “mixed banking supervisory process in the SSM”.<sup>527</sup>

---

<sup>524</sup> See Article 23(1)(c) of the CRDIV: the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the credit institution in which the acquisition is proposed.

<sup>525</sup> See Article 23(1)(d) of the CRDIV: whether the credit institution will be able to comply and continue to comply with the prudential requirements based on this Directive and the CRR, and where applicable, other Union law, in particular Directives 2002/87/EC and 2009/110/EC, including whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities.

<sup>526</sup> See Article 23(1)(e) of the CRDIV: whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

<sup>527</sup> See Wissink, Duijkersloot and Widdershoven, ‘Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection’ (above, n.521), p. 97.

#### (iv) Investigations in the SSM

It has been widely recognized in political economy literature that there exists an information gap between the banks and the supervisors.<sup>528</sup> The information submitted by supervised entities in the context of their standard reporting requirements (for example, via standardized templates or supervisory dialogue) may not necessarily always be sufficient for supervisors to adequately and comprehensively assess intrinsic risks faced by individual entities from an unbiased supervisory perspective, or to detect potential breaches of the applicable prudential requirements.

Another twist to this inherent information asymmetry can be added when banking supervision is arranged in multilevel regime, in which a central supervisor relies on the supervisory information transmitted by local supervisor. This may further complicate the flow of information between the supervisees and the ultimate supervisor due to the emergence of agency problems between the central and local supervisor.<sup>529</sup> Therefore, it is imperative that (central) supervisors have at their disposal a set of investigatory powers which allow them to obtain additional information directly from the supervised entities. In order to carry supervisory tasks conferred upon the ECB by the SSM Regulation, the ECB and NCAs are attributed a

---

<sup>528</sup> See Schüler, 'Incentive Problems in Banking Supervision-The European Case' (above, n. 124); Edward J. Kane, 'The evolving US legislative agenda in banking and finance', in *Regulation and Supervision of Financial Institutions in the NAFTA Countries and Beyond* (Springer, 1997), pp. 180–193.

<sup>529</sup> See, for example, Howarth, Quaglia and Gren, 'Supranational banking supervision in Europe: The construction of a credible watchdog' (above, n. 394) Carletti, Dell'Ariccia and Marquez, 'Supervisory incentives in a banking union' (above, n.362); Tröger, 'The Single Supervisory Mechanism–Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement' (above, n.396).

set of investigatory powers which they may use directly in relation to significant and less significant institutions subject to the constraints instituted by the principle of differentiated supervision.

- Investigatory powers in the subsystem of SSM Direct Supervision

To overcome information asymmetries and agency problems in respect to significant supervised entities, the SSM Regulation grants the ECB three types of investigatory competences: (i) the power to request information,<sup>530</sup> (ii) the power to conduct investigations,<sup>531</sup> and (iii) the power to conduct on-site inspections.<sup>532</sup> At the lowest level of intrusiveness, the ECB may request credit institutions, financial holding companies and mixed financial holding companies established in participating Member States as well as persons “belonging” to these entities<sup>533</sup> to provide all information necessary to carry out its tasks. These requests may cover both *ad hoc* information and information “at recurring intervals” and “in specified formats” for supervisory and related statistical purposes.<sup>534</sup> All the above listed addresses have a duty to provide the information requested to the ECB, and such a provision is not deemed to be in breach of professional secrecy.<sup>535</sup> This investigatory power is exercised in line with procedures stipulated in the SSM Framework Regulation involving cooperation with the NCAs.

---

<sup>530</sup> See Article 10 of the SSM Regulation.

<sup>531</sup> See Article 11 of the SSM Regulation.

<sup>532</sup> See Article 12 of the SSM Regulation.

<sup>533</sup> This also includes third parties with whom these entities formed outsourcing agreements.

<sup>534</sup> See Article 10(1) of the SSM Regulation.

<sup>535</sup> See Article 10(2) of the SSM Regulation in conjunction with Article 53 of the CRDIV.



The ECB's power to conduct investigations can be regarded as a next step on the level of investigatory intrusiveness. When information requests turn out to be insufficient to effectively to carry out its tasks, the ECB has the power to conduct all necessary investigations. During these investigations, the ECB may require to submit documents examine the books and records and take copies or extracts therefrom, obtain written or oral explanations from these persons or their representatives or staff and to interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.<sup>536</sup> It is important to note that any investigations needs to be conducted on the basis of an ECB formal decision,<sup>537</sup> which has to specify legal basis and its purpose, the ECB's intention to exercise the powers to conduct investigations, and the fact that any obstruction of the investigation by the person being investigated constituted a breach of an ECB decision (Union law) and may be penalized.<sup>538</sup> In case an obstruction occurs, the competent national supervisor (NCA) is obliged to provide the "necessary assistance" to the ECB, including facilitating the access to the business premises of the entity under investigation.<sup>539</sup>

Finally, the ECB has the power to conduct on-site inspections which may be regarded as the most intrusive investigatory power available. Subject to prior notification to the national competent authorities concerned, it may conduct all

---

<sup>536</sup> See Article 11(1) of the SSM Regulation.

<sup>537</sup> See Article 11(2) of the SSM Regulation.

<sup>538</sup> See Article 142 of the SSM Framework Regulation.

<sup>539</sup> Ibid.

necessary on-site inspections at the business premises of supervised entities and any other undertaking included in consolidated supervision.<sup>540</sup> Similarly as in the case of exercising power to conduct investigations, initiating on-site inspections has to be based on an ECB formal decision.<sup>541</sup> If deemed necessary for the proper conduct and efficiency of an onsite inspection, the ECB does not to announce its willingness to carry out such an inspection to the entity concerned.<sup>542</sup> The officials and other personnel authorized by the ECB may enter any business premises and land of entities subject to the ECB decision launching an on-site inspection, and they enjoy all the powers with regard to general investigations.<sup>543</sup> Where an on-site inspection requires judicial authorisation, the ECB has to apply for it. In such cases, national court has to review the authenticity of an ECB decision regarding an on-site inspection, as well as proportionality and suitability of the envisaged coercive measures.<sup>544</sup> While conducting its review, national court may request the ECB to provide more detailed explanations however is not allowed to rule on the necessity of an on-site inspection since ECB decisions as acts of Union law are subject to review only by the CJEU.<sup>545</sup>

---

<sup>540</sup> As well as subsidiaries in non-participating Member States in the cases where the ECB is consolidating supervisor.

<sup>541</sup> See Article 12(3) of the SSM Regulation.

<sup>542</sup> See Article 12 (1) of the SSM Regulation.

<sup>543</sup> As stipulated by the Article 11(1) of the SSM Regulation.

<sup>544</sup> See Article 12(2) of the SSM Regulation.

<sup>545</sup> See Article 13(2) of the SSM Regulation.

- Investigatory powers in the subsystem of SSM Indirect Supervision

To address exposure to information asymmetries concerning the supervision of less significant supervised entities, under the CRDIV the NCAs are granted the exactly the same set of competences as the SSM Regulation attributes to the ECB. The fact that the SSM Regulation mirrors the CRDIV is necessary to ensure the equal treatment of credit institutions operating within the Single Market. It would be at odds with the objectives of ensuring level playing field if one EU supervisor had more investigatory instruments than another one. However, the CRDIV – like the SSM Regulation – also requires making use of any administrative powers vis-à-vis supervised entities in “effective, proportionate and dissuasive” way.<sup>546</sup>

Accordingly the NCAs can make use of all the investigatory powers vis-à-vis institutions under their supervisory remit in the same manner as the ECB vis-à-vis those under its supervisory jurisdiction. This includes the power to request information also covers ad hoc information and information “at recurring intervals” and “in specified formats” for “supervisory and related statistical purposes” from institutions established financial holding companies and mixed financial holding companies established in the Member State concerned as well as persons belonging to this entities and third parties which were outsourced operational functions or activities.<sup>547</sup> The NCAs are also empowered to conduct all necessary investigations vis-à-vis supervised entities which may requests for the submission of documents,<sup>548</sup>

---

<sup>546</sup> See Article 65 (1) of the CRDIV, last sentence.

<sup>547</sup> See Article 65(3)(a)(i-vi) of the CRDIV.

<sup>548</sup> See Article 65(3)(b)(i) of the CRDIV: the right to require the submission of documents.

examinations of the books and records and taking copies or extracts from such books and records,<sup>549</sup> obtaining written or oral explanations,<sup>550</sup> and conducting interviews.<sup>551</sup> Lastly, the NCAs may also conduct all necessary inspections at the business premises of the supervised entities.<sup>552</sup> In jurisdictions where an onsite inspection requires judicial authorisation, the NCAs are obligated to apply for it in advance.<sup>553</sup>

The allocation of investigatory powers within the subsystem of SSM Indirect Supervision displays some particularities. Article 6(5)(d) of the SSM Regulation provides that the ECB may at any time make use of its investigatory powers in relation to less significant institutions, without a necessity of its prior decision to “exercise directly itself all the relevant powers for one or more less significant credit institutions”<sup>554</sup> (takeover clause). This suggests the ECB may directly use its investigatory powers vis-à-vis all credit institutions operating in participating Member States, notwithstanding the principle of differentiated supervision laid down in Article 6(6) of the SSM Regulation. Therefore, the use of investigatory powers in the subsystem of SSM Indirect Supervision could be regarded to some

---

<sup>549</sup> See Article 65(3)(b)(ii) of the CRDIV: to examine the books and records of the supervised entities and take copies or extracts from such books and records.

<sup>550</sup> See Article 65(3)(b)(iii) of the CRDIV: to obtain written or oral explanations from supervised entities or their representatives or staff.

<sup>551</sup> See Article 65(3)(b)(iv) of the CRDIV: to interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.

<sup>552</sup> See Article 65(3)(c) of the CRDIV the power, subject to other conditions set out in Union law, to conduct all necessary inspections at the business premises of the supervised entities and any other undertaking included in consolidated supervision where a competent authority is the consolidating supervisor (...).

<sup>553</sup> Ibid., last sentence: if an inspection requires authorization by a judicial authority under national law, such authorization shall be applied for.

<sup>554</sup> See Article 6(5)(b) of the SSM Regulation.

extent as the example of concurring competences between the Member States and the Union since both the NCAs and the ECB – as the competent authorities – are authorized to exercise them in respect of less significant institutions.

(v) Early supervisory interventions in the SSM

Despite the fact that banks main role is to generate profits for their shareholders, it is widely recognized that they are different from other profit-seeking undertakings due to their important role in payments and financial systems, and the real economy. For these reasons, they require tougher supervision than other financial markets participants.<sup>555</sup> In this context, it is important that the authorities responsible for banking supervision have at their disposal appropriate tools to effectively monitor prudential situation of individual credit institutions. However, competent authorities can also be subject to regulatory capture and apply their supervisory powers more leniently in order to favor their national banking champions.<sup>556</sup> The EU banking crisis demonstrated that in some European jurisdictions it was indeed the case.<sup>557</sup>

As noted by the Commission's experts, the existence of different national systems of supervision has led to the inconsistent use of supervisory powers across Member

---

<sup>555</sup> See Lastra, *International financial and monetary law* (above, n. 470), p.117.

<sup>556</sup> See European Commission, *Commission Staff Working Paper Impact Assessment: Proposal for a Directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (...)*, SEC/2011/0952 final, p. 113-114.

<sup>557</sup> See i.a. Larosi re et al., *The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosi re—Report* (above, n. 416).

States that resulted in regulatory competition and supervisory capture.<sup>558</sup> Thus, in order to enhance the European supervisory framework, the CRR/CRDIV framework introduced more consistent supervisory toolkit to be used by national supervisors and set the conditions for their activation. In this respect, the SSM Regulation attributed accordingly supervisory powers, provided to national supervisors in the CRDIV, to the ECB which may use them directly vis-à-vis institutions under its direct supervision. Following the principle of differentiated supervision, the NCAs may make use of the supervisory powers assigned to them by the CRDIV when carrying out the ECB's supervisory tasks in relation to less significant institutions.

- Early intervention powers in the subsystem of SSM Direct Supervision

Article 16(2) of the SSM Regulation<sup>559</sup> provides the ECB with recourse to a comprehensive set of supervisory powers whose exercise is however constrained by the occurrence of one of the following conditions. In particular, when a supervised entity does not meet prudential requirements provided in relevant Union law; or when the ECB has evidence that a supervised entity may breach these requirements within next 12 months; as well as when “the arrangements, strategies, processes and mechanisms implemented by the credit institution and the own funds and liquidity held by it do not ensure a sound management and coverage of its risks”, the ECB is competent to impose the following intervention measures concerning:

---

<sup>558</sup> See European Commission, *Commission Staff Working Paper Impact Assessment: Proposal for a Directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (...)* (above, n. 556), p. 107.

<sup>559</sup> The scope of supervisory powers assigned to the ECB mirrors the scope of powers assigned to national competent authorities by virtue of Article 104 of the CRDIV.

- (1) Capital requirements of a significant supervised entity;<sup>560</sup>
- (2) Restoring general compliance of a significant supervised entity with supervisory requirements;<sup>561</sup>
- (3) Business model of a significant supervised entity;<sup>562</sup>
- (4) Risk profile of a significant supervised entity;<sup>563</sup>
- (5) Liquidity requirements of a significant supervised entity;<sup>564</sup>
- (6) Governance of a significant supervised entity;<sup>565</sup>
- (7) Disclosure requirements of a significant supervised entity;<sup>566</sup>
- (8) Removal of managers of a significant supervised entity.<sup>567</sup>

---

<sup>560</sup> Four measures can be identified: (1) to require institutions to hold own funds in excess of the capital requirements (...) related to elements of risks and risks not covered by the relevant Union acts (Article 16(2)(a) of the SSM Regulation); (2) to require institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements (Article 16(2)(d) of the SSM Regulation); (3) to require institutions to use net profits to strengthen own funds (Article 16(2)(h) of the SSM Regulation); (4) to restrict or prohibit distributions by the institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution (Article 16(2)(i) of the SSM Regulation).

<sup>561</sup> Two measures can be identified: (1) to require institutions to present a plan to restore compliance with supervisory requirements pursuant to the acts referred to in the first subparagraph of Article 4(3) and set a deadline for its implementation, including improvements to that plan regarding scope and deadline (Article 16(2)(c) of the SSM Regulation); (2) to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions (Article 16(2)(j) of the SSM Regulation).

<sup>562</sup> One measure can be identified: to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution (Article 16(2)(e) of the SSM Regulation).

<sup>563</sup> One measure can be identified: to require the reduction of the risk inherent in the activities, products and systems of institutions (Article 16(2)(f) of the SSM Regulation).

<sup>564</sup> One measure can be identified: to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities (Article 16(2)(k) of the SSM Regulation).

<sup>565</sup> Two measures can be identified: (1) to require the reinforcement of the arrangements, processes, mechanisms and strategies (Article 16(2)(b) of the SSM Regulation); (2) to require institutions to limit variable remuneration as a percentage of net revenues when it is inconsistent with the maintenance of a sound capital base (Article 16(2)(g) of the SSM Regulation).

<sup>566</sup> One measure can be identified: to require additional disclosures (Article 16(2)(l) of the SSM Regulation).

In addition, a number of intervention powers were granted to the ECB by the EU legislation governing resolution of credit institutions. The ECB as a competent supervisor is involved in the precautionary stage of the resolution process (pre-resolution) which relate to the assessment of recovery plans presented by credit institutions,<sup>568</sup> and may take measures to address their deficiencies.<sup>569</sup> The purpose of recovery planning is to prepare measures to restore viability and address fragilities of a significant institution, in cases it comes under severe stress or experiences a significant financial deterioration. Recovery plans are submitted by significant supervised entities on a yearly basis, or after a significant change to the presumptions of the previous recovery plan.<sup>570</sup> They should not assume any access to or receipt of extraordinary public financial support,<sup>571</sup> such as an ESM financial assistance. The assessment of these plans should take into account their completeness, quality and credibility and should also determine the adequacy of the measures foreseen by recovery plans.

Lastly, under the BRRD, the ECB as a competent authority is granted more specific early intervention powers<sup>572</sup> which can be used vis-à-vis supervised entities in extraordinary cases where, for example due to rapidly deteriorating financial

---

<sup>567</sup> One measure can be identified: to remove at any time members from the management body of credit institutions who do not fulfil the requirements set out in the acts referred to in the first subparagraph of Article 4(3) (Article 16(2)(m) of the SSM Regulation).

<sup>568</sup> See Article 6(6) subpar 3 of the BRRD which recommends to use supervisory measures related to capital and liquidity requirements, governance of a supervised entity in the context of recovery plans assessment and implementation.

<sup>569</sup> See Article 6(5) and (6) of the BRRD.

<sup>570</sup> See Article 5(2) of the BRRD.

<sup>571</sup> See Article 5(3) of the BRRD.

<sup>572</sup> See Article 27-28 of the BRRD.



conditions, they infringe or are likely to infringe prudential requirements laid down in relevant Union law (notably the CRR/CRDIV legislation), including quantitative thresholds of the institution's own funds requirements plus 1.5 percentage points.<sup>573</sup> These powers are consistent with the supervisory powers conferred upon it by the SSM Regulation and complement in one aspect: a possibility to install one or more temporary administrators in a supervised entity, who either replace the management body of the institution temporarily or work temporarily with the management body of the institution.<sup>574</sup>

- Early intervention powers in the subsystem of SSM Indirect Supervision

To exercise the ECB's supervisory tasks listed in the Article 4(1) of the SSM Regulation vis-à-vis less significant institutions, Article 104 of the CRDIV attributes to the NCAs a range of intervention powers that corresponds to the powers conferred upon the ECB by Article 16(2) of the SSM Regulation.<sup>575</sup> The NCAs may exercise them in relation to less significant institutions subject to similar conditions imposed upon the ECB. They include measures related to:

(1) Capital requirements of a less significant supervised entity;<sup>576</sup>

---

<sup>573</sup> See Article 27(1) of the BRRD.

<sup>574</sup> See Article 29 of the BRRD.

<sup>575</sup> With a notable exception of a possibility to remove a manager, the scope of the early intervention measures provided for the NCAs is identical to the scope of the measures which were attributed to the ECB.

<sup>576</sup> Four measures can be identified: (1) to require institutions to hold own funds in excess of the capital requirements (...) related to elements of risks and risks not covered by the relevant Union acts (Article 104(1)(a) of the CRDIV); (2) to require institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements (Article 104(1)(d) of the CRDIV); (3) to require institutions to use net profits to strengthen own funds (Article 104(1)(h) of the CRDIV); (4) to restrict or prohibit distributions by the institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution (Article 104 (1)(i) of the CRDIV).

- (2) Restoring general compliance of a less significant supervised entity with supervisory requirements;<sup>577</sup>
- (3) Business model of a less significant supervised entity;<sup>578</sup>
- (4) Risk profile of a less significant supervised entity;<sup>579</sup>
- (5) Liquidity requirements of a less significant supervised entity;<sup>580</sup>
- (6) Governance of a less significant supervised entity;<sup>581</sup>
- (7) Disclosure requirements of a less significant supervised entity.<sup>582</sup>

In addition, a number of administrative powers have been granted to the NCAs as competent authorities by the EU legislation governing resolution of credit institutions. The NCAs are involved in the precautionary stage of the resolution process (pre-resolution) of less significant institutions. This includes such supervisory activities as the assessment of recovery plans presented by credit

---

<sup>577</sup> Two measures can be identified: (1) to require institutions to present a plan to restore compliance with supervisory requirements pursuant to this Directive and to the CRR and set a deadline for its implementation, including improvements to that plan regarding scope and deadline (Article 104(1)(c) of the CRDIV); (2) to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions (Article 104(1)(j) of the CRDIV).

<sup>578</sup> One measure can be identified: to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution (Article 104(1)(e) of the CRDIV).

<sup>579</sup> One measure can be identified: to require the reduction of the risk inherent in the activities, products and systems of institutions (Article 104(1)(f) of the CRDIV).

<sup>580</sup> One measure can be identified: to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities (Article 104(1)(k) of the CRDIV).

<sup>581</sup> Two measures can be identified: (1) to require the reinforcement of the arrangements, processes, mechanisms and strategies (Article 104(1)(b) of the CRDIV); (2) to require institutions to limit variable remuneration as a percentage of net revenues when it is inconsistent with the maintenance of a sound capital base (Article 104(1)(g) of the CRDIV).

<sup>582</sup> One measure can be identified: to require additional disclosures (Article 104(1)(l) of the CRDIV).

institutions or undertaking appropriate measures to address their deficiencies.<sup>583</sup> Under the BRRD, the NCAs are also granted specific early intervention powers which can be used vis-à-vis supervised entities in extraordinary cases where, for example due rapidly deteriorating financial conditions, they infringe or are likely to infringe prudential requirements laid down in relevant Union law (notably the CRR/CRDIV legislation), including quantitative thresholds of the institution's own funds requirements plus 1.5 percentage points. These powers are consistent with the supervisory powers listed in Article 104 of the CRDIV and complement in two aspects: a possibility remove member of management boards,<sup>584</sup> and to install one or more temporary administrators in a supervised entity, who either replace the management body of the institution temporarily or work temporarily with the management body of the institution.<sup>585</sup>

It remains unclear whether the ECB could circumvent NCAs' responsibility to adopt supervisory decisions in the exercise of their respective supervisory powers in relation to less significant institutions, as attributed to them by Article 6(6) of the SSM Regulation, and apply its early intervention powers under Article 16(2) of the SSM Regulation directly in relation to LSIs. It appears that the SSM Regulation does not explicitly provide such a possibility as in the case of the use of the ECB's investigatory powers. Instead, Article 6(5)(a) of the SSM Regulation empowers the ECB to issue regulations, guidelines and general instructions to the NCAs which may

---

<sup>583</sup> On the content of recovery plans, see Article 5 of the BRRD.

<sup>584</sup> See Article 28 of the BRRD.

<sup>585</sup> See Article 29 of the BRRD.

regulate the ways how the NCAs should exercise their early intervention powers vis-à-vis less significant institutions. This arrangement suggests that the ECB cannot exercise directly its early intervention powers in the system of SSM Indirect Supervision unless it decides to “exercise directly all relevant powers” for one or more less significant institutions in accordance with the procedure set by Article 6(5)(c) of the SSM Regulation.

#### (vi) Sanctions and enforcement in the SSM

The accomplishment of the aims set by banking and financial regulation, including notably public confidence in financial markets, is always dependent upon its effective enforcement.<sup>586</sup> In legal scholarship, there is a fine line between the concepts of application and enforcement of a legal act. Application of law refers to the responsibility of a public law body (such as a ministry or an independent administrative agency), whereas enforcement is the responsibility of a judicial authority.<sup>587</sup>

In complex and highly regulated areas of public policies such as banking supervision, this division becomes somewhat blurred and results in overlaps between the processes of application and enforcement of a legal act. In those cases, the enforcement of law cannot be easily detached from its application and is also a part of supervisory actions without the need for a court to endorse a certain

---

<sup>586</sup> See Lastra, *International financial and monetary law* (above, n.470), p. 120.

<sup>587</sup> See Asen Lefterov, *The Single Rulebook : legal issues and relevance in the SSM context*, ECB Legal Working Paper Series No 15 (Frankfurt, 2015), <https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp15.en.pdf>, accessed on December 2017, p. 23.

requirement.<sup>588</sup> This becomes particularly visible in cases when there is a need to punish a credit institution for its breaches of applicable prudential requirements, or to restore its compliance with applicable prudential regulation. Whereas sanctioning measures are characterized by their non-periodical and (predominantly) pecuniary nature intending and can only be applied once for individual cases; enforcement measures are characterized by their periodical and (sometimes) non-pecuniary nature and can be applied so long until non-compliance is evicted.

- Sanctioning powers in the subsystem of SSM Direct Supervision

To achieve the abovementioned objectives, Article 18 of the SSM Regulation attributes the ECB with autonomous sanctioning and enforcement powers vis-à-vis supervised entities without necessity to recourse for a judicial authorisation. Where the ECB considers that there is reason to suspect a significant supervised entity of a breach of regulatory requirements under directly applicable EU legal acts,<sup>589</sup> it has at its disposal two sanctioning options: either (i) to directly impose administrative pecuniary penalties on that entity,<sup>590</sup> or (ii) to ask NCAs to open sanctioning proceedings against that entity with an objective to impose non-pecuniary penalties foreseen by relevant national legislation.<sup>591</sup> Administrative pecuniary penalties imposed directly by the ECB can be of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10%

---

<sup>588</sup> Ibid.

<sup>589</sup> See Article 18(1) of the SSM Regulation.

<sup>590</sup> Ibid.

<sup>591</sup> See Article 134(1) of the SSM Framework Regulation.

of the total annual turnover of a legal person in the preceding business year or such other pecuniary penalties as may be provided for in relevant Union law.<sup>592</sup>

However, in a situation where there is a suspicion that natural persons representing supervised entities might have breached directly applicable EU legal acts, the ECB does not have any direct sanctioning powers vis-à-vis those natural persons, and is only empowered to ask NCAs to impose either pecuniary or non-pecuniary penalties on them.<sup>593</sup> The NCAs, acting on their own initiative, may ask the ECB to request them to open such proceedings.<sup>594</sup> The same regime applies to situations where the ECB considers that there exist reasons to suspect a breach of regulatory requirements under national rules transposing EU Directives, both with regard to supervised entities<sup>595</sup> and natural persons representing these entities.<sup>596</sup>

A specific sanctioning regime is foreseen when there is a suspicion that a supervised entity breached ECB legal acts,<sup>597</sup> notably its Regulations and Decisions. In these cases, the ECB may also impose fines and periodic penalty payments (PPPs) based on the provisions of the Council Regulation 2532/98.<sup>598</sup> Such a periodic penalty payment

---

<sup>592</sup> See Article 18(1) and (2) of the SSM Regulation.

<sup>593</sup> See Article 134 (1) of the SSM Framework Regulation.

<sup>594</sup> See Article 134 (2) of the SSM Framework Regulation.

<sup>595</sup> The ECB may ask NCAs to impose pecuniary penalties on supervised entities in line with Article 18(5) of the SSM Regulation and/or non-pecuniary penalties in line with Article 134(1) of the SSM Framework Regulation.

<sup>596</sup> The ECB may ask NCAs to impose pecuniary penalties on natural persons representing supervised entities in line with Article 18(5) of the SSM Regulation and/or non-pecuniary penalties in line with Article 134(1) of SSM Framework Regulation.

<sup>597</sup> See Article 18(7) of the SSM Regulation.

<sup>598</sup> See 'Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions', in *OJ L* 318, 27.11.1998 (amended in 2015 to adapt the ECB to its supervisory function), together with (supplementing) 'European Central Bank Regulation (EC) No 2157/1999 of 23 September 1999 on the powers of the European Central Bank to impose sanctions (ECB/1999/4)', in *OJ L* 264, 12.10.1999 (amended in 2014 to adapt the ECB to its supervisory function).

shall be effective and proportionate and is capped at 5% of the average daily turnover per day of infringement for a maximum period of six months.<sup>599</sup> Given their prolonged nature, they may be regarded as an enforcement measure despite of the fact the Council Regulation 2532/98 refers to them per sanctions. Theoretically, national enforcement measures vis-à-vis significant institutions should be also at the ECB's disposal, both directly and indirectly, by virtue of Article 9(1) of the SSM Regulation. Its second subparagraph attributes to it all the powers vis-à-vis significant supervised entities which national competent authorities enjoy under the relevant Union law, including national transposition of directives.<sup>600</sup> Notably, the CRDIV regulation confers upon the competent authorities certain enforcement competences, such as for example cease-and-desist orders.<sup>601</sup> Finally, its third subparagraph provides the ECB with the possibility to require, by way of instruction, national competent authorities to make use of their supervisory powers not conferred upon the ECB.<sup>602</sup> This legal basis could serve as a platform to take indirect enforcement measures by the ECB vis-à-vis significant supervised entities.

---

<sup>599</sup> See Article 4(1)(b) of the 'Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions' (above, n. 598).

<sup>600</sup> See Article 9(1) of the SSM Regulation, subpara 2 states that "for the exclusive purpose of carrying out the tasks conferred on it, the ECB shall have all the powers and obligations set out in this Regulation. It shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation (...)".

<sup>601</sup> See Article 66(2)(b) and 67(2)(b) of the CRDIV.

<sup>602</sup> See Article 9(1) of the SSM Regulation, subpar. 3: To the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers.

- Sanctioning powers in the subsystem of SSM Indirect Supervision

When it comes to the sanctioning of less significant institutions, the foundations of the applicable regime are primarily laid down in the CRDIV whose objective was not only to bring more consistency to the typology of supervisory powers allowing national supervisors to effectively oversee credit institutions, but also equip them with “sufficiently strict and convergent sanctioning powers”.<sup>603</sup>

Prior to the crisis, European banking sector was one of the areas where national sanctioning regimes were divergent and not always appropriate to ensure deterrence.<sup>604</sup> As already briefly mentioned,<sup>605</sup> the accomplishment of the aims set by banking and financial regulation, including notably public confidence in financial markets, is always dependent upon its effective enforcement which in the area of banking supervision cannot be easily detached from its application. This is explicitly manifested by such situations, in which there is a need to punish a credit institution for breaches of prudential requirements or to restore its compliance with applicable prudential regulation. Therefore, in order to strengthen European supervisory framework, it became of utmost importance to spell out certain key sanctioning powers in the EU law so that effective enforcement of the CRDIV regulatory package could be ensured across all the Member States.

---

<sup>603</sup> See European Commission, *Commission Staff Working Paper Impact Assessment: Proposal for a Directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (...)* (above, n.558), p. 3.

<sup>604</sup> Ibid.

<sup>605</sup> See *supra* subsection 6.3.4(vi) (with regard to sanctioning powers in the subsystem of SSM Direct Supervision).



Relevant Union law empowers the competent authorities to impose administrative pecuniary penalties, other administrative measures without necessity to recourse for a judicial authorisation. It is also without prejudice to criminal penalties defined in applicable national regulations.<sup>606</sup> The CRDIV envisages a minimum set of sanctioning powers which ought to be “effective, proportionate and dissuasive”,<sup>607</sup> and which should be imposed on supervised entities in event of a substantial non-compliance with applicable prudential requirements.<sup>608</sup> It obliges Member States lay down rules on administrative penalties and other administrative measures<sup>609</sup> as well as to retain the power to be able provide higher levels of sanctions.<sup>610</sup> Thus, it follows

---

<sup>606</sup> Notably, it was provided that in cases when the Member States decide not to lay down rules for administrative penalties for breaches which are subject to national criminal law they shall communicate to the Commission the relevant criminal law provisions.

<sup>607</sup> Ibid., last sentence.

<sup>608</sup> Among the examples of substantial non-compliance (derived from Article 70 of the CRDIV), one can find situations in which (i) an institution has obtained an authorization through false statements or any other irregular means; (ii) an institution, on becoming aware of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the applicable thresholds, fails to inform the competent authorities of those acquisitions or disposals (...); (iii) an institution listed on a regulated market (...) does not, at least annually, inform the competent authorities of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings (...); (iv) an institution fails to have in place governance arrangements required by the competent authorities(...); (v) an institution fails to report information or provides incomplete or inaccurate information on compliance with the obligation to meet own funds requirements (...); (vi) an institution fails to report or provides incomplete or inaccurate information with regard to specific reporting obligations laid down in the CRR; (vii) an institution fails to report information or provides incomplete or inaccurate information about a large exposure (...); (viii) an institution fails to report information or provides incomplete or inaccurate information on liquidity (...); (ix) institution fails to report information or provides incomplete or inaccurate information on the leverage ratio; (x) an institution repeatedly or persistently fails to hold liquid assets (...); (xi) an institution incurs an exposure in excess of the limits set out in the CRR (...);(xii) an institution is exposed to the credit risk of a securitization position without satisfying the conditions set out in the CRR; (xiii) an institution fails to disclose information or provides incomplete or inaccurate information (...); (xiv) an institution makes payments to holders of instruments included in the own funds of the institution (...) or in cases where such payments to holders of instruments included in own funds are prohibited; (xv) an institution is found liable for a serious breach of the national provisions adopted pursuant to the Directive 2005/60/EC; (xvi) an institution allows one or more persons not complying with the fit and proper requirement to become or remain a member of the management body.

<sup>609</sup> See Article 65(1) of the CRDIV, first sentence.

<sup>610</sup> See Recital (41) of the CRDIV.

that the applicable sanctions for breaches of applicable prudential regulations may possibly vary from to a jurisdiction to jurisdiction.<sup>611</sup>

The CRDIV provides a range of sanctioning measures, mainly of a non-periodical and pecuniary nature.<sup>612</sup> In particular, seven specific sanctioning instruments can be used by competent authorities that can be grouped into four categories. The first category encompasses sanctions of non-periodical and non-pecuniary nature, such as “naming-and-shaming” statements,<sup>613</sup> and cease-and-desist orders.<sup>614</sup> The second category of sanctions covers measures of non-periodical and pecuniary nature that comprise of administrative pecuniary penalties on supervised institutions,<sup>615</sup> administrative pecuniary penalties on natural persons belonging to those institutions,<sup>616</sup> as well as of special administrative pecuniary penalties.<sup>617</sup> The third category refers to sanctions of periodical and non-pecuniary nature that notably cover temporary bans against a member of the management body of a supervised

---

<sup>611</sup> In this context, as stipulated by recital (42) of the CRDIV, “this Directive should be without prejudice to any provisions in the law of Member States relating to criminal penalties”.

<sup>612</sup> As already explained, sanctioning measures are characterized by their non-periodical and (predominantly) pecuniary nature intending and can only be applied once for individual cases; enforcement measures are characterized by their periodical and (sometimes) non-pecuniary nature and can be applied so long until the non-compliance is evicted.

<sup>613</sup> See Article 67(2)(a) of the CRDIV: “a public statement which identifies the natural person, institution, financial holding company or mixed financial holding company responsible and the nature of the breach”.

<sup>614</sup> See Article 67(2)(b) of the CRDIV: “an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct”.

<sup>615</sup> See Article 67(2)(e) of the CRDIV: “in the case of a legal person, administrative pecuniary penalties of up to 10 % of the total annual net turnover including the gross income consisting of interest receivable and similar income, income from shares and other variable or fixed-yield securities, and commissions or fees receivable in accordance with Article 316 of the CRR of the undertaking in the preceding business year”.

<sup>616</sup> See Article 67(2)(f) of the CRDIV: “in the case of a natural person, administrative pecuniary penalties of up to EUR 5 000 000, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 17 July 2013”.

<sup>617</sup> See Article 67(2)(g) of the CRDIV: “administrative pecuniary penalties of up to twice the amount of the benefit derived from the breach where that benefit can be determined”.

institution.<sup>618</sup> The fourth group of sanctioning measures relates to exclusion from the banking market in a form of withdrawals of the authorisation of the institution.<sup>619</sup> To highlight the crucial importance of the entry into the banking markets, the CRDIV framework provides a detailed sanctioning regime for the breaches of prudential requirements related to authorisations of a credit institutions<sup>620</sup> and approvals of qualifying holdings.<sup>621</sup> For these purposes, the NCAs have recourse to “naming-and-shaming” statements,<sup>622</sup> cease-and-desist orders,<sup>623</sup> and various pecuniary sanctions.<sup>624</sup> In addition, they may also suspend voting rights of the shareholder(s).<sup>625</sup>

The imposition of any of the abovementioned sanctions needs to be carried out in a proportionate manner by competent authorities while taking into account all relevant circumstances.<sup>626</sup> Member States are also obliged to ensure the right of

---

<sup>618</sup> See Article 67(2)(d) of the CRDIV: “subject to Article 65(2), a temporary ban against a member of the institution’s management body or any other natural person, who is held responsible, from exercising functions in institutions”.

<sup>619</sup> See 67(2)(c) of the CRDIV: “in the case of an institution, withdrawal of the authorization of the institution in accordance with Article 18”.

<sup>620</sup> In particular, when the banking business is carried out by an institution which is not a credit institution (Article 66(1)(a) of the CRDIV) as well as when an institution commences banking activities without obtaining a license (Article 66(1)(b) of the CRDIV).

<sup>621</sup> In particular, when an acquisition or disposal of qualifying holding was not notified in accordance with relevant applicable prudential requirements (Article 66(1)(c)-(d) of the CRDIV).

<sup>622</sup> See Article 66(2)(a) of the CRDIV which mirrors Article 67(2)(a) of the CRDIV.

<sup>623</sup> See Article 66(2)(b) of the CRDIV which mirrors Article 67(2)(b) of the CRDIV.

<sup>624</sup> See Article 66(2)(c)-(e) of the CRDIV which mirrors Article 67(2)(e)-(g) of the CRDIV.

<sup>625</sup> See Article 66(2)(f) of the CRDIV which introduces a possibility of a suspension of the voting rights of the shareholder or shareholders held responsible for the breaches referred to announced in a ‘naming-and-shaming’ statement.

<sup>626</sup> According to Article 70(a)-(h) of the CRDIV, the relevant circumstances include: (i) the gravity and the duration of the breach, (ii) the degree of responsibility of the natural or legal person responsible for the breach, (iii) the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person, (iv) the importance of profits gained or losses avoided by the natural or legal person responsible for the breach, insofar as they can be determined, the losses for third parties caused by the breach, insofar as they can be determined, (v) the level of

judicial review of their sanctioning decisions.<sup>627</sup> Subject to professional secrecy requirements, they should be also published and notified to the EBA which shall maintain a central database on all sanctions imposed by competent authorities.<sup>628</sup> In addition, the ECB may also directly impose sanctions on the institutions supervised in the subsystem of SSM Indirect Supervision, but only where relevant ECB legal acts impose obligations on the less significant institutions vis-à-vis the ECB.

It therefore follows that the scope of sanctioning powers available for the NCAs under the CRDIV framework is broader than one directly attributed to the ECB by the SSM Regulation. It follows that the NCAs have recourse to a more comprehensive set of sanctioning toolbox than the ECB. The NCAs are empowered to impose sanctions both on supervised entities and persons belonging to those entities, whereas the ECB may directly sanction only supervised entities and only in case of a breach of directly applicable EU legal acts.<sup>629</sup> In the field of sanctioning competences, the NCAs still play a significant role and remain competent to impose sanctions available in under CRDIV regime also vis-à-vis entities directly supervised by the ECB.<sup>630</sup> To certain extent, such an allocation of sanctioning competences may

---

cooperation of the natural or legal person responsible for the breach with the competent authority, (vi) previous breaches by the natural or legal person responsible for the breach and finally (vii) any potential systemic consequences of the breach.

<sup>627</sup> See Article 72 of the CRDIV: “Member States shall ensure that decisions and measures taken pursuant to laws, regulations and administrative provisions adopted in accordance with this Directive or to Regulation (EU) No 575/2013 are subject to a right of appeal. Member States shall also ensure that failure to take a decision within six months of submission of an application for authorization which contains all the information required under the national provisions transposing this Directive, is subject to a right of appeal”.

<sup>628</sup> See Article 69 of the CRDIV.

<sup>629</sup> This also includes ECB Regulation and Decisions, which are however subjected to special regime.

<sup>630</sup> The ECB needs to ask an NCA concerned in cases when it finds appropriate to impose sanctions on natural persons for breaches of directly applicable EU legal acts as well as in cases of a breach of national transpositions of the CRDIV by both significant supervised entities and persons belonging to those entities.

occur problematic in terms of ensuring the equal treatment of credit institutions across in the Banking Union, and more broadly, across the Single Market.



Figure 7 Areas of supervisory decision-making competence in the SSM

#### 6.4. Administrative supervisory interactions within the SSM

The modalities of administrative interactions between the higher and lower level actors are considered to be the third element which influences the organisational design of a multilevel regime. The SSM Regulation provides that supervisory interactions between the ECB and the NCAs within the SSM are governed by three main principles: cooperation in good faith, exchange of information and NCA assistance to the ECB.<sup>631</sup> The SSM, as a multilevel regime, has been defined as “a

---

<sup>631</sup> See Articles 6(2) and (3) of the SSM Regulation.

system of financial supervision consisting of the ECB and NCAs of participating Member States”<sup>632</sup> which together with the Single Rulebook for banking services and new frameworks for banking resolution underpins the construction of the Banking Union.<sup>633</sup> The reference to the SSM as a system indicates that it cannot be qualified neither as an EU institution nor other EU body, but rather as an arrangement comprising of independent and, in the same time, interdependent, actors residing at different levels. Such a design was driven by a need to avoid setting up a new centralized EU bureaucracy and to upstream the aggregated benefits of local supervisory expertise towards supranational level. The SSM Regulation broadly characterizes the SSM by its objectives rather than its nature. It is expected to ensure that the Union’s supervisory is implemented in a coherent and effective manner on the basis of the Single Rulebook applicable across the entire Single Market and in line with the highest standards.<sup>634</sup> A layer of complexity to the SSM’s functioning is added by the principle of differentiated supervision set by Article 6(6) of the SSM Regulation which distinguishes two SSM supervisory (sub)systems: SSM Direct Supervision for significant institutions, and the system of SSM Indirect Supervision for less significant institutions.

---

<sup>632</sup> See Article 2(9) of the SSM Regulation.

<sup>633</sup> See Recital (11) of the SSM Regulation.

<sup>634</sup> See Recital (12) of the SSM Regulation: a single supervisory mechanism should ensure that the Union’s policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the Single Rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned, and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations.

Depending on the applicable SSM supervisory subsystem, supervisory interactions between the ECB and the NCAs are moderated in different ways as regards the participation in the supervisory process over individual institutions. The following subsection will analyze these supervisory interactions in both subsystems in relation to three main phases of the supervisory process: (i) the ongoing conduct of day-to-day supervisory activities which may lead to (ii) the adoption of a supervisory decision, and (iii) its subsequent implementation vis-à-vis supervised entity concerned where necessary.

#### 6.4.1. Interactions in the supervisory process of the subsystem of SSM Direct Supervision

Whereas the ECB centralizes the exclusive competence to adopt supervisory decisions (phase two) concerning significant supervised entities, the day-to-day supervision (phase one) and the implementation of ECB supervisory decisions (phase three where applicable) are decentralized and carried out “close to the ground”.<sup>635</sup> For the ECB, this implies a possibility to take recourse to the administrative capacities of the NCAs in order to benefit from their closer proximity to the supervised credit institutions.<sup>636</sup> The NCAs are responsible for assisting the ECB with the preparation and implementation of any acts concerning the exercise of

---

<sup>635</sup> See Tröger, ‘The Single Supervisory Mechanism–Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement’ (above, n.396), p. 470.

<sup>636</sup> The SSM Regulation explicitly recognizes that national supervisors have important and long-established expertise in the supervision of credit institutions within their territory and their economic, organisational and cultural specificities. It also mentions that there exists a large body of dedicated and highly qualified staff for those purposes at national level. See Recital (37) of the SSM Regulation, first sentence. See also Teixeira, ‘Europeanising prudential banking supervision. Legal foundations and implications for European integration’ (above, n. 125), pp. 558-560.

its supervisory tasks relating to all significant institutions. These responsibilities include such supervisory activities as the ongoing day-to-day assessment of a credit institution's situation and related on-site verifications, preparing of ECB draft decisions<sup>637</sup> (phase one of the supervisory process) as well as ensuring their effective enforcement, including the initiation of sanctioning proceedings upon the ECB requests where necessary (phase three of the supervisory process).<sup>638</sup>

Such an institutional arrangement however does not imply that the NCAs became a part to the ECB's internal structures. On the contrary, they will remain public administrative units of participating Member States and are governed by national rules in respect of their organization and functions. The way how national supervisory apparatus assists and remains closely involved in the supervision of significant institutions is primarily realized through the activities of so-called Joint Supervisory Teams (JSTs).

(i) Day-to-day supervision of significant institutions (phase one of the supervisory process)

JSTs are dedicated administrative structures responsible for the operational supervision of significant institutions.<sup>639</sup> By virtue of the SSM Regulation, each significant supervised entity is assigned to a specific JST.<sup>640</sup> A JST is composed by

---

<sup>637</sup> See Recitals (37) of the SSM Regulation and (3) of the SSM Framework Regulation.

<sup>638</sup> See Recital (36) of the SSM Regulation, last sentence.

<sup>639</sup> See Danièle Nouy, *Toward the European Banking Union: achievements and challenges: Speech at the OeNB Economics Conference* (Vienna, 2014), [https://www.bankingsupervision.europa.eu/press/speeches/date/2014/html/se140512\\_1.en.html](https://www.bankingsupervision.europa.eu/press/speeches/date/2014/html/se140512_1.en.html), accessed 01 December 2017.

<sup>640</sup> See Article 3(1) of the SSM Framework Regulation, first sentence.



supervisory apparatus originating from both the ECB and NCAs.<sup>641</sup> The vast majority of JST members are appointed by NCAs<sup>642</sup> who are however expected to work under functional management of a JST Coordinator appointed by the ECB from its staff members. The composition of a JST needs to take into account geographical diversity, specific expertise and profile of the team members,<sup>643</sup> as well as different types, business models and size of credit institution.<sup>644</sup> In particular, the size of JSTs may vary substantially depending on the scope of activities of credit institutions. The largest JSTs may even comprise of more than 70 members whereas the smallest one has only 5 members.<sup>645</sup> Therefore, for efficiency reasons, some JST members (including JST Coordinators) may be involved in work of more than a one JST.<sup>646</sup>

In order to minimize the possible risk of the supervisory capture, a JST Coordinator is initially appointed for three years and is expected to rotate on a regular basis.<sup>647</sup> The coordinator is supported by sub coordinators designated by the respective NCAs, who are usually also direct line managers of national supervisors assigned to a given JST by the NCAs. The sub coordinators are responsible for clearly defined

---

<sup>641</sup> See Article 3 of the SSM Framework Regulation, second sentence.

<sup>642</sup> See European Court of Auditors, *Single Supervisory Mechanism - Good start but further improvements needed* (above, n.13), p.127; Angeloni, *Exchange of views on supervisory issues with the Finance and Treasury Committee of the Senate of the Republic of Italy* (above, n.13).

<sup>643</sup> See Recital (79) of the SSM Regulation.

<sup>644</sup> See Article 1 of the SSM Regulation, third paragraph.

<sup>645</sup> See Andreas Dombret, *The first six months of European banking supervision - an NCA's perspective: Speech at the ILF (Institute for Law and Finance) Conference on the Banking Union* (Frankfurt, 2015), <http://www.bis.org/review/r150507b.htm>, accessed 01 December 2017.

<sup>646</sup> As noted by the ECB, some JST coordinators may be responsible for more than one JST. See European Central Bank, *SSM Quarterly Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation*, 2014/4, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmqr20144.en.pdf>, accessed 01 December 2017, p. 10.

<sup>647</sup> See European Central Bank, *Guide to banking supervision* (Frankfurt, 2014), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>, accessed 01 December 2017, p. 17.

thematic or geographic areas of supervision and represent the views of relevant NCAs in JSTs.<sup>648</sup> It follows that national supervisors are subject to two reporting lines: functionally their ultimate manager is a JST Coordinator, but organisationally they are accountable to their respective heads of divisions (who are also often JST sub coordinators).<sup>649</sup> The sub coordinator may also give instructions regarding the conduct of supervisory activities to the members of a JST appointed by his home NCA as long as they do not conflict with the instructions given by a JST Coordinator.<sup>650</sup>

The JSTs operate as remote administrative structures. Whereas the members of JST appointed by the ECB (JST Coordinator and ECB supervisors) are affiliated in one of the ECB's intermediate structure pertaining to its supervisory arm,<sup>651</sup> the members of JSTs appointed by the NCA(s) remain based at their headquarters. Given the distance between the supranational and national supervisory apparatus, it was decided that JSTs' workflow management and business process will be fully digitalized. For this purpose a special cyberinfrastructure, including the Information Management System (IMAS) was set up to provide JST members with secure communication channels.<sup>652</sup>

---

<sup>648</sup> Ibid.

<sup>649</sup> See Article 6(2) of the SSM Framework Regulation.

<sup>650</sup> Ibid, last sentence.

<sup>651</sup> At the moment, JSTs are group in fifteen divisions within the ECB's Directorate General Micro prudential Supervision I and Directorate General Micro prudential Supervision II. See Organigram of banking supervision at the ECB, available at <https://www.bankingsupervision.europa.eu/organisation/whoiswho/organigram/html/index.en.html>.

<sup>652</sup> See Ibid., p. 11.

Among the main day-to-day supervisory tasks of JSTs, one can list the following ones:

- (1) Performing the supervisory review and evaluation process (SREP);<sup>653</sup>
- (2) Preparation a supervisory examination programme (SEP), including yearly on-site inspection plan;<sup>654</sup>
- (3) Implementation of a supervisory examination programme (SEP);<sup>655</sup>
- (4) Coordination of on-site inspection teams in the context of inspection plans.<sup>656</sup>

The conduct of SREPs is considered to be the main tool of banking supervision<sup>657</sup> and thus it may be regarded as the primary supervisory responsibility of JSTs. It encompasses a wide range of supervisory activities carried out in order to determine the risk profile<sup>658</sup> of a credit institution, which are subject to a common methodology combining quantitative and qualitative elements in the overall assessment.<sup>659</sup> In doing so, JST supervisors analyze four main characteristics of each supervised institution<sup>660</sup>: its business model,<sup>661</sup> its internal governance and risk

---

<sup>653</sup> See Article 3 (2)(a) of the SSM Framework Regulation.

<sup>654</sup> See Article 3 (2)(b) of the SSM Framework Regulation.

<sup>655</sup> See Article 3 (2)(c) of the SSM Framework Regulation.

<sup>656</sup> See Article 3 (2)(d) of the SSM Framework Regulation.

<sup>657</sup> See Julie Dickson, *Dealing with diversity – the European banking sector: Speech at the 17th Handelsblatt Annual Conference on European Banking Regulation* (Frankfurt, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161128.en.html>, accessed 01 December 2017.

<sup>658</sup> The risk-based approach (Principle Six) is one of main guiding principles in the SSM. See European Central Bank, *Guide to banking supervision* (Frankfurt, 2014), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidetobankingssupervision201411.en.pdf>, accessed 01 December 2017, p. 8.

<sup>659</sup> See European Central Bank, *SSM SREP Methodology Booklet: 2016 edition* (2016), [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/srep\\_methodology\\_booklet\\_2016.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/srep_methodology_booklet_2016.en.pdf), accessed 01 December 2017, p. 2.

<sup>660</sup> Ibid., p. 14.

management,<sup>662</sup> its capital position and related risks,<sup>663</sup> and its liquidity and funding position and related risks.<sup>664</sup> The analysis of each element consists of three phases: data gathering, initial automated scoring and subsequent scoring based on supervisory judgement.<sup>665</sup>

The results of SREPs may require undertaking some preventing supervisory measures vis-à-vis individual institutions, notably the use of power to impose additional capital requirements (Pillar Two “add-ons”) by the ECB. For each supervised institution, the assigned JST drafts a SREP report. Importantly, the report states how much supervisory (Pillar Two) capital the bank should hold in addition to the required regulatory capital. In case there is a need for a capital add-on, a JST submits its proposal to the ECB’s Supervisory Board for a draft SREP decision, which is subsequently transmitted to the Governing Council in the non-objection procedure.<sup>666</sup>

---

<sup>661</sup> The assessment focuses on the viability (one year perspective), sustainability (two years perspective) and sustainability over the cycle (three years perspective) of the business model.

<sup>662</sup> The assessment focuses on the adequacy of governance and risk management.

<sup>663</sup> The assessment focuses on the risks to capital (e.g. credit, market, operational risk and IRRBB).

<sup>664</sup> The assessment focuses on the risks to liquidity and funding (e.g. short-term liquidity risk, funding sustainability).

<sup>665</sup> In this phase, the supervisors use their judgments to account for different business orientations and operational styles of a credit institution concerned. They are not however granted full flexibility. As such, their judgment is constrained in the following way: on a four-grade scale, phase 2 automated score can be improved by one notch and worsened by two notches. Ibid. p. 16.

<sup>666</sup> As a result of the SREP exercise for 2015, there was a moderate increase in the aggregate overall Pillar 2 requirements for significant institutions amounting to around 30 basis points as a ratio to risk-weighted assets and was quite diversified across banks. See Ignazio Angeloni, *Challenges facing the Single Supervisory Mechanism: Speech at De Nederlandsche Bank’s ‘Netherlands Day’* (Amsterdam, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161006.en.html>, accessed 01 December 2017.

From 2016 onwards, additional capital requirements imposed in ECB decisions on SREPs have two components: a binding Pillar 2 Requirement (P2R)<sup>667</sup> and a non-binding Pillar 2 Guidance (P2G).<sup>668</sup> To certain extent, this may be regarded as an element introducing more flexible supervisory expectations. While the P2R has an immediate effect and non-compliance with lead to the formal breach of capital requirements, failing to comply with the P2G will not entail such an effect, but trigger instead more intensified supervision and the imposition of institution-specific measures.<sup>669</sup> The JSTs may also set the liquidity requirements<sup>564</sup> for significant institutions as well as to propose to take additional, specially tailored measures choosing from the list of early intervention powers assigned to the ECB.

The SREP's outcomes are also used to plan the priorities for JSTs' supervisory activities concerning each credit institution over the following 12 to 18 months.<sup>670</sup> They are incorporated into individual Supervisory Examination Programmes (SEPs) which lay down the supervisory cycle and define the scope and intensity of future day-to-day supervisory activities for each bank aiming to monitor their risks and to address their weaknesses.<sup>671</sup>

---

<sup>667</sup> The level of supervisory capital set by P2R will have to be reached immediately and maintained all the time.

<sup>668</sup> The level of supervisory capital set by P2G will indicate to banks the adequate level of capital to be maintained over a longer horizon. A breach of P2G will not trigger automatic supervisory action, nor prevent the distribution of internal resources for dividends and bonuses. But it will trigger closer supervisory scrutiny and surveillance.

<sup>669</sup> See Danièle Nouy, *Introductory statement: First ordinary hearing in 2016 of the Chair of the ECB's Supervisory Board at the European Parliament's Economic and Monetary Affairs Committee* (2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160613.en.html>, accessed 01 December 2017.

<sup>670</sup> See European Central Bank, 'How does banking supervision work?', <https://www.bankingsupervision.europa.eu/banking/approach/cycle/html/index.en.html>, accessed 01 December 2017.

<sup>671</sup> On the recommended content of SEPs, see Article 99 of the CRDIV.

The imposition of supervisory measures foreseen by JSTs, both in individual SEPs and SREP reports, requires however the formal ECB's approval and cannot be executed at JST level. At this stage, the phase two of supervisory process is initiated and higher (supranational) level is primarily involved. The exclusive competence to adopt formal supervisory decisions on significant supervised entities is centralized in the ECB, which operates through its internal (the Supervisory Board) and decision-making bodies (the Governing Council).

(ii) *Adoption of supervisory decisions on significant institutions (phase two of the supervisory process)*

The adoption of formal supervisory decisions constitutes the phase two of the supervisory process. In most cases, it results from the findings collected in the course of day-to-day-supervision conducted by the JSTs.<sup>672</sup> This phase of the supervisory process entirely takes place at the ECB level and consists of (i) the review of the proposals of the draft supervisory decision by the Secretariat to the Supervisory Board,<sup>673</sup> and (optionally) its endorsement by the Steering Committee,<sup>674</sup> (ii) the endorsement of the complete draft supervisory decisions by the Supervisory

---

<sup>672</sup> It should be pointed out that the ECB's intermediate structures or the NCAs may also trigger ECB supervisory procedures, notably with supervisory activities authorizations or their withdrawals and assessment of qualifying holdings. These supervisory activities carried out by non-JST supervisory staff of the ECB and NCAs who needs to liaise with the JST concerned especially with regard to institution-specific issues.

<sup>673</sup> The Secretariat to the Supervisory Board is an ECB intermediate structure which ensures the efficiency of the decision-making processes of the SSM and the institutional quality of its decisions. It supports the Supervisory Board, the Steering Committee as other substructures of the ECB supervisory arm.

<sup>674</sup> The Steering Committee is an ECB internal body whose establishment is foreseen by the SSM Regulation. As of January 2017, it consists of eight members, including the Chair and the Vice-Chair of the Supervisory Board, an ECB representative and five representatives of NCAs. Its main tasks include support activities of the Supervisory Board, including preparing its meetings. See Article 26(10) of the SSM Regulation.

Board,<sup>675</sup> (iii) the adoption of the supervisory decisions by the Governing Council<sup>676</sup> in the special non-objection procedure and their subsequent issuance. Despite the fact that the decision-making process takes place entirely at the ECB level, the national supervisory decision-makers are also involved in all the stages of ECB supervisory procedures due to the composition of both the Supervisory Board and the Governing Council.

Once a proposal for the draft supervisory decision has been submitted by a JST to the Secretariat to the Supervisory Board through the ECB intermediate structures,<sup>677</sup> a quality check is conducted that includes *inter alia* the completeness of the legal basis of draft decisions. In order to guarantee due process, the Secretariat organizes the hearing of the supervised entity concerned where the proposed decision may affect it adversely.<sup>678</sup> At this stage, the Secretariat usually seeks views and opinions of NCAs before transmitting the complete draft proposal to the attention of the Steering Committee and Supervisory Board. This takes place through the so-called SSM coordination network<sup>679</sup> managed by the Secretariat which gathers high-level

---

<sup>675</sup> The Supervisory Board is an ECB internal body whose establishment is foreseen by the SSM Regulation. It consists of the Chair, the Vice-Chair, four ECB representatives appointed by the Governing Council and one representative of the NCAs from each participating Member State. Its tasks include the planning and execution of the ECB supervisory tasks, proposing to the Governing Council complete draft decisions to be adopted by the latter and conduct preparatory works regarding the ECB's supervisory tasks. See Articles 26(1) and (8) of the SSM Regulation.

<sup>676</sup> The Governing Council is one of three ECB's decision-making bodies. See Article 129 of the TFEU in conjunction with Articles 9 and 10 of the ESCB/ECB Statute.

<sup>677</sup> Importantly, the ECB horizontal services should ensure their consistency across the JSTs (both formally and materially) in order to avoid distortions in treatment and fragmentation in line with the Principle Three – Homogeneity within the SSM, See European Central Bank, *Guide to banking supervision* (above, n. 658), p. 7.

<sup>678</sup> See Article 22 of the SSM Regulation, and Article 31 of the SSM Framework Regulation.

<sup>679</sup> This informal network brings together representatives of NCAs' SSM coordination departments who have access to all dossiers submitted to the Supervisory Board, including those requiring formal ECB supervisory decisions.

officials from the NCAs. Based on the feedback received, the wording of the draft decision may be amended (*inter alia* by changes in wording or actions to be taken) in order to accommodate NCAs' diverging opinions.<sup>680</sup> The Secretariat can also return the proposal to originating business area and request revisions.

After the review conducted by the Secretariat and the SSM Coordination Network, a proposal becomes a complete draft decision. Depending on the gravity of a foreseen supervisory measure, it may be either endorsed by the Supervisory Board in so-called written procedure,<sup>681</sup> or put on the agenda of the Board's upcoming meeting where there is a need for a high-level discussion.<sup>682</sup> In the second case, it is transmitted to the Steering Committee which prepares the Board's meetings.<sup>683</sup> The Supervisory Board endorses the complete draft decisions by simple majority of its members.<sup>684</sup> It may however still alter the complete draft decision in order to reflect deliberations and discussions between its members that took place during the meeting.

Finally, the complete draft decision endorsed by the Supervisory Board is transmitted to the Governing Council.<sup>685</sup> The Supervisory Board's proposal is considered to be adopted unless the Governing Council objects it within a maximum

---

<sup>680</sup> See Informal interview with L (14 November 2016) in *Annex*.

<sup>681</sup> The Article 6.7 of the Supervisory Board's Rules of Procedure provides that decisions may also be taken in a written procedure. In those cases, decisions are not put on the agenda of the Board's meeting but adopted electronically. As reported by the ECB, the majority of the Supervisory Board decisions is taken this way, see European Central Bank, *ECB Annual Report on supervisory activities: 2015*, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2015.en.pdf>, accessed 01 December 2017, p. 11.

<sup>682</sup> In addition, where at least three members of the Supervisory Board with voting rights object to a written procedure, the item shall be put on the agenda of the subsequent Supervisory Board meeting. See Article 6.7 of the Rules of Procedure of the Supervisory Board.

<sup>683</sup> See Article 26(10) of the SSM Regulation.

<sup>684</sup> See Article 26(6) of the SSM Regulation.

<sup>685</sup> It should be accompanied by explanatory notes outlining the background to and the main reasons underlying the draft decision. See Article 13.g.1. of the Rules of Procedure of the European Central Bank.



period of ten working days.<sup>686</sup> When the Governing Council objects to the complete draft decision,<sup>687</sup> it is obliged to state the reasons in writing, in particular as regards monetary policy concerns.<sup>688</sup> In case the NCA(s) affected by the decision have different views regarding the objection raised by the Governing Council, they may request the Supervisory Board to refer the issue to the Mediation Panel.<sup>689</sup> The notification of a supervisory decision non-objected by the Governing Council to the addressee(s) formally concludes this stage of the supervisory process<sup>690</sup> unless the addressee decides to submit the decision to the Administrative Board of Review.

(iii) Enforcement of supervisory measures on significant institutions (optional phase three of the supervisory process)

Significant supervised entities are expected to comply with decisions adopted by the ECB. However, there may exist instances where ECB supervisory decisions need to be formally enforced against their addressees due to a variety of reasons (e.g. refusal or inability to comply). In these situations, based on Article 291(2) of the TFEU, these would be primarily the organs of the Member States' administration that would have the obligations to implement ECB decisions due to the fact that they enjoy

---

<sup>686</sup> In emergency situations a reasonable time period shall be defined by the Supervisory Board and shall not exceed 48 hours. See Article 13.g.2. of the Rules of Procedure of the European Central Bank ( 'Decision of the ECB of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2)', in *OJ L* 80, 18.3.2004).

<sup>687</sup> To ensure the effectiveness of the principle of separation, the Governing Council meetings regarding the supervisory tasks shall take place separately from regular Governing Council meetings and shall have separate agendas. See Article 13k of the Rules of Procedure of the European Central Bank.

<sup>688</sup> See Article 26(8) of the SSM Regulation.

<sup>689</sup> The Mediation Panel is an internal ECB body whose establishment is foreseen by the SSM Regulation in order to ensure separation between ECB monetary policy and supervisory tasks. It is composed by of one member per participating Member State and Chaired by the Vice-Chair of the Supervisory Board. In this regard, see 'Regulation (EU) No 673/2014 of the European Central Bank of 2 June 2014 concerning the establishment of a Mediation Panel and its Rules of Procedure (ECB/2014/26)', in *OJ L* 179, 19.6.2014.

<sup>690</sup> The ECB may notify its decision in five ways: orally, by delivering a hard copy, by registered mail, by express courier service, by telefax or electronically. See Article 35 (1) of the SSM Framework Regulation.

administrative sovereignty in their respective jurisdictions. The ECB powers to directly enforce its decisions in Member States' jurisdictions are limited to the imposition of pecuniary penalties, including fines and periodic penalty payments (PPPs)<sup>691</sup> which are provided by the Council Regulation No 2532/98.<sup>692</sup> This necessarily implies that to a large extent Union law is enforced in the Member States on the basis of the national enforcement rules, and is commonly referred to as “decentralized enforcement” of Union law stemming from the principle of national procedural autonomy.<sup>693</sup> In this respect, the NCAs have been clearly made responsible for assisting the ECB in the implementation of any acts relating to the exercise of the ECB supervisory tasks primarily by means of ongoing day-to-day assessment of a credit institution's situation and related on-site verifications.<sup>694</sup>

The NCAs are expected to ensure that a supervisory measure adopted by the ECB is effectively implemented in their home jurisdictions. To this end, the SSM Regulation provides the ECB with two indirect instruments to enforce its supervisory measures. The first one is the power to instruct the NCAs and the second is the power request the opening of national sanctioning or enforcement proceedings. The scope of the ECB's power of instruction vis-à-vis NCAs is very broad. It does not only entail a possibility to give the NCAs instructions related to the exercise of the ECB's

---

<sup>691</sup> PPPs are imposed in event of a continuing breach of a regulation or supervisory decision of the ECB in order to restore compliance of supervised entities/persons belonging to them. See Article 129(1) of the SSM Framework Regulation.

<sup>692</sup> See Article 120(b) of the SSM Framework Regulation, see also *supra* n.597.

<sup>693</sup> See Herwig C.H. Hofmann and Alexander Türk, *Legal challenges in EU administrative law: towards an integrated administration* (Edward Elgar Publishing, 2009); Cristopher Harding and Bert Swart, *Enforcing European Community Rules: Criminal Proceedings, Administrative Procedures and Harmonization* (Dartmouth Publishing Company, 1996).

<sup>694</sup> See Recital (37) of the SSM Regulation.

supervisory tasks,<sup>695</sup> but also to make use of their residual powers which stem from relevant Union law.<sup>696</sup> It implies that in jurisdictions, where NCAs are assigned specific enforcement powers, the ECB has a possibility to instruct those NCAs to make use of them vis-à-vis credit institutions in order to ensure their compliance with the ECB's supervisory decisions and other measures. As pointed out by Andreas Witte, it is still to be determined in the future administrative practice and possible jurisprudence whether the ECB should be empowered to use this authority whenever it lacks a power to act itself.<sup>697</sup>

The second instrument at the ECB's disposal is to request the NCAs to open respective sanctioning or enforcement proceedings vis-à-vis significant supervised entities as well as against natural persons belonging to them.<sup>698</sup> This option may be used by the ECB when there is a need to impose specific penalties of a non-pecuniary nature vis-à-vis supervised entities or natural persons for their non-compliance with the prudential requirements stipulated in an ECB supervision decision.<sup>699</sup> However, the request only aims at opening of a proceeding, while the imposition of these measures (by a national administrative act) remains within the NCAs'

---

<sup>695</sup> See Article 6(3) of the SSM Regulation which refers to instructions given by the ECB when performing the tasks mentioned in Article 4(1) of that Regulation (SSM supervisory tasks).

<sup>696</sup> See Article 9(1) of the SSM Regulation, third paragraph.

<sup>697</sup> See Andreas Witte, "The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?", *Maastricht Journal of European and Comparative Law* 21 (2014): pp. 89–109 (pp.103–104).

<sup>698</sup> See Article 18(5) of the SSM Regulation in conjunction with Article 134(1) of the SSM Framework Regulation.

<sup>699</sup> See Recital (36) of the SSM Regulation: "(...) where the ECB considers it appropriate for the fulfilment of its tasks that a penalty is applied for such breaches, it should be able to refer the matter to national competent authorities for those purposes".

competence.<sup>700</sup> The ECB should be informed by the NCAs on the results of these procedures.<sup>701</sup> In addition, when the ECB suspects that a criminal offence could have been committed, it has also the power to request the relevant NCA to refer the matter to appropriate law enforcement authorities.<sup>702</sup>

#### 6.4.2. Interactions in the supervisory process of the system of SSM Indirect Supervision

The supervisory process applicable to the subsystem of SSM Indirect Supervision can be perceived as encompassing the same three phases as the one governing the subsystem of SSM Direct Supervision. However, it displays important differences in terms of administrative interactions between the ECB and NCAs when compared to its counterpart. Whereas formal decision-making on significant institutions is centralized at the ECB level, formal decision-making on less significant institutions carried out in a decentralized way and is split across the NCAs of nineteen participating Member States. This stems from the principle of differentiated supervision reflected in Article 6(6) of the SSM Regulation which attributes decision-making authority on less significant institutions to the NCAs. In the same manner, the ongoing conduct of day-to-day supervisory activities and implementation of NCA supervisory decisions and other measures are also allocated to the national level.

---

<sup>700</sup> For an overview of sanctioning and enforcement measures provided to the NCAs by the CRDIV, see *supra* n.613 et seq.

<sup>701</sup> See Article 134(3) of the SSM Framework Regulation.

<sup>702</sup> See Article 136 of the SSM Framework Regulation

This however does not imply that the supranational level is isolated from the supervisory process concerning less significant institutions. First of all, the NCAs do not have their own micro-prudential supervisory tasks within the SSM, but exercise supervisory tasks conferred upon the ECB by the SSM Regulation. Secondly, NCA supervisory process is subject to the special, multidimensional ECB's oversight regime<sup>703</sup> including supervisory oversight,<sup>704</sup> institutional/sectoral oversight,<sup>705</sup> as well as analytical and methodological support.<sup>706</sup> It therefore follows that the outreach of NCAs assistance to the ECB in the subsystem of SSM Indirect Supervision is built of the relations of information<sup>707</sup> than hierarchical subordination which however does not exclude a possibility of supranational intervention by the ECB.

(i) Day-to-day supervision of less significant institutions (phase one of the supervisory process)

The NCAs retain full autonomy concerning the internal organization of the supervision of less significant institutions. However, as a part of institutional adaptation to the realities of the SSM, the majority of NCAs have created separate business areas dedicated exclusively to carry out their responsibilities in relation to

---

<sup>703</sup> The legal foundations of this special regime are based on the ECB's general responsibility to exercise oversight over the functioning of the system. See Article 6(5)(b) of the SSM Regulation.

<sup>704</sup> The main objectives of this oversight dimension are to promote best supervisory practices and develop common standards and ensure consistency of supervisory outcomes. For more specific information, see European Central Bank, *Guide to banking supervision* (above, n. 658), p. 40.

<sup>705</sup> The main objectives of this oversight dimension is to oversee sectors and country-specific institutional arrangements, exchange information with NCAs on high-priority LSIs and participate in crisis management. For more specific information, *Ibid.*

<sup>706</sup> The main objectives of this oversight dimension are to prepare methodologies for LSI supervision (e.g. risk-based prioritization of banks, SREP application) and analyze common sources of risk. For more specific information, *Ibid.*

<sup>707</sup> See European Central Bank, *Public hearing on the draft ECB SSM Framework Regulation* (19 February 2014).

less significant institutions.<sup>708</sup> The scope of the ECB's oversight over phase one of NCA supervisory process over individual less significant institutions varies and is related to the specific status of a given institution. Notwithstanding the above, the NCAs are obliged to submit annual reports to the ECB, in which they specify the activities undertaken on all less supervised entities in the aggregated manner.<sup>709</sup> Secondly, the NCAs shall also notify the ECB about deterioration of the financial situation of any less significant entity, especially if this may result in a need for public financial support.<sup>710</sup> However, for those less significant institutions which are considered as "high-priority" ones, the oversight over the phase one of NCA supervisory process is more intensified.<sup>711</sup> The ECB may request at any time information on the performance of supervisory activities targeting high-priority less significant institutions.<sup>712</sup> The NCAs are requested to ex-ante notify to the ECB any "material"<sup>713</sup> supervisory procedures concerning high priority institutions. They consist of the removal of bank management board members, the appointment of special manager and those procedures which have a significant impact on a

---

<sup>708</sup> See Informal interview with B (09 November 2015, 28 June 2016) in *Annex*.

<sup>709</sup> The NCAs reporting requirements are laid down in Articles 99-100 of SSM Framework Regulation.

<sup>710</sup> See Article 96 of the SSM Framework Regulation.

<sup>711</sup> The ECB determines the scope of supervisory information to be notified by NCAs for which less significant supervised entities, in particular taking into account their risk situation and potential impact on the domestic financial system (See Article 97 of the SSM Framework Regulation). Based on this authorization, the ECB requested to classify their supervised entities into three categories: low, medium and high-priority one. In each jurisdiction, there should be at least three high-priority institutions. As of March 2016, 93 LSIs were on the high-priority list (see <https://www.bankingsupervision.europa.eu/about/ssmexplained/html/hplsi.en.html>).

<sup>712</sup> See Article 97 (3) of the SSM Framework Regulation.

<sup>713</sup> The materiality status of a supervisory procedure is related to the priority rank of the LSI subject to this procedure. The ECB has decided to consider all supervisory procedures related to high-priority LSIs as material. See European Central Bank, *ECB Annual Report on supervisory activities: 2015* (above, n.681), p. 42.

supervised entity.<sup>714</sup> In addition, the NCAs should also notify the ECB those supervisory procedures which they consider material,<sup>715</sup> and those which may negatively affect the SSM reputation.<sup>716</sup>

The ECB is empowered to express its views on “material” supervisory procedures recommending appropriate course of action and initiate follow-up action.<sup>717</sup> For the purpose of receiving and assessing such notifications, the ECB established a dedicate framework consisting of country-specific desks (Country Desks) and Central Notification Point (CNP)<sup>718</sup> managed by one of the ECB’s intermediate structures.<sup>719</sup> Furthermore, the ECB’s oversight over the conduct of day-to-day NCA supervision also takes place through a range of informal policy instruments, such as a permanent Senior Management Network (SMN). This administrative platform groups ECB and NCAs managers responsible for LSI supervision who should regularly meet (at least on a quarterly basis) to discuss “overarching topics emerging from day-to-day LSI supervision”.<sup>720</sup> Its role is also to assist the Supervisory Board in the fulfilment of its tasks related to oversight and LSI supervision. The SMN is supported by a dedicated

---

<sup>714</sup> See Article 97(2)(a)(b) of the SSM Framework Regulation.

<sup>715</sup> See Article 97 (4)(a) of the SSM Framework Regulation.

<sup>716</sup> See Article 97 (4)(b) of the SSM Framework Regulation.

<sup>717</sup> In total, until December 2016, the CNP received and assessed a total of 179 ex-ante notifications from NCAs, of which 141 were notifications of material draft decisions or procedures relating covering a wide range of supervisory issues (e.g. capital, liquidity and governance), and 38 were related to the deterioration of the financial situation of the LSI. See European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013*, COM(2017) 591 final SWD(2017) 336 final.

<sup>718</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2015* (above, n.681), p.42. Also, the functioning of the notifications framework was explained by an ECB official during a bilateral meeting (Informal interview with A (13 November 2015, 12 January 2016, 15 July 2016) in *Annex*).

<sup>719</sup> To be precise, the Directorate General Micro-Prudential Supervision III, which is responsible for SSM Indirect Supervision.

<sup>720</sup> See European Central Bank, *Guide to banking supervision* (above, n. n.658), p. 66-67.

secretariat which coordinates daily communication and workflows between the ECB and NCAs concerning LSI supervision.<sup>721</sup> The ECB also organizes bilateral country visits and peer-to-peer reviews which allow ECB management to discuss with their NCA counterparts country-specific matters concerning its oversight.

Last but not least, the organization of supervisory workflows on the common procedures is another relevant channel for intense administrative interactions between the ECB and NCAs. As already pointed out, the common procedures are carried out mix of advisory and decisive roles for both national and EU authorities and are regarded as an example of a “mixed banking supervisory process in the SSM”.<sup>722</sup> Although they are not formally subjected to SSM Indirect Supervision arrangements, nevertheless the daily-work of national supervisors who prepare the draft ECB supervisory decision on matters pertaining to common procedures is monitored by their counterparts based at the ECB who are responsible for the assessment and review of the draft decisions submitted by the NCAs.<sup>723</sup>

(ii) Adoption of supervisory decisions on less significant institutions (phase two of the supervisory process)

Following the principle of differentiated supervision in the SSM, supervisory decision-making on less significant institutions is carried out at the NCA level in accordance with relevant national administrative procedures. There exists however no uniform administrative practice across the NCAs concerning the adoption of

---

<sup>721</sup> See Informal interview with A (13 November 2015, 12 January 2016, 15 July 2016) in *Annex*.

<sup>722</sup> See *supra* n.527.

<sup>723</sup> For more details on the division of work between the ECB and NCAs on common procedures, see the subsection 6.3.4(iii).



supervisory measures. In some SSM jurisdictions supervisory measures resulting from day-to-day supervisory activities do not necessarily need to be imposed as formal supervisory decisions. In this context, Germany and Austria can be given as examples of jurisdiction where the NCAs tend to rely on supervisory dialogue and persuasion to communicate their supervisory expectations in order to avoid the formal issuance of a SREP decision requiring a supervised entity, for example, to hold additional own funds.<sup>724</sup> On the other hand, due to strong administrative traditions of administrative interventionism, countries like France prefer to conclude annual supervisory process by issuing formal individual decisions.

The ECB's oversight over the adoption of supervisory decisions by NCAs is primarily limited to the use of two instruments that are also widely used in the phase of the NCA supervisory process: notifications and annual reporting. The NCAs are requested to ex-ante notify to the ECB their willingness to adopt 'material' supervisory decisions concerning LSIs<sup>725</sup> under the conditions as their obligation to report on the initiation of 'material' supervisory procedures.<sup>726</sup> Similarly, the ECB is empowered to express its views on 'material' supervisory draft decisions and may recommends specific changes or amendments, which are however not binding upon the NCA concerned. In addition, the NCAs report to the ECB on annual basis on all supervisory decisions adopted.<sup>727</sup> More importantly, the ECB may issue binding acts

---

<sup>724</sup> See Informal interview with B (09 November 2015, 28 June 2016) in *Annex*.

<sup>725</sup> See Article 98 of the SSM Framework Regulation.

<sup>726</sup> See *supra* n. 714.

<sup>727</sup> See *supra* n. 709.

such as regulations, guidelines and general instructions that may specify the ways how the NCAs adopt their supervisory decisions in relation to NCAs.<sup>728</sup>

(iii) Enforcement of supervisory measures on less significant institutions (optional phase three of the supervisory process)

The enforcement of supervisory measures addressed to less significant institutions rests solely on the Member States' administrative apparatus and is subject to national enforcement rules and proceedings. The NCAs verify whether credit institutions adopted proposed supervisory measures. In the positive scenario case, the follow-up will be limited to a monitoring of a credit institution's situation. However, in the negative scenario case when a supervised entity is not willing or able to comply with a foreseen measure, the NCAs have recourse a number of sanctioning and enforcement instruments which intend to ensure that the supervisory judgment expressed by a supervisory decision is followed. In particular, the CRDIV framework empowers the NCAs use a range of punitive measures to address non-compliance which include pecuniary and non-pecuniary sanctions as well as a possibility of market exclusion.<sup>729</sup> In the framework of their reporting obligations, the NCAs are also expected report to ECB on the administrative sanctions imposed on an annual basis. Furthermore, the NCAs may also make use of other sanctioning powers are made available to them by national legislators and which are not provided by the

---

<sup>728</sup> See Article 6(5)(a) of the SSM Regulation.

<sup>729</sup> See *supra* n. 613-625.

CRDIV. This may notably include such public law instruments that impact on civil, company or penal law.<sup>730</sup>

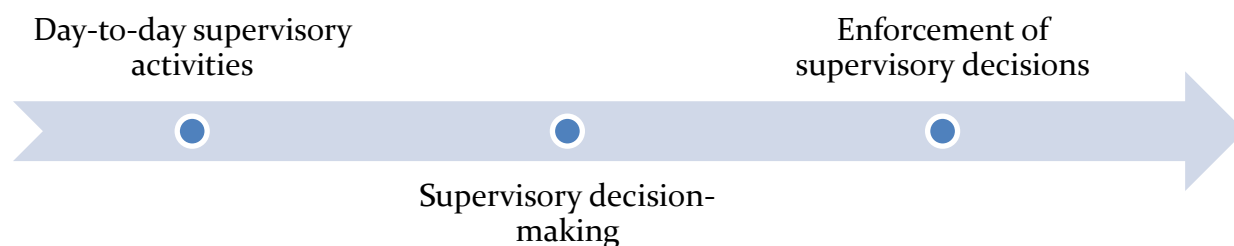


Figure 8 Phases of the supervisory process

## 6.5. Jurisdictional outreach of the SSM

The fourth element of the organisational design of EU multilevel administration is related to its jurisdictional outreach. Within the EU constitutional and administrative order, there may exist a plurality of regulatory arrangements applicable to either all EU Member States or to a subset of EU Member States only. The SSM Regulation is binding in its entirety and directly applicable in all Member States (*de iure* applicability).<sup>731</sup> However, it is legally effective only in the Member States whose currency is the euro (*de facto* applicability) unless other Member States voluntary opt-in to participate in the Single Supervisory Mechanism. Therefore, the Single Supervisory Mechanism can be perceived as a continuation of a trend initiated by the Maastricht Treaty which started the first comprehensive experiment on differentiated integration by the establishing of the Economic and Monetary

<sup>730</sup> See Roeland Johannes Theissen, *EU banking supervision* (Eleven international publishing, 2013), p. 974.

<sup>731</sup> See also Busch and Ferrarini, *The European Banking Union* (above, n.474), p. 101.

Union<sup>732</sup> whose supranationalized “M” pillar is applicable only to Member States using the single currency. This experiment was to be initially of temporary nature due to the explicit Treaty obligation to introduce the euro as the legal tender in remaining Member States.<sup>733</sup> It was nonetheless petrified by the Lisbon Treaty which constitutionalized the permanent differentiation between “Members States whose currency is the euro” (euro area Member States)<sup>734</sup> and “Member States with derogation” (non-euro area Member States).<sup>735</sup> The creation of the SSM adds another layer to this differentiation<sup>736</sup> by introducing three categories of Member States in the context of Banking Union: the euro area, the non-euro area participating Member States and the non-participating Member States.

Although the deeper rationale for the Banking Union is cross-border banking in the Single Market<sup>737</sup>, the SSM as its first and crucial pillar was constructed on the basis of the Treaty provisions governing monetary union, and not the Single Market<sup>738</sup> which limits its compulsory applicability to euro area Member States.<sup>739</sup> However, the SSM

---

<sup>732</sup> See Chiara Zilioli and Martin Selmayr, *The Law of the European Central Bank* (Hart Pub Limited, 2001), p. 133.

<sup>733</sup> See Article 3(4) of TEU as well as Article 119(2) and 140 of the TFEU, however with notable exceptions of the United Kingdom and Denmark. The former Member State obtained a protocol allowing it to refrain from this duty unless it explicitly notifies its intention to do so (opt-out clause). See Protocol No (15) to the Treaties on certain provisions relating to then United Kingdom and Northern Ireland. Subsequently, as the Maastricht Treaty was rejected by a referendum in Denmark, the latter Member State also obtained similar exemption. See Protocol No (16) to the Treaties on certain provisions relating to Denmark.

<sup>734</sup> See the Treaty’s special section stipulating “provisions specific to Member States whose currency is the euro”, See Articles 136-138 of the TFEU.

<sup>735</sup> Regardless of the reason why they did not introduce it.

<sup>736</sup> On this aspect, see Pierre Schammo, ‘Differentiated integration and the single supervisory mechanism: which way forward for the European Banking Authority?’, *Britain Alone* (2014).

<sup>737</sup> See Dirk Schoenmaker and Pia Hüttel, ‘Should ‘outs’ join the Banking Union?’, in *Single Supervision and cross-border banking 2015.3*, pp. 89–112, <http://european-economy.eu/book/single-supervision-and-cross-border-banking/>, accessed 01 December 2017.

<sup>738</sup> Notably, the enabling clause (Article 127(6) of the TFEU) is located in the Chapter on Monetary Policy.

<sup>739</sup> See Article 139 (2) of the TFEU.

may also have the effect on those non-euro area Member States whose domestic banking sectors are dominated either by branches or subsidiaries of credit institutions headquartered in one of euro area participating Member States.<sup>740</sup> In these cases, the SSM's influence on domestic supervisory processes may be significant since the supervision of banking groups on a consolidated basis is listed among the core activities of the SSM's prudential supervisors.<sup>741</sup> For these reasons and with an objective to foster the integrity of the Single Market for banking services,<sup>742</sup> the SSM Regulation provides non-euro area Member States with an option of voluntary opt-in to the SSM by concluding a close cooperation agreement with the ECB.<sup>743</sup> To provide a more comprehensive picture of the jurisdictional outreach of the SSM on the Single Market for banking services, the following sections will analyze the status of Member States (i) which are obliged to participate in the SSM (euro area participating member States), (ii) which voluntarily decide to opt-in to SSM (the non-euro area participating Member States) and (iii) which decide to opt-out from the SSM (the non-participating Member States).

#### 6.5.1. Applicability to euro-area participating Member States

The legal obligations of an individual Member State to participate in the SSM hinges upon the use of the euro as its currency. For these reasons, the SSM Framework Regulation specifically distinguishes between a group of euro area participating

---

<sup>740</sup> Wymeersch, 'The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union' (above, n.407), p. 61.

<sup>741</sup> See *supra* n.435.

<sup>742</sup> See Recitals (3) and (42) of the SSM Regulation.

<sup>743</sup> See Article 7 of the SSM Regulation.

Member States and the non-euro-area participating Member States.<sup>744</sup> For the former Member States, the ECB is automatically considered as responsible for the supervision of significant institutions operating within their domestic banking jurisdictions. Supervisory decisions issued by the ECB are binding and directly applicable to supervised entities addressed by them without a need for national transposition. They also enjoy the primacy over national supervisory legislation and measures.<sup>745</sup> The National Competent Authorities (NCAs) of participating Member States became integral parts of the SSM's supranational administrative system, while remaining in the same time units of national public administration (“*dédoublement fonctionnel*”).<sup>746</sup> Within the SSM, they are responsible for the exercise of the ECB supervisory tasks in relation to ‘less significant’ entities. The NCAs cannot be either suspended or excluded from the participation in the SSM as long as their Member States maintain the status of a Member State whose currency is the euro. The transfer of supervisory tasks to the ECB is permanent and irrevocable unless the SSM Regulation is changed by the Council in the same procedure applied to its adoption.

---

<sup>744</sup> See Article 2(16)-(17) of the SSM Framework Regulation,

<sup>745</sup> See Article 132 of the TFEU.

<sup>746</sup> The doctrine of *dédoublement fonctionnel* means that national administrations assume a dual role of both Member States and Union's agents, although from the point of view of their legal status they are and remain organs of the former. It was developed by a French lawyer Georges Scelle, and was principally designed to explain the functioning of international organisations. It can be however also applied to other multilevel polities, such including federations. For an instructive overview of Scelle's doctrine, see *inter alia*, Georges Scelle and Carlo Santulli, *Précis de droit des gens: principes et systématique. Introduction, le milieu intersocial. Première partie* (Dalloz, 1932); Georges Scelle, *Théorie et pratique de la fonction exécutive en droit international* (Martinus Nijhoff, 1936); Georges Scelle, *Précis de droit des gens principes et systématique: Droit constitutionnel international: les libertés individuelles et collectives, l'élaboration du droit des gens positif. Deuxième partie* (Recueil Sirey, 1934); Georges Scelle, *Quelques réflexions sur l'abolition de la compétence de guerre* (A. Pédone, 1954); Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel', *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70* (1956): p. 324; Georges Scelle, 'Quelques réflexions hétérodoxes sur la technique de l'ordre juridique interétatique', *Hommage d'une génération de juristes au Président BASDEVANT*, Pedone (1960): p. 477.

Since the SSM is integrally related to the single currency, a possibility of leaving the mechanism is connected to the specific Treaty provisions on the Economic and Monetary Union which provide no possibility for euro area Member States to exit from the euro area or be excluded from this group of Member States. The only possibility to leave the euro zone is foreseen by Article 50(1) of the TEU which lays down a special procedure for withdrawal from the EU. Any national unilateral withdrawal from the obligations stipulated by SSM supervisory legislation would therefore have to be deemed as infringement of the Treaties and secondary law by a Member State (or its administrative apparatus) that subject to the infringement proceedings before the CJEU.

#### 6.5.2. Applicability to non-euro area participating Member States

Unlike euro area Member States which are legally obliged to participate in the SSM, the non-euro area Member States may decide to become parts to the arrangement on a voluntary basis. For this purpose, a special procedure of “close cooperation” is foreseen in Article 7 of the SSM Regulation. This arrangement constitutes another interesting example of an interaction between the EU legal framework and intergovernmental and contractual elements<sup>747</sup> whose proliferation may be observed in the context of the adoption of EU anti-crisis measures.

The establishment of close cooperation between the ECB and a non-participating Member States allows extending the applicability of the SSM and the scope of the

---

<sup>747</sup> See Teixeira, ‘Europeanising prudential banking supervision. Legal foundations and implications for European integration’ (above, n. 125), p. 565.

ECB's exclusive supervisory competence beyond the euro area's core. By these means, ECB can assume supervisory responsibilities in non-euro area Member States, although in a looser fashion than in euro area Member States. Crucially, the ECB cannot impose directly binding supervisory measures beyond the euro area because the ECB legal acts, such as regulations and decisions, are not directly applicable to non-euro area Member States.<sup>748</sup> As a result, the ECB's supervision over significant institutions headquartered in the non-euro area participating Member States needs to be carried out by ways of instructions, requests and guidelines to the NCAs in close cooperation, and by ways of general instructions on matters pertaining to LSI supervision. This indicates at a somewhat incomplete and imperfect fashion of the SSM operation when extended beyond the euro area jurisdictions.

The "close cooperation" procedure is initiated by a non-participating Member State which notifies to the ECB and EBA its willingness to become a part to the SSM. From then onwards, it becomes a "requesting Member State".<sup>749</sup> In its application, this Member State is obliged to make a number of commitments, including:

- (i) to ensure that its NCA will follow all the instructions, guidelines or requests issued by the ECB;<sup>750</sup>

---

<sup>748</sup> See Article 139(2) of the TFEU in connection with Article 107(2) of SSM Framework Regulation.

<sup>749</sup> See Article 1.5 of the 'Decision of the ECB of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5)' (above, n. 74).

<sup>750</sup> See Article 3(1)(a) of the Decision ECB/2014/5.



- (ii) to provide all information on the supervised entities incorporated in its jurisdiction for the purpose of carrying out a comprehensive assessment exercise;<sup>751</sup>
- (iii) to provide all requested data to the ECB for the finalization of its preparatory activities;<sup>752</sup>
- (iv) to adopt national legislation which ensures that legal acts adopted by the ECB are binding and enforceable in its jurisdiction;<sup>753</sup>
- (v) to ensure that any measure requested by the ECB will be adopted by its NCA;<sup>754</sup> as well as
- (vi) to provide a copy of the draft relevant national legislation as well as an their English translations with a request for the ECB opinion on those issues.<sup>755</sup>

The ECB reviews the application in the light of the foregoing requirements and adopts a decision establishing close cooperation with a requesting Member State in case it fulfills all the requirements.<sup>756</sup> A requesting Member State is obliged to maintain close cooperation for at least three years and only after it may request its termination by the ECB having provided reasoned grounds.<sup>757</sup> The ECB, on the other hand, may suspend or terminate close cooperation when a Member State in close

---

<sup>751</sup> See Article 3(1)(b) of the Decision ECB/2014/5.

<sup>752</sup> See Article 3(1)(c) of the Decision ECB/2014/5.

<sup>753</sup> See Article 3(2)(a) of the Decision ECB/2014/5.

<sup>754</sup> Ibid.

<sup>755</sup> See Article 3(2)(b) of the Decision ECB/2014/5.

<sup>756</sup> See Article 7(2) of the SSM Regulation.

<sup>757</sup> Notably, the request shall clarify the reasons for the termination and potential adverse effects on the fiscal responsibilities of the requesting Member States. See Article 7(6) of the SSM Regulation.

cooperation ceases to fulfill its contractual commitments made in the application after having sent a prior warning to a non-compliant NCA in close cooperation.<sup>758</sup>

Furthermore, close cooperation may be suspended or terminated also in situations, in which a Member State in close cooperation either formulates a reasoned disagreement with an objection to a supervisory decision adopted by the Governing Council,<sup>759</sup> or a reasoned disagreement with a draft supervisory decision issued by the Supervisory Board.<sup>760</sup> These possibilities result from the fact that non-euro area participating Member States are not present in the Governing Council, whose membership is restricted only to high-level experts (central bankers) originating from euro area Member States. By this token they cannot fully benefit from all the decision-making mechanisms provided for euro area participating Member States.<sup>761</sup>

When the Governing Council confirms its objection, the relevant NCA in close cooperation may notify that it will not be bound by this decision.<sup>762</sup> Upon the receipt of such a notification, the ECB shall consider a possibility of suspension or termination of the close cooperation with the Member State concerned while taking into account (i) integrity of the SSM,<sup>763</sup> (ii) adverse effect on the fiscal responsibilities in EU Member States (including in the Member State in question),<sup>764</sup> (iii) progress in the adoption of supervisory measures by the NCAs of that state

---

<sup>758</sup> See *supra* n. 750-752.

<sup>759</sup> See Article 7(7) of the SSM Regulation.

<sup>760</sup> See Article 7(8) of the SSM Regulation.

<sup>761</sup> See Recital (43) of the SSM Regulation.

<sup>762</sup> See *supra* n. 759.

<sup>763</sup> See Article (7)(7)(a) of the SSM Regulation.

<sup>764</sup> See Article (7)(7)(a)(b) of the SSM Regulation.

which are equally effective to the rejected ECB supervisory decision and do not impose more favorable treatment of supervised entities within its jurisdiction.<sup>765</sup>

Where a Member State in close cooperation disagrees with a draft decision of the Supervisory Board, it is obliged to inform the Governing Council of its reasoned disagreement.<sup>766</sup> The Governing Council shall consider the reasons presented by that Member State and explain in writing its decision. As a last resort measure, the Member State concerned may request the ECB to terminate the close cooperation with immediate effect and will not be bound by the ensuing decision.

In a situation, in which a non-euro area Member State terminates the close cooperation agreement with the ECB, it is allowed to enter into a new one only after the period of three years.<sup>767</sup> It follows that close cooperation can be regarded as flexible and dynamics administrative arrangements allowing repeatedly opt-in and opt-out from supranational supervisory regime. The possibility to challenge ECB's supervisory decisions by Member States in close cooperation may create problems of commitment to high supervisory standards in its jurisdiction.<sup>768</sup> It remains to be seen whether such an institutional design would allow reaping welfare benefits in the form of more attractive financing costs for credit institutions operating in the "close cooperation" jurisdictions.

---

<sup>765</sup> See Article 7(7)(c) of the SSM Regulation.

<sup>766</sup> See Article 7(8) of the SSM Regulation.

<sup>767</sup> See Article 7(9) of SSM Regulation in connection to Article 6(7) of the Decision ECB/2014/5.

<sup>768</sup> See Tröger, 'The Single Supervisory Mechanism—Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement' (above, n.396), p. 491.

Until now, Bulgaria, Denmark and Romania were the only non-euro area Member States which have informally inquired about entering into a close cooperation agreement<sup>769</sup> while the United Kingdom and Sweden definitely excluded such a possibility. Central and eastern EU Member States have adopted the “wait and see” approach, with the Czech Republic being the most skeptical about its possible participating in the SSM.<sup>770</sup>

### 6.5.3. Applicability to non-participating Member States

The SSM’s limited territorial applicability does not imply that it remains in a “splendid isolation” from supervisory authorities of those EU Member States which do not form part of this administrative arrangement. The SSM Regulation imposes on the ECB, which has the ultimate responsibility for the SSM overall functioning, obligations to cooperate closely the competent authorities of non-participating Member States, especially in the colleges of supervisors.<sup>771</sup> To achieve this objective, the ECB shall conclude memoranda of understanding (MoU) with the competent authorities of EU Member States which remain outside of the SSM.<sup>772</sup> Those documents should lay down the framework for cooperation and supervision of cross-border banking groups. In particular, they should clarify the consultations related to the ECB supervisory decisions which may have effects on subsidiaries or branches of

---

<sup>769</sup> See Christos V. Gortsos, *The single supervisory mechanism (SSM): legal aspects of the first pillar of the European Banking Union* (Nomiki Bibliothiki, 2015), p. 184; Danmarks Nationalbank, *Danish participation in the Banking Union*, <https://www.nationalbanken.dk>, accessed 01 February 2017; Schoenmaker and Hüttel, ‘Should ‘outs’ join the Banking Union?’ (above, n.737), p. 107.

<sup>770</sup> Ibid.

<sup>771</sup> See Recital (42) of the SSM Regulation.

<sup>772</sup> See Recital (14) of the SSM Regulation.

euro area headquartered banking groups which operate outside of the SSM as well as cooperation arrangements in crisis situations, including early warning mechanisms.

The content of MoUs shall be reviewed on regular basis and include the modalities of cooperation in the performance of supervisory tasks.<sup>773</sup> In addition, the ECB is obliged to conclude MoUs with the competent authorities of those non-participating Member States which are home jurisdictions for at least one “globally systemic important institution”.<sup>774</sup> Furthermore, the ECB also maintains international relations with regard to the conduct of the SSM specific tasks.<sup>775</sup> In particular, it may establish contact and enter into contractual administrative arrangements with supervisory authorities and administrations of third countries as well as international organizations and financial fora.<sup>776</sup>

## **6.6. Preliminary observations as regards the first structural condition affecting formal top-down compliance expectation**

In order to dissect the organisational design of the SSM, this chapter analyzed the formal systemic position of the ECB within the SSM by concentrating on the four core elements: its constitutional foundations, the distribution of supervisory responsibilities between the ECB and NCAs therein, the modalities of administrative interactions between the ECB and NCAs in respect to the conduct of operational supervision, and its territorial applicability.

---

<sup>773</sup> See Article 3(6) of the SSM Regulation, first subparagraph.

<sup>774</sup> Ibid., second and third subparagraph.

<sup>775</sup> See Recital (80) of the SSM Regulation.

<sup>776</sup> See Article 8 of the SSM Regulation.

The analysis has revealed that the SSM supervisory system as whole cannot be classified as falling purely under one of the identified models of EU administration. This is the consequence of the principle of differentiated supervision, which sets two distinct multilevel arrangements within the SSM: the subsystem of SSM Direct and Indirect Supervision respectively. On the one hand, the constitutional foundations and territorial applicability of the SSM have a universal dimension and are common to both subsystems. On the other hand, the distribution of supervisory responsibilities between the ECB and NCAs and the modalities of administrative interactions between the ECB and NCAs in respect to the conduct of operational supervision display some particular features with regard to the subsystem of SSM Direct and Indirect Supervision respectively.

The constitutional foundations, on which the ECB as the higher level actor is based, set a scope of intrusiveness of administrative measures (depth) that can be adopted vis-à-vis third parties (including lower level actors) within the SSM. The territorial applicability of the SSM supervisory system sets the outreach of its jurisdiction in the EU (width). Both elements have an external dimension (vis-à-vis actors not pertaining to the SSM multilevel administrative regime such as financial market participants) and an internal dimension (vis-à-vis actors pertaining to the multilevel administrative regime such as the NCAs) influencing the systemic position of the ECB in the SSM as a whole. Another of the institutional elements, namely, the distribution of supervisory responsibilities and the modalities of administrative interactions in the SSM are more of an internal dimension, which greatly influences

the position of the ECB and its corresponding shadow of hierarchy specifically with respect to the lower level actors (JST/NCAs) in the corresponding SSM supervisory subsystems. Due to the variation introduced by the latter two elements, both subsystems can be isolated from each other and presented as different models of EU administration in accordance with the typology developed in chapter three.

#### 6.6.1. Organization of the subsystem of SSM Direct Supervision

The subsystem of SSM Direct Supervision can be classified as an example of EU centripetal multilevel administration which, however, is limited in its jurisdictional outreach and does not cover by default the entire EU. Within this subsystem, the higher level actor (the ECB) formally enjoys a strong systemic position and casts a long shadow of hierarchy vis-à-vis lower level actors, but these features may be undermined as regards its jurisdiction over non-euro area participating Member States due to the constitutional limitations concerning the applicability of ECB acts beyond the euro area. This finding is based on the following considerations.

*Firstly*, SSM Direct Supervision, as a part of the SSM multilevel supervisory system, is founded on the direct constitutional mandate laid down in Article 127(6) of the TFEU which allows the conferring upon the ECB specific tasks relating to the prudential supervision of credit institutions. The Treaties provide solid legal underpinnings for the conduct of these tasks as they empower the ECB to adopt binding acts upon to which produce legal effects vis-à-vis third parties with a view to

exercise the Union's competences conferred upon it.<sup>777</sup> With regard to the conditions for the application and enforcement of these legal acts, the ECB's measures binding the individuals are not explicitly required to bring about the "approximation effect" which would be required in the context of measures adopted within supranational regulatory regimes created under Article 114 of the TFEU.<sup>778</sup>

Secondly, Article 6(4) of the SSM Regulation attributes to the ECB the responsibility to carry out directly all SSM supervisory tasks in relation to significant supervised entities. SSM supervisory tasks cover key areas of prudential supervision over credit institutions and only a small number other prudential tasks have been left within the competence of the NCAs. To effectively carry out these tasks, the ECB has been vested with decision-making authority in the areas of authorisations, approvals, investigations, early supervisory interventions and sanctioning. The ECB may also adopt regulations only to the extent necessary to organize or specify the arrangements for the carrying out of these tasks.<sup>779</sup> Both third parties (i.e. supervised entities) and the NCAs can be addressees of these legal acts. Early practice indicated that the ECB has interpreted its regulatory competences in a rather broad manner, which however has recently raised some concerns from the European Parliament

---

<sup>777</sup> See Articles 132 and 288 of the TFEU.

<sup>778</sup> See Judgment of 8 June 2010, Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* EU:C:2010:321; Judgment of 6 December 2005, Case C-66/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union ("Smoke flavourings")* EU:C:2005:743; Judgment of 2 May 2006, Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union ("ENISA")* EU:C:2006:279; Judgment of 2 May 2006, Case C-436/03 *European Parliament v Council of the European Union ("European Cooperative Society")* EU:C:2006:277.

<sup>779</sup> See Article 4(3) of the SSM Regulation.



and Council with regard to the separation between regulatory and supervisory powers within the European legislative framework.<sup>780</sup>

*Thirdly*, the administrative relations between the ECB and NCAs are based on the principle cooperation in good faith<sup>781</sup> and far-reaching mutual assistance duties in the system of SSM Direct Supervision. The NCAs are obliged to put their resources at the ECB's disposal by appointing their staff members to Joint Supervisory Teams, responsible for operational supervision of significant institutions. The ECB is responsible for the establishment, composition and leadership of the JSTs which are always managed and chaired by an ECB-originating coordinator.<sup>782</sup> The NCAs need also to appoint JST sub-coordinators from their supervisory staff who assist JST Coordinators with regard to the organization and coordination of the tasks in the JSTs. All JST members, including those appointed by the NCA, are obliged to follow the instructions given by an ECB-originating JST Coordinator.<sup>783</sup> In addition, the ECB may further shape the administrative interactions with the JSTs and the NCAs by issuing instructions to the NCAs as a whole. These instructions may concern the scope of NCA assistance obligations when performing its supervisory tasks (for example, with respect to the preparation and implementation of any supervisory

---

<sup>780</sup> See European Parliament, *Addendum to the ECB Guidance to banks on non-performing loans: Competence of the ECB to adopt such Addendum: Opinion of Legal Service*, SJ-o693/17 LV/MMEN/rj D(2017)44064 (Brussels, 08 November), <http://bit.ly/2jH26og>, accessed 01 December 2017; Council, *Addendum to the ECB Guidance to banks on non-performing loans: Prudential provisioning backstop for non-performing exposures: General considerations on the powers of the ECB*, 14837/17 JUR 556 EF 299 ECOFIN 1016 (Brussels, 23 November), <http://bit.ly/2Ap5kHf>, accessed 01 December 2017.

<sup>781</sup> See Article 6(2) of the SSM Regulation.

<sup>782</sup> See Article 4 of the SSM Framework Regulation.

<sup>783</sup> See Article 6(1) of the SSM Framework Regulation.

act).<sup>784</sup> An ECB instruction to an NCA may request make use of their powers, under and in accordance with the conditions set out in national law.<sup>785</sup>

*Fourthly*, SSM Direct Supervision, seen as an EU multilevel centripetal administrative arrangement, does not cover the entire EU. Rather its compulsory applicability is limited to only euro area Member States. This limitation imposes a constraint on the systemic position of the ECB in the subsystem of SSM Direct Supervision, especially where non-euro area Participating Member States decide to join the SSM on a voluntary basis. Because acts of the ECB are not binding upon non-euro area Member States, the exercise of supervisory powers by the ECB in those jurisdictions will hinge upon the implementation by the respective NCAs. Similarly, the ECB as a higher level actor will have limited possibilities to issue instructions, addressed both to NCA supervisory staff via an ECB-based JST Coordinator and the NCA as a whole.

#### 6.6.2. Organization of the subsystem of SSM Indirect Supervision

The subsystem of SSM Indirect Supervision can be classified as an example of EU intervention-based multilevel administration, where the higher level actor (the ECB) formally enjoys a semi-strong systemic position and casts a shorter shadow of hierarchy<sup>786</sup> vis-à-vis lower level actors in the comparison to the subsystem of SSM Direct Supervision. This finding is based on the following considerations.

---

<sup>784</sup> See Article 6(3) of the SSM Regulation.

<sup>785</sup> See Article 9(1), third paragraph of the SSM Regulation.

<sup>786</sup> On the impact of a shadow of hierarchy in multilevel contexts, see *supra* n. 59.

Similarly to the subsystem of Direct Supervision, SSM Indirect Supervision is founded on a direct constitutional mandate laid down in Article 127(6) of the TFEU which allows conferring upon the ECB specific tasks relating to the prudential supervision of credit institutions and, also, is limited in its jurisdictional outreach and does not cover the entire EU by default. What however distinguishes the subsystem of SSM Indirect Supervision from the former, is the allocation of responsibilities therein and the modalities of administrative interactions between the ECB and NCAs.

*Firstly*, Article 6(6) of the SSM Regulation attributes to the NCA the responsibility to carry out directly the bulk of SSM supervisory tasks conferred upon the ECB in relation to less significant supervised entities. The regime set therein allocates to the NCAs the responsibility to carry out tasks in seven out of nine SSM supervisory areas listed in the Article 4(1) of the SSM Regulation<sup>787</sup> and the authority to adopt all relevant supervisory decisions with regard to credit institutions considered less significant. The purpose of this regime “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 institutions and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the Basic [SSM] Regulation”.<sup>788</sup> As a higher level actor in the subsystem of SSM Indirect Supervision, the ECB is responsible for

---

<sup>787</sup> With exception of the tasks of (i) granting and (ii) withdrawing of authorization of a credit institution (Article 4(1)(a) of the SSM Regulation) and (iii) assessing changes in the shareholder structure of a supervised institution (Article (4)(1)(c) of the SSM Regulation) (“common procedures”).

<sup>788</sup> See Judgment of 16 May 2017, Case T-122/15 *Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank* (“L-Bank”) EU:T:2017:337, para 63.

exercising the oversight over the functioning of the system,<sup>789</sup> but is not allowed directly to exercise its supervisory powers on LSIs in addition to NCAs, with the exception of investigations. Neither can the ECB instruct the NCAs regarding their supervisory decisions on individual entities. In its oversight capacity, the ECB may only request from the NCAs information (either ad-hoc or on continuous basis) related to the performance of their supervisory tasks on LSIs,<sup>790</sup> and make use of investigatory powers vis-à-vis LSIs conferred upon it by the SSM Regulation.<sup>791</sup>

*Secondly*, although the administrative relations between the ECB and NCAs in the subsystem of SSM Indirect Supervision are also based on the principle of cooperation in good faith,<sup>792</sup> NCA assistance is based more on relations of information<sup>793</sup> than hierarchical subordination which does not exclude a possibility of supranational intervention by the ECB. The NCAs as the lower level actors remain responsible for day-to-day supervision and can autonomously adopt supervisory decisions vis-à-vis LSIs. The ECB's influence in the NCA supervisory process regarding LSIs has an indirect dimension and is limited and primarily rests on the issuance of regulations, guidelines and general instructions and the NCAs' ex-ante notifications on certain supervisory procedures and decisions. The possibility of ECB direct intervention is limited to exceptional situations when the supervision of one or more LSIs needs to

---

<sup>789</sup> See Article 6(5)(c) of the SSM Regulation.

<sup>790</sup> See Article 6(5)(e) of the SSM Regulation.

<sup>791</sup> See Article 6(5)(d) of the SSM Regulation.

<sup>792</sup> See Article 6(2) of the SSM Regulation.

<sup>793</sup> See European Central Bank, *Public hearing on the draft ECB SSM Framework Regulation* (above, n.707).

be taken over by the ECB from NCAs in order to ensure the consistent application of high supervisory standards.<sup>794</sup>

---

<sup>794</sup> See Article 6(5)(b) of the SSM Regulation.

# CHAPTER 7

## Operational design of the Single Supervisory Mechanism

### 7.1. Introductory remarks

This chapter analyses the operational design of multilevel supervisory subsystems pertaining to the SSM with a view to measure the formal capacity of internal mechanisms that the bureaucratic principal – the ECB (supervisory apparatus) may use to align possibly heterogeneous preferences and objectives of its bureaucratic agent the - NCAs (supervisory apparatus), and to reduce the ambiguities of their essentially incomplete agency contract. This exercise is a part of the second phase of testing of the Enforcement and Management hypotheses on the formal top-down compliance expectations in the subsystems of SSM Direct and Indirect Supervision. These hypotheses offer different explanations as regard the formal top-bottom compliance expectation: whereas the Enforcement approach highlights the importance of the formal capacity for control, the Management approach accentuates the relevance of the formal capacity for cooperation in the relations between the principal and the agent.

It starts with mapping both supervisory subsystems in terms of Principal-Agent relations between collective units of EU public administration (section two, III.7.2). In order to proceed to the second phase of testing of the Enforcement Hypothesis, the next section applies the traditional and conservative Principal-Agent perspective

to investigate the formal capacity of the ECB (supervisory apparatus) to control the actions of undertaken by the NCA (supervisory apparatus) (section three, III.7.3). It focuses on the identification and assessment of *ex-ante* and *ex-post* control mechanisms at the disposal of the ECB (supervisory apparatus) to monitor and steer the action of the NCA (supervisory apparatus) within the subsystem of SSM Direct and Indirect Supervision and takes into account their range (forward-looking/backward looking dimension), intrusiveness (direct/indirect dimension), origin (embedded in rules of law/practice), and whether they have been actually activated.

Subsequently, the more recent and liberal Principal-Agent perspective is applied to study of the SSM supervisory subsystems in order to move to the second step of in testing of the Management Hypothesis (section four, III.7.4). The aim of this section is to gauge the formal capacity for cooperation between the ECB and NCA (supervisory apparatuses) within the subsystems of SSM Direct and Indirect Supervision. To this end, this section will focus on whether any informal structures for cooperation between ECB and NCAs supervisory apparatus have been established; and (ii) whether there are any tangible outcomes of that cooperation aiming at reducing the ambiguities of the agency contract between the ECB and NCAs (supervisory apparatuses) and clarifying contractual expectations of the ECB (supervisory apparatus), such as system-wide policy stances, guides and methodologies on certain aspects of the Union's policies on prudential supervision of credit institutions.

Section five presents the outcomes of the assessment of the capacity for control and cooperation within respective SSM supervisory subsystems, both from the traditional and liberal Principal-Agent perspective (section five, III.7.5). This exercise will provide insights into the structure of the second condition which is expected to affect the formal top-down compliance expectations within the SSM; and supported by the findings of chapter five, will constitute the basis to formulate conclusions on the EH and MH hypotheses' testing exercise in chapter seven.

## **7.2. Application of the Principal-Agent framework to this study**

A brief presentation of the main Principal-Agent tenants and various applications in chapter four proved the general suitability of this analytical approach to study compliance issues in multilevel context. However, in order draw a Principal-Agent relation, it is firstly required to present a "Principal-Agent proof" by identifying two distinguishable actors, whose relations are hierarchy or dependency-oriented, and the respective agency contract that between them.<sup>795</sup>

To this end, this section would like to highlight two specific theoretical accounts from Principal-Agent review, offered by section three of chapter four, that provide solid basis to construct a Principal-Agent relationship between the Union and Member States administration, in particular as regards the SSM (subsection one). In the next stage, this section maps Principal-Agent relations with respect to the subsystem of SSM Direct and Indirect Supervision. In doing so, it identifies the

---

<sup>795</sup> See Delreux and Adriaensen, 'Introduction. Use and Limitations of the Principal-Agent Model in Studying the European Union' (above, n.272).



principal, the agent and the agency contract transferring tasks and responsibilities from the former to the latter (subsection two). It also looks at information asymmetries and complexity of the contract. Following the assumptions of traditional and conservative Principal-Agent perspective, this section also recognizes heterogeneity of preferences between the principal and the agent in the SSM (subsection three).

#### 7.2.1. EU administrative system seen as a Principal-Agent relation

Although the overwhelming majority of the Principal-Agent applications consider elected policymakers (majoritarian institutions) as the principals and the supranational, international and national bureaucratic actors (non-majoritarian institutions) as their agents, section three of chapter four clearly indicates that a growing number of Principal-Agent contributions has successfully extended this framework to study other existing politico-administrative dynamics. It is noted that top-down relationships between the EU and its Member States remain rather under-researched.<sup>796</sup> There exist two specific accounts, one coming from the political science literature and other from economics, which support the validity of such an approach to the SSM involving a Union-level principal and a Member State-level agent.

The first belongs to Jonas Tallberg who almost twenty years ago developed a Principal-Supervisor-Agent model to capture the relations between the Member State governments (multiple principals), the Commission and the Court

---

<sup>796</sup> See *supra* n.327.

(supervisors) and individual member states (multiple agents) in the area of EU law enforcement.<sup>797</sup> He considers them as a two-level Principal-Agent relationship: between the national and the supranational level, which is the decisional phase of European integration (with a transfer of sovereignty taking place); and between the supranational and national level, which constitutes the post-decisional phase of European integration (the exercise of transferred sovereignty). The second account, which is already mentioned above, is a recent joint work by Elena Carletti, Giovanni Dell'Ariccia and Robert Marquez who perceive multilevel systems of centralized supervision consisting of central and local supervisors in terms of a Principal-Agent relation.<sup>798</sup> They assume that the central supervisor heavily relies on the supervisory information collected by the local supervisor and this may create agency problems.

It therefore follows that there seem to be no impediments to apply the Principal-Agent-oriented lens to model to the relations between the Union and Member State administration, provided that the “Principal-Agent proof” can be identified. This would be in line with a remark made by Terry Moe who notes that “the whole of politics is structured by a chain of Principal-Agent relationships, from citizen to politician, from politician to bureaucratic superior, from bureaucratic superior to bureaucratic subordinate”.<sup>799</sup>

---

<sup>797</sup> See Tallberg, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (above, n. 367).

<sup>798</sup> See Elena Carletti, Giovanni Dell'Ariccia, and Robert Marquez, ‘Supervisory incentives in a banking union’ (2016).

<sup>799</sup> See *supra* n. 2535.

### 7.2.2. SSM administrative system seen from the Principal-Agent perspective

In the light of the discussion in the previous section, the remainder of this chapter is underpinned by the assumption that the interactions between the ECB and NCA (supervisory apparatuses) operating in a respective SSM subsystem can be modelled as Principal-Agent relations between the bureaucratic superior as a whole (the principal) and the bureaucratic subordinate as a whole (the agent). These relations take place in the post-decisional phase of European integration, namely after the transfer of the competence from the Member States to the Union. Following the differentiation between the subsystems of SSM Direct and Indirect Supervision, different business areas and apparatuses of the ECB and NCAs will be identified as the bureaucratic principals and bureaucratic agents in the respective SSM supervisory systems.<sup>800</sup> One caveat is however in order. In order to reduce complexity and highlight the focus of this study on EU administration, the Principal-Agent relations are constructed exclusively between the ECB and NCA supervisory apparatuses considered as bureaucrats (civil servants) by virtue of having a standardized employment or civil service relation with either the ECB or NCAs. This implies that civil servants who were politically nominated; or sit in decision-making bodies of either ECB or NCAs; or have a special non-standardized employment contract due to their more high-level and political profile will not pertain to bureaucratic Principal-Agent relationship as constructed in the present chapter.

---

<sup>800</sup> In order to reduce complexity, the Principal-Agent relation is constructed solely between ECB and NCA (supervisory apparatus) who can be considered as bureaucrats (civil servants).

(i) Mapping a Principal-Agent relation in the subsystem of SSM Direct Supervision

The SSM Regulation confers upon the ECB exclusive competence to carry out a number of supervisory tasks (SSM supervisory tasks) over credit institutions operating in the Banking Union.<sup>801</sup> According to Article 6(4) of the SSM Regulation, the ECB is directly responsible for the conduct of these tasks with respect to supervision of significant institutions,<sup>802</sup> and for the adoption of formal supervisory decisions resulting from its direct supervisory activities on those institutions. The ECB does not however conduct its supervisory tasks relying solely on its own internal supervisory resources, functionally separated from its central banking arm.<sup>803</sup>

For the purpose of direct supervision over significant institutions, the ECB establishes dedicated structures, Joint Supervisory Teams (JSTs),<sup>804</sup> which to a lesser extent consist of ECB staff (mainly located in Frankfurt) and predominantly of NCA staff.<sup>805</sup> The ECB's reliance on the NCA resources is justified in functional terms since "national supervisors have important and long-established expertise in the

---

<sup>801</sup> See *supra* n. 436-444.

<sup>802</sup> Direct supervision covers also the issuance of so-called "operational acts", which are non-formal requests to supervised entities to take certain action. These non-formal requests to supervised entities constitute the overwhelming majority of acts addressed to supervised entities, and formal binding supervisory decisions are only issued where a supervised entity does not comply with the operational acts, except for where it is legally required, or imposes legal obligations on supervised entities affecting their fundamental rights (SREP decisions, imposition of Pillar 2 capital or liquidity requirements or other measures under Article 16(2) of the SSM Regulation). See also Informal interview with C (29 January 2016, 21 October 2016) and F (26 October 2016) in *Annex*.

<sup>803</sup> See Article 1 of 'Decision of the ECB of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39)', in *OJ L* 300, 18.10.2014.

<sup>804</sup> See Article 3(1) of the SSM Framework Regulation.

<sup>805</sup> 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 JSTs composition, however not in a formalized form. See *supra* n. 13 and n. 642.

supervision of credit institutions within their territory and their economic, organisational and cultural specificities”.<sup>806</sup>

From the administrative perspective, the JSTs do not form an integral part of the ECB, but constitute an external, inter-institutional structure. This is due to that fact that NCA supervisory staff assigned to the JST continues to have an employment, or civil service, relationship with the respective NCA and their primary reporting lines also remain within that NCA. Under Article 3(2) of the SSM Framework Regulation, the JSTs are mandated by the ECB to carry out key SSM supervisory tasks on its behalf.<sup>807</sup> It therefore follows that the foregoing provision can be regarded as setting the core features of the “agency contract” between the ECB and NCAs that further clarifies the nature and the scope of NCA assistance obligations to the ECB in respect to the supervision of significant institutions.<sup>808</sup> The foregoing institutional characteristics allow drawing a Principal-Agent bureaucratic relation between the ECB’s supervisory arm and the NCA/JSTs within the subsystem of SSM Direct Supervision since the “Principal-Agent” proof (i.e. identification of two distinguishable actors and of the agency contract between them) has been presented.

---

<sup>806</sup> See Recital (37) of the SSM Regulation.

<sup>807</sup> The JST are be responsible for the execution of the annual supervisory programme for the respective credit institution; i.e. it will work in form of a virtual team (in one or more locations) on tasks of banking supervision, exchanging information, drafting documents, assessing findings, preparing inspections, etc.

<sup>808</sup> Article 6(3) of the SSM Regulation sets a general rule that the NCAs shall be responsible for assisting the ECB where appropriate and without prejudice to the responsibility and accountability of the ECB for the tasks conferred on it by this Regulation.

Within the subsystem of SSM Direct Supervision, the bureaucratic principal is assumed to be represented by the ECB apparatus pertaining to the ECB's supervisory arm responsible for the supervision of significant institutions. This covers the following "operational" business areas: the ECB's Directorate General Micro-Prudential Supervision I and II (DG-MSI and DG-MSII) which host ECB supervisory apparatus in fifteen divisions<sup>809</sup>; the ECB's Directorate General Micro-Prudential Supervision IV (DG-MSIV) whose ten specialized divisions are responsible for horizontal support for DG-MSI and DG-MSII; and the Directorate Secretariat to the Supervisory Board (DSSB) which prepares draft supervisory decisions.<sup>810</sup>

---

<sup>809</sup> Including ECB supervisory apparatus forming part of the Joint Supervisory Teams ("core JST").

<sup>810</sup> In order to reduce analytical complexity, the ECB Supervisory Board and ECB-based representatives in the Supervisory Board are not considered as forming a part of the bureaucratic principal. This is due to the fact that they do not have standardized civil service contracts with the ECB as all ECB staff members, and by this token, cannot be considered as pertaining to ECB bureaucratic apparatus. The ECB Supervisory Board could be however perceived as a collective ("political") principal of ECB supervisory apparatus. This Principal-Agent relation is however out of scope of this study.

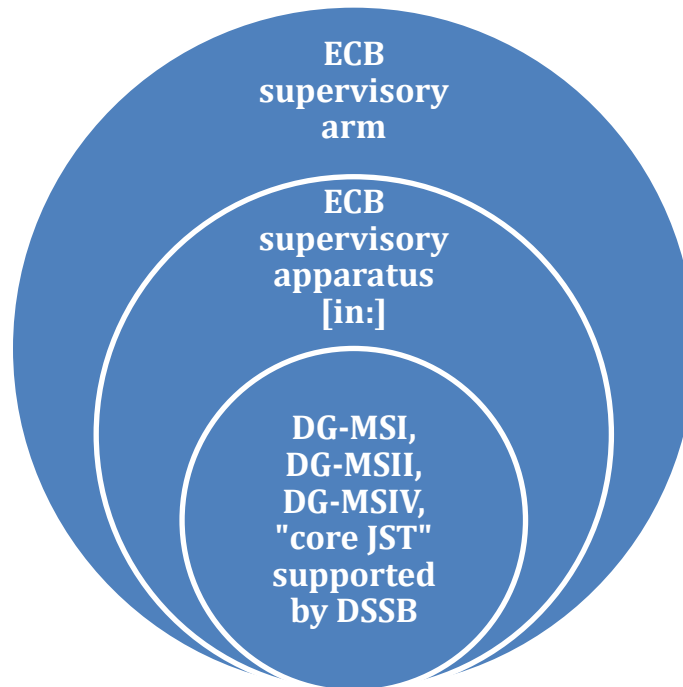


Figure 9 Bureaucratic principal in the subsystem of SSM Direct Supervision

On the other hand, the bureaucratic agent in the subsystem of SSM Direct Supervision is represented by the JSTs, and more specifically by the NCA supervisory apparatus of participating Member States that has been assigned to them<sup>811</sup> and functionally separated from the supervision of less significant institutions.<sup>812</sup> The circumstance the NCA supervisory apparatus dominates the JSTs (in aggregated terms) justifies considering them as indeed separate actors within the subsystem of SSM Direct Supervision. In addition, NCA supervisory apparatus, which is affiliated

<sup>811</sup> This includes NCA supervisors and NCA sub-coordinators. It is noted that the initial target for JST staffing consisted of the ratio 25% of ECB supervisory staff and 75% supervisory staff. See *supra* n. 805.

<sup>812</sup> In most NCAs, there exists a functional separation between NCA staff, who form JSTs and are responsible for supervision of significant institutions, and NCA staff, who are responsible for supervision of less significant institutions. One of interviewees pointed out at much higher workload on the NCA's arm responsible for supervision of significant institutions which introduces somewhat unequal division of labour between JST and non-JST supervisors, see also Informal interview with K (17 January 2016) in *Annex*.

in their horizontal business areas supporting both NCA JST and non-JST function,<sup>813</sup> can be also considered as pertaining to the bureaucratic agent.<sup>814</sup>

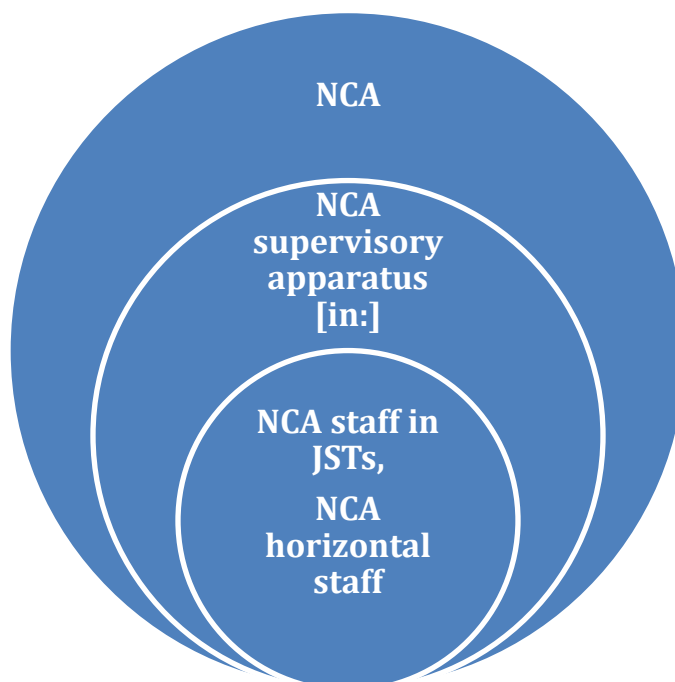


Figure 10 Bureaucratic agent in the subsystem of SSM Direct Supervision

## (ii) Mapping a Principal-Agent relation in the subsystem of SSM Indirect Supervision

As noted above, the SSM Regulation confers upon the ECB exclusive competence to carry out a number of supervisory tasks (SSM supervisory tasks) over credit institutions operating in the Banking Union.<sup>815</sup> However, Article 6(6) of the SSM

<sup>813</sup> Notably including NCA on-site inspections, legal and audit services.

<sup>814</sup> In order to reduce analytical complexity, the heads of NCA (as well as members of an NCA management board) are not considered as forming a part of the bureaucratic agent. This is due to the fact that they are usually nominated by government and/or parliament and do not have standardized civil service contracts with the NCAs as other NCA staff members. By this token, they should not be considered as pertaining to NCA bureaucracy but rather as its political/technocratic leaders. The head of the NCA could be however perceived either as forming a part of a collective principal, the ECB Supervisory Board, whose agents is ECB supervisory apparatus. She/he could be also perceived as an agent of national government (elected policy-makers). These Principal-Agent relations are however out of scope of this study.

<sup>815</sup> See *supra* n.801.



Regulation attributes to the NCAs direct responsibility to exercise the ECB's exclusive competence to carry out seven out of nine SSM supervisory tasks with respect to less significant institutions,<sup>816</sup> and empowers them to adopt all relevant supervisory decisions on them. As noted by the Court, the sole purpose of Article 6(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 institutions and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the Basic [SSM] Regulation".<sup>817</sup> Therefore, the ECB does not carry out direct supervision of less significant institutions on its own, but – as in the case of the subsystem of SSM Direct Supervision – takes recourse to the NCAs resources for functional reasons.<sup>818</sup> Consequently, Article 6(6) of the SSM Regulation can be regarded as setting the core features of the "agency contract" between the ECB and NCAs that delineates the scope of NCA assistance obligations to the ECB in respect to supervision of less significant institutions. The foregoing institutional characteristics allow drawing a Principal-Agent bureaucratic relation between the ECB's supervisory arm and the NCAs within the subsystem of SSM Indirect Supervision since the "Principal-Agent" proof (i.e. identification of two distinguishable actors and of the agency contract between them) has been presented.

---

<sup>816</sup> With exception of the tasks of (i) granting and (ii) withdrawing of authorization of a credit institution (Article 4(1)(a) of the SSM Regulation) and (iii) assessing changes in the shareholder structure of a supervised institution (Article (4)(1)(c) of the SSM Regulation) ("common procedures").

<sup>817</sup> See *supra* n.788, para 63.

<sup>818</sup> See *supra* n. 636.

Within the subsystem of SSM Indirect Supervision, the bureaucratic principal is assumed to be represented by the ECB apparatus pertaining to the ECB's supervisory arm responsible for the oversight over supervision of less significant institutions by the NCAs. This covers the following “operational” business areas: the ECB's Directorate General Micro-Prudential Supervision III (DG-MSIII) which hosts ECB supervisory apparatus in three divisions responsible for different dimensions of supervisory oversight. It is supported by the Directorate Secretariat to the Supervisory Board (DSSB) which prepares draft supervisory decisions.<sup>819</sup>

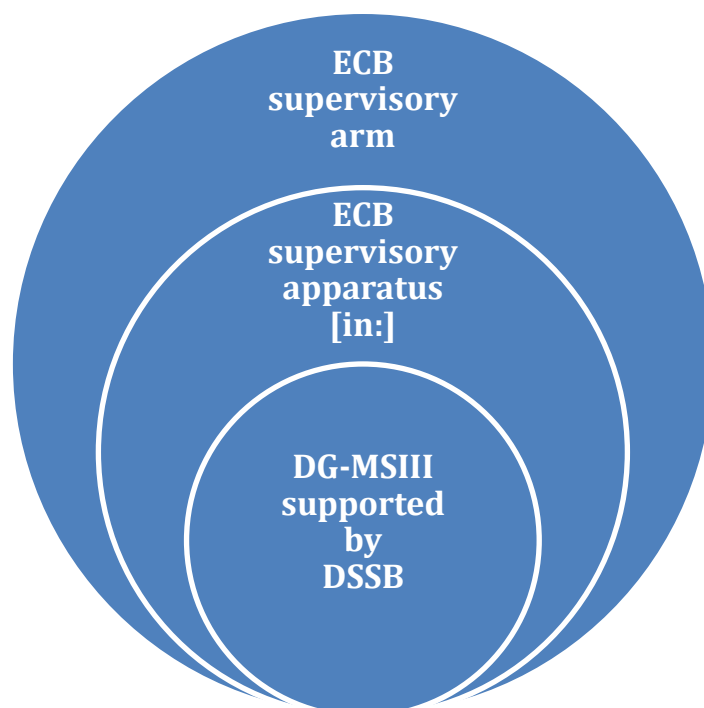


Figure 11 Bureaucratic principal in the subsystem of SSM Indirect Supervision

<sup>819</sup> In order to reduce analytical complexity, the ECB Supervisory Board and ECB-based representatives in the Supervisory Board are not considered as forming a part of the bureaucratic principal. This is due to the fact that they do not have standardized civil service contracts with the ECB as all ECB staff members, and by this token, cannot be considered as pertaining to ECB bureaucratic apparatus. The ECB Supervisory Board could be however perceived as a collective principal of ECB supervisory apparatus. This Principal-Agent relation is however out of scope of this study.

On the other hand, the bureaucratic agent in the subsystem of SSM Indirect Supervision is assumed to be represented by NCA supervisory apparatus of participating Member States that has not been assigned to the Joint Supervisory Teams and is responsible for the supervision of less significant institutions.<sup>820</sup> This also includes supervisory apparatus affiliated in NCA horizontal business areas (including on-site inspections, legal services) which supports both NCA JST and non-JST function.<sup>821</sup>

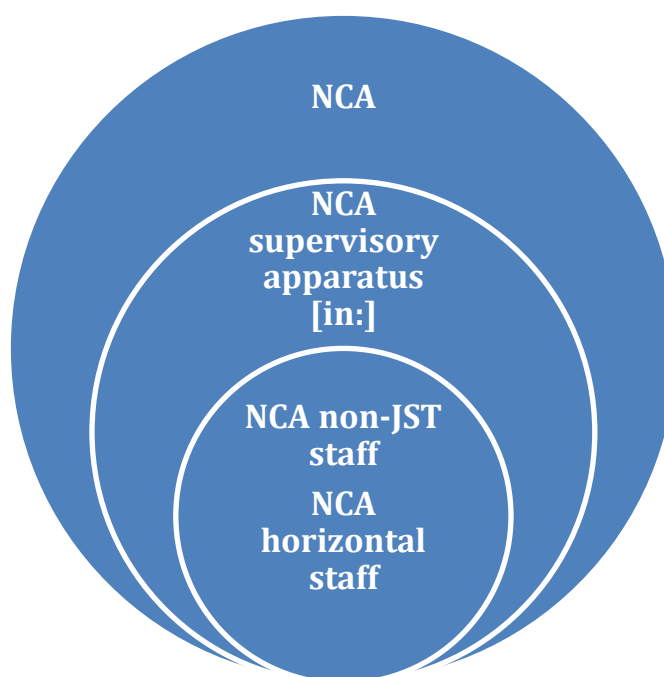


Figure 12 Bureaucratic agent in the subsystem of SSM Indirect Supervision

<sup>820</sup> In most NCAs, there exists a functional separation between NCA staff, which forms JSTs and is responsible for supervision of significant institutions, and NCA staff, which is responsible for supervision of less significant institutions. See Informal interview with A (13 November 2015, 12 January 2016, 15 July 2016) in *Annex*.

<sup>821</sup> In order to reduce analytical complexity, the head of NCA management and top NCA management are not considered as forming a part of the bureaucratic agent. This is due to the fact that they are usually nominated by government and/or parliament and do not have standardized civil service contracts with the NCAs as other NCA staff members. By this token, they should not be considered as pertaining to NCA bureaucracy but rather as its political/technocratic leaders. The head of the NCA could be however perceived either as forming a part of a collective principal, the ECB Supervisory Board, whose agents is ECB supervisory apparatus. She/he could be also perceived as an agent of national government (elected policy-makers). These Principal-Agent relations are however out of scope of this study.

### 7.2.3. Heterogeneity of preferences within SSM on Union's policies related to prudential supervision of credit institutions

In addition to the identification of the “Principal-Agent proof”, traditional and conservative perspectives on Principal-Agent relations require to demonstrate that the principal and the agent as rational actors are expected to display inherently diverging preferences. These preferences are assumed to be rather static and not prone to change over time. On the other hand, more recent and liberal Principal-Agent applications consider the preferences of the principal and the agents as a variable rather than a necessary condition to apply the model to a particular situation.<sup>822</sup> In particular, where Principal-Agent environment is characterized by high complexity of policy-making, preference formation is considered to be a dynamic process. By reducing its informational advantage, the agent is expected to better inform the principal about its preferences. The principal, in turn, is expected to take them into account when forming its preferences.

Since traditional and conservative Principal-Agent approach is used to test the Enforcement hypothesis, it is necessary to demonstrate that the preferences of the ECB and NCA (supervisory apparatuses) are likely to be originally heterogeneous. Before undertaking this exercise, one caveat is in order. It needs to be emphasized that the assumptions regarding preferences of the principal and the agent may not

---

<sup>822</sup> See Richard W. Waterman and Kenneth J. Meier, ‘Principal-agent models: an expansion?’, *Journal of public administration research and theory* 8, no. 2 (1998): pp. 173–202; Anne Rasmussen, ‘EU conciliation delegates: Responsible or runaway agents?’, *West European Politics* 28, no. 5 (2005): pp. 1015–1034; Manfred Elsig, ‘European Union trade policy after enlargement: larger crowds, shifting priorities and informal decision-making’, *Journal of European Public Policy* 17, no. 6 (2010): pp. 781–798; Eugénia da Conceição-Heldt, ‘Variation in EU member states’ preferences and the Commission’s discretion in the Doha Round’, *Journal of European Public Policy* 18, no. 3 (2011): pp. 403–419; Johan Adriaansen, *National Administrations in EU Trade Policy: Maintaining the Capacity to Control* (Springer, 2016).

necessarily reflect the state of things as they actually exist, but rather only a situation where “conditions in the world approximate the conditions assumed in the model, observed behaviours and outcomes can be expected to approximate predicted behaviours and outcomes”.<sup>823</sup> Therefore, following the advice given by Gary King, Robert Keohane and Sidney Zerba, one should consider the conditions assumed in the model as solely abstracting the “right” features of the reality they represent.<sup>824</sup>

The Principal-Agent framework is largely about efficient allocation of tasks and responsibilities between the parties to the agency contract which is driven by a desire to multiply the principal’s gains and benefits in highly complex policy areas.<sup>825</sup> Based on the rational choice underpinnings of the Principal-Agent approach, it is argued that ECB and NCA (supervisory apparatuses) are likely to display diverging policy preferences and objectives concerning Union’s policies related to prudential supervision of credit institutions when interacting in the subsystems of SSM Direct and Indirect Supervision.

#### (i) The preferences and objectives of the ECB-principal

In line with rational choice underpinnings of the institutional analysis offered by this dissertation, the ECB Banking Supervision is considered to act as self-utility maximizer<sup>826</sup> when pursuing its objective of “contributing to the safety and

---

<sup>823</sup> See Ostrom Elinor, *Governing the commons: The evolution of institutions for collective action* (Cambridge University Press Cambridge, 1990), p. 183.

<sup>824</sup> Gary King, Robert O. Keohane, and Sidney Verba, *Designing social inquiry: Scientific inference in qualitative research* (Princeton university press, 1994), p. 49.

<sup>825</sup> See *supra* n.256.

<sup>826</sup> See *supra* n. 261.

soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage.”<sup>827</sup> To achieve these objectives, the ECB is likely to initially display the “integrationist” preference across different supervisory policy fields in order to promote “ever closer (Banking) Union”,<sup>828</sup> understood in terms of “ensuring the consistent application of the Single Rulebook to credit institutions”,<sup>829</sup> and harmonizing supervisory practices to ensure level playing field for all banks operating in the Banking Union’s jurisdictions.<sup>830</sup>

Such an ECB stance on its policy preferences and objectives in the SSM can be explained by the assumption that it leads to its institutional self-aggrandizement<sup>831</sup> in relation to Member States’ administration, which is in line with the rational choice expectations concerning the behaviour of higher level actors operating in a multilevel (federal) context.<sup>832</sup> Under the assumption that a unit of supranational

---

<sup>827</sup> See Article 1(1) of the SSM Regulation.

<sup>828</sup> See Preamble to TEU, on the somewhat ambiguous meaning of ‘ever closer Union’, see for example Simon Glendinning and Roch Dunin-Wąsowicz, *Ever Closer Union: Report of the hearing held on 15th April, 2016*, LSE European Institute, <http://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-10---Ever-Closer-Union-REPORT.pdf>, accessed 01 December 2017.

<sup>829</sup> See Recital (87) of the SSM Regulation.

<sup>830</sup> Between February 2014 and December 2017, the formulation “ensuring/fostering the level playing field” across institutions headquartered in the Banking Union has appeared more than 100 times in official communication of the ECB supervisory apparatus, see the official website of the ECB’s supervisory function (ECB Banking Supervision) <https://www.bankingsupervision.europa.eu/press/speeches> (accessed on 01 December 2017).

<sup>831</sup> See R. Daniel Kelemen assumes that this is the key preference of both federal (supranational) and state (national) actors operating in a multilevel setting. See R. Daniel Kelemen, ‘The structure and dynamics of EU federalism’, *Comparative Political Studies* 36, 1-2 (2003): pp. 184–208. In this context, self-aggrandizement is understood as a desire to increase the power and prestige of supranational administrative apparatus.

<sup>832</sup> On a near consensus in the literature on EU integration regarding generally pro-integrationist preferences of supranational institutions, see for example Tallberg, *European governance and supranational institutions: making states comply* (above, n. 252); Pollack, ‘The Engines of Integration? Supranational Autonomy and Influence in the European’ (above, n. 375); Laura Cram, ‘The Politics of EU Policy-Making: Conceptual Lenses and the Integration

administration (such as the ECB Banking Supervision) is a collective actor,<sup>833</sup> its preference can be also ascribed to its bureaucratic apparatus<sup>834</sup> whose career opportunities depend on the strength of their allegiance and loyalty to the hiring institution.<sup>835</sup>

## (ii) The preferences and objectives of the NCA-agent

In line with rational choice underpinnings of the institutional analysis offered by this dissertation, the NCA is considered to act as self-utility maximizer in the same manner as the ECB's supervisory function (ECB Banking Supervision).<sup>836</sup> Unlike the latter, the NCA as a part of national administration have jurisdiction-specific objectives in ensuring to the safety and soundness of credit institutions and the stability of the financial system and are expected to promote domestic interests (like for example economic growth). To achieve these objectives, the NCA is likely to display initially the "home-biased" (particularist) preference across different supervisory fields in order to minimize adjustment costs of their domestic banking

---

Process', *London/New York: Routledge* (1997); Giandomenico Majone, *Regulating Europe* (London: Routledge, 1996); George Ross, *Jacques Delors and European Integration* (Cambridge Univ Press, 1995); Charles Grant, *Delors: Inside the house that Jacques built* (Nicholas Brealey London, 1994).

<sup>833</sup> See Benz, 'European public administration as a multilevel administration: a conceptual framework' (above, n. 166), p. 42.

<sup>834</sup> On the loyalties of supranational officials, see also Cris Shore, *Building Europe: The cultural politics of European integration* (Routledge, 2013); Liesbet Hooghe, 'Supranational activists or intergovernmental agents? Explaining the orientations of senior Commission officials toward European integration', *Comparative Political Studies* 32, no. 4 (1999): pp. 435–463.

<sup>835</sup> On the motivations on bureaucrats participating in politico-administrative processes, see notably Gordon Tullock, *The politics of bureaucracy* (Public Affairs Pr, 1965); Barry R. Weingast and William J. Marshall, 'The industrial organization of Congress; or, why legislatures, like firms, are not organized as markets', *Journal of Political Economy* 96, no. 1 (1988): pp. 132–163; Terry M. Moe, 'Politics and the Theory of Organization', *Journal of Law, Economics, and Organization* 7, special issue (1991): pp. 106–129.

<sup>836</sup> See *supra* n. 826826.

sector.<sup>837</sup> This can be understood in terms of widening flexibility and “room for manoeuvre” in the application of the Union’s supervisory policies in its home jurisdiction.

Such a preference is expected to preserve the prominence of NCA institutional status both in domestic jurisdictions and in relation to ECB Banking Supervision seen as a higher level actor,<sup>838</sup> and would in line with the rational choice expectations concerning the behaviour of lower level actors operating in a multilevel (federal) context. Under the assumption that a unit of national administration (such as the NCA) is a collective actor,<sup>839</sup> its preference can be also ascribed to its bureaucratic apparatus<sup>840</sup> whose career opportunities depend on the strength of their allegiance and loyalty to the hiring institution.<sup>841</sup>

---

<sup>837</sup> See, indicatively, David Howarth and Lucia Quaglia, *The Political Economy of European Banking Union* (Oxford University Press, 2016) David Howarth and Lucia Quaglia, ‘The comparative political economy of Basel III in Europe’, *Policy and Society* 35, no. 3 (2016): pp. 205–214; Domenico Lombardi and Manuela Moschella, ‘Domestic preferences and European banking supervision: Germany, Italy and the Single Supervisory Mechanism’, *West European Politics* 39, no. 3 (2016): pp. 462–482; Aneta B. Spendzharova and Ismail Emre Bayram, ‘Banking union through the back door? How European banking union affects Sweden and the Baltic States’, *West European Politics* 39, no. 3 (2016): pp. 565–584; David Howarth and Lucia Quaglia, ‘Internationalised banking, alternative banks and the Single Supervisory Mechanism’, *West European Politics* 39, no. 3 (2016): pp. 438–461.

<sup>838</sup> On national supervisors home-biased supervisory perspective, see (for example) Nicolas Véron, ‘Europe’s Banking Union’, *The New International Financial System: Analyzing the Cumulative Impact of Regulatory Reform* 48 (2015): p. 131; Javier Bilbao-Ubillos, *The Economic Crisis and Governance in the European Union: a critical assessment* (Routledge, 2013), p.33; Howarth, Quaglia and Gren, ‘Supranational banking supervision in Europe: The construction of a credible watchdog’ (above, n.394).

<sup>839</sup> As noted by Tobias Tröger, national supervisors “will discharge their duties in a way that allows them to acquire favourable reputation among their peers, among the general public and in the media”, see Tröger, ‘The Single Supervisory Mechanism–Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement’ (above, n.396), p. 476.

<sup>840</sup> On the loyalties of supranational officials, see also Shore, *Building Europe: The cultural politics of European integration* (above, n. 941); Hooghe, ‘Supranational activists or intergovernmental agents? Explaining the orientations of senior Commission officials toward European integration’ (above, n.834). See also Informal interview with F (25 October 2016) and G (10 March 2017) in *Annex*.

<sup>841</sup> This is due to the fact advancement of their future carrier in administration, politics or private sector make them prone to promoting the interests of those who offer most desirable career path in a long term, see *supra* n. 584. However, as Michelle Cini notes, “the appointment of temporary staff encourages an intermingling of



### 7.3. The formal capacity for control in the SSM

According to the Enforcement approach, the assessment of the formal capacity of the ECB (supervisory apparatus) to control the NCA (supervisory apparatus) in the SSM constitutes the second phase of determining the expectation for formal top-down compliance therein. The formal capacity of the ECB (supervisory apparatus) to control the NCA (supervisory apparatus) within the subsystems of SSM Direct and Indirect Supervision can be measured by employing traditional and conservative Principal-Agent perspective on their relations. This perspective advocates that higher levels of the agent's compliance can be achieved where the principal has adequate control mechanisms at its disposal.

These mechanisms consist of *ex-ante* and the *ex-post* controls, which ideally should be are backed by the principal's recourse to coercion or constraint. In other words, they are binding upon the agents and can be enforced (either directly or indirectly) by the principal against them. They may cover a variety of aspects relating to the Principal-Agent interactions. The *ex-ante* devices can address the ambiguities of the incomplete agency contract, such as establishing additional *rules of law* defining the scope and modalities of the agency, formulation of performance expectations, applicable procedural requirements, internal ordinances, and manuals. In particular,

---

national and European administrators which itself has the potential to provoke a sort of process of Europeanisation at the national and subnational levels", see Michelle Cini, The European Commission: leadership, organisation, and culture in the EU administration (Manchester University Press, 1996), p. 121. On the possibilities of national officials loyalty shifts, see also Jarle Trondal, 'The parallel administration of the European Commission: National officials in European clothes?' (2003); Jarle Trondal, 'Beyond the EU membership-non-membership dichotomy? Supranational identities among national EU decision-makers', *Journal of European Public Policy* 9, no. 3 (2002): pp. 468–487; Jeffrey Lewis, 'The methods of community in EU decision-making and administrative rivalry in the Council's infrastructure', *Journal of European Public Policy* 7, no. 2 (2000): pp. 261–289.

legally binding instruments adopted by the ECB (supervisory apparatus) in a view of clarifying in advance the internal functioning of the respective SSM supervisory subsystems can be considered as a particular type of *ex-ante* controls. The *ex-post* controls represent backward-looking perspective allowing the ECB to react (through steering or intervention) to undesired activities of the JSTs/NCAs can be classified as the *ex-post* procedures. In addition, they could be regarded as “police patrols” if they are centralized and can be directly used by the ECB or as “fire alarms” if they are of decentralized and indirect nature.

This section will identify and assess formal *ex-ante* and *ex-post* controls which the bureaucratic principal (ECB supervisory apparatus) has over its bureaucratic agent (NCA supervisory apparatus) with respect to the subsystem of SSM Direct (III.7.3.1) and Indirect Supervision (III.7.3.2). While carrying out their credibility assessment, it will take into account their range (forward-looking/backward looking dimension) intrusiveness (direct/indirect dimension), origin (embedded in rules of law/practice) and whether they have been actually activated.

### 7.3.1. The ECB’s control mechanisms in the system of SSM Direct Supervision

#### The formal *ex-ante* controls<sup>842</sup>

Legally binding instruments adopted by the ECB in a view of clarifying in advance the internal functioning of the subsystem of SSM Direct Supervision can be regarded

---

<sup>842</sup> The selection was based on the analysis whether these measures introduce specific *rules of law* which have a substantial impact on the national supervisory apparatus (NCAs) and which it is bound to observe. As noted by one interviewee, the design of the SSM rests primarily on binding *rules of law* rather than non-binding rules of practice. See Informal interview with M (08 November 2016) in *Annex*.

as particularly relevant *ex-ante* controls aiming to clarify the ambiguities of the assistance contract between the ECB (supervisory apparatus) and NCA (supervisory apparatus) in the JSTs. These acts may not only affect the regulatory environment in which significant supervised entities operate, but also normatively frame or reframe various aspects of interactions between the ECB and NCAs and their supervisory apparatuses in the SSM. Moreover, they may be regarded as further stipulating technical *rules of law*, which supranational and national supervisory apparatus is always bound to observe.

The ECB may develop such rules that are binding upon the NCA when carrying out prudential supervision over significant institutions. As provided by the SSM Regulation, the ECB can adopt Regulations<sup>843</sup> and Decisions<sup>844</sup> which however need to comply with the Single Rulebook legislation.<sup>845</sup> Furthermore, the ECB can issue instructions to the NCAs of participating Member States when carrying out

---

<sup>843</sup> A Regulation is a legal act of general applicability, binding in its entirety and directly applicable in all Member States without the need for implementation in national law, see Article 288(2) of the TFEU. However, Article 4(3) of the SSM Regulation limits adoption to the extent necessary in order to organize or specify the modalities for carrying out its supervisory tasks.

<sup>844</sup> A Decision is an act with a specific scope of application (the addressees), binding in its entirety for those to whom it is addressed, see Article 288(4) of the TFEU. There can also be Decisions without addressees, also referred to as “general Decisions” which have general applicability. It is noted that general decisions (or decisions without addressees) are specifically mentioned in art. 288 TFEU: “A decision shall be binding in its entirety. A decision that specifies those to whom it is addressed shall be binding only on them”. This paragraph refers also to the possibility of issuing decisions without addressees (or general decisions) that will be legally binding and have general applicability.

<sup>845</sup> In particular, when adopting supervisory acts, the ECB must apply all relevant Union law and, where the Union law is in the form of directives, the national legislation transposing those directives. The acts of the ECB are also subject to binding regulatory and implementing technical standards developed by the European Banking Authority (EBA) and adopted by the Commission.

supervision of significant institutions.<sup>846</sup> Similarly, ECB-based coordinators of JSTs may issue instructions to NCA supervisory staff.<sup>847</sup>

In this respect, the ECB has adopted a number of legal acts relating to the supervision of significant institutions which touch upon the relations of its supervisory apparatus with their NCA counterparts, and more broadly, with the NCAs as a whole. Among them, the following instruments should be mentioned: (i) the SSM Framework Regulation,<sup>848</sup> (ii) the Decision ECB/2014/29,<sup>849</sup> (iii) the Regulation ECB/2015/13,<sup>850</sup> (iv) the Regulation ECB/2016/4,<sup>851</sup> (v) the Decision ECB/2016/40,<sup>852</sup> as well as (vi) the Decision ECB/2014/5<sup>853</sup> regulating the interactions with those Member States which decided to opt-in to the SSM. All these legal acts can be regarded as the *ex-ante* controls in a sense that they clarify complement the SSM Regulation - the basic and high-level act governing the functioning of the subsystem of SSM Direct (and Indirect) Supervision.

---

<sup>846</sup> See Article 9(1) of the SSM Regulation.

<sup>847</sup> See Article 6(1) of the SSM Framework Regulation. It needs to be pointed out that the issue of whether or not such instructions would be enforced vis-à-vis individual NCA staff members is problematic, mainly due to the lack of employment/civil service relationship between the ECB and NCA supervisory staff assigned to the JSTs.

<sup>848</sup> See '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): SSM Framework Regulation' (above, n.74).

<sup>849</sup> See 'Decision of the ECB of 2 July 2014 on the provision to the European Central Bank of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014 (ECB/2014/29)' (above, n.74).

<sup>850</sup> See 'Regulation (EU) 2015/534 of the ECB of 17 March 2015 on reporting of supervisory financial information (ECB/2015/13)' (above, n.74).

<sup>851</sup> See 'Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4)' (above, n.74).

<sup>852</sup> 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)' (above, n.74).

<sup>853</sup> See 'Decision of the ECB of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5)' (above, n.74).

(i) The SSM Framework Regulation<sup>854</sup>

The SSM Framework Regulation is an act issued by the ECB which can be considered as instituting a range of the *ex-ante* controls which frame the interactions between the supranational and national apparatus in various aspects of the SSM. It lays down the specific arrangements governing the structures and the ways of the supervision of significant<sup>855</sup> (SSM Direct Supervision) and less significant institutions<sup>856</sup> (SSM Indirect Supervision), supervision of the consolidated basis<sup>857</sup>, supplementary supervision<sup>858</sup> and the passporting issues.<sup>859</sup> It also sets out the operational principles governing the interactions of the ECB and NCAs<sup>860</sup> and their respective supervisory apparatuses, due process<sup>861</sup> and reporting of breaches of supervisory legislation.<sup>862</sup> In the context of the supervision of significant institutions, it introduces the concept of Joint Supervisory Teams (JST) for each supervised entity and lays down their composition and leadership. The JST overwhelmingly consist of local experts from the NCAs of participating Member States working under the overall coordination of the ECB coordinator which ensures that “JSTs take a European perspective”.<sup>863</sup>

---

<sup>854</sup> See *supra* n.848.

<sup>855</sup> See Part II, Title 1, Chapter 1 of the SSM Framework Regulation. The importance of the SSM Framework Regulation as a mechanism to fill-in the SSM agency contract was additionally emphasized in the data triangulation stage, see notably Informal interview with N (03 March 2017) in *Annex*.

<sup>856</sup> See Part II, Title 1, Chapter 2 of the SSM Framework Regulation.

<sup>857</sup> See Part II, Title 2 of the SSM Framework Regulation.

<sup>858</sup> See Part II, Title 4 of the SSM Framework Regulation.

<sup>859</sup> See Part II, Title 3 of the SSM Framework Regulation.

<sup>860</sup> See Part III, Title 1 of the SSM Framework Regulation.

<sup>861</sup> See Part III, Title 2 of the SSM Framework Regulation.

<sup>862</sup> See Part III, Title 3 of the SSM Framework Regulation.

<sup>863</sup> See Danièle Nouy, *Launch of the SSM – what will change in banking supervision and what are the imminent impacts on the banking sector?*, Speech at the Third FIN-FSA Conference on EU Regulation and Supervision

Furthermore, the SSM Framework Regulation also stipulates the specific methodology for the assessment of the significance of institutions<sup>864</sup> which is of a crucial importance to delineate the scope of EU Direct and Indirect Supervision within the SSM. This activity can be regarded a crucial exercise since it enables to determine which of the around 4,500 individual credit institutions in the euro area will be deemed significant.<sup>865</sup> It also sets the scope of the direct supranational supervision by allocating them to one of the applicable SSM administrative sub-arrangement.

Lastly, the SSM Framework Regulation also clarifies the management of common procedures,<sup>866</sup> further develops the close cooperation arrangements for non-euro area participating Member States which join the SSM and regulates the exercise of supranational supervisory competence related to the imposition of administrative penalties, information requests, general investigations and on-site inspections.

(ii) Decision ECB/2014/29 (on the provision of supervisory data)<sup>867</sup>

The SSM Regulation obliges the ECB and NCAs to cooperate in good faith and exchange the information.<sup>868</sup> It also requires the NCAs to provide the ECB directly with all information necessary for the purposes of carrying out its supervisory tasks

---

(Helsinki, 5 June), <https://www.bankingsupervision.europa.eu/press/speeches/date/2014/html/se140605.en.html>, accessed 20 February 2017.

<sup>864</sup> See Part IV of the SSM Framework Regulation.

<sup>865</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2016*, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2016.en.pdf?e6209395b9450c2655f04a4e24ffa463>, accessed 01 December 2017, p. 49.

<sup>866</sup> This aspect is addressed subsequently in subsection 7.3.2(ii).

<sup>867</sup> See *supra* n. 849.

<sup>868</sup> See Article 6(2), first sentence of the SSM Regulation.

as well as well to grant the access to the information reported by the institutions.<sup>869</sup> As instructed by the SSM Framework Regulation, this information shall be provided in a timely and accurate manner and include input stemming from the NCAs' verifications and onsite activities.<sup>870</sup> Furthermore, in situations where the ECB directly obtains information on credit institutions, it is also obliged to forward this information to the NCA(s) concerned in order to enable them to carry out their assistance role<sup>871</sup> and their tasks related to prudential supervision.<sup>872</sup> In this context, the ECB Decision on the provision of supervisory data can be regarded as an *ex ante control* since it organizes the processes relating to collection and quality review of data reported by both NCAs and supervised entities. Notably, it sets the specific remittance dates,<sup>873</sup> details of data quality checks to be performed by NCAs before submission,<sup>874</sup> qualitative information requirements,<sup>875</sup> and specifications of the transmission formats.<sup>876</sup>

(iii) Regulation ECB/2015/13 (on reporting of supervisory financial information)<sup>877</sup>

This Regulation complements the ECB Decision on the provision of supervisory data by further specifying the requirements concerning the reporting of supervisory financial information on significant (and less significant) entities by the NCAs.

---

<sup>869</sup> See Article 6(2), second sentence of the SSM Regulation.

<sup>870</sup> See Article 21(1) of the SSM Framework Regulation.

<sup>871</sup> See Article 21(2) of the SSM Framework Regulation.

<sup>872</sup> See Article 21(3) of the SSM Framework Regulation.

<sup>873</sup> See Article 3 of the Decision ECB/2014/29.

<sup>874</sup> See Article 4 of the Decision ECB/2014/29.

<sup>875</sup> See Article 5 of the Decision ECB/2014/29.

<sup>876</sup> See Article 6 of the Decision ECB/2014/29.

<sup>877</sup> See *supra* n. 850.

Under the Single Rulebook legislation, supervisory financial reporting (FINREP) is only mandatory for institutions applying International Financial Reporting Standards (IFRS) at the consolidated level. In this context, the Commission Implementing Regulation<sup>878</sup> is not intended to be the unique source of regular standardized information to be used in day-to-day supervision. Although it provides for maximum harmonization of supervisory information in key areas, it does not cover the entire spectrum of supervisors' needs concerning regular reporting. For these reasons, the competent authorities have options to extend financial reporting obligations to other supervised entities.<sup>879</sup>

The ECB Regulation broadens the regular reporting of supervisory financial information to specific institutions applying international accounting standards (IFRS)<sup>880</sup> and the obligation to report supervisory financial information (FINREP) on a consolidated basis to credit institutions applying national accounting frameworks (nGAAP).<sup>881</sup> Regarding significant supervised entities, it regulates the transmission of supervisory information to the ECB by the NCAs on significant supervised groups and subgroups which apply international accounting standards (IFRS), significant supervised groups and subgroups subjected to national accounting frameworks (nGAAP), significant supervised entities, branches established in a participating Member State by a credit institution established in a non-participating Member

---

<sup>878</sup> See 'Commission Implementing Regulation (EU) No 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council', in *OJ L 191*, 28.6.2014.

<sup>879</sup> See, for example, Article 99(3)(6) of the CRR.

<sup>880</sup> See Article 99(3) of the CRR.

<sup>881</sup> See Article 99(6) of the CRR.



State, as well as significant supervised groups regarding subsidiaries established in a non-participating Member State or a third country. Depending on the institutions' accounting regime, it requires them to make use of specific reporting templates attached to the Commission Implementing Regulation. As such, it can be regarded as another *ex-ante* procedure which pinpoints the exchange of information between supranational and national supervisory apparatus.

(iv) Regulation ECB/2016/4 (on the exercise of options and national discretions)<sup>882</sup>

The key pieces of the Single Rulebook – the CRR and CRDIV – provide competent (supervisory) authorities and Member States' legislatures with the possibility to choose how (an option) and whether (a discretion) to apply certain prudential requirements to credit institutions.<sup>883</sup> Overall, there exist around 150 such provisions, of which some are granted to Member States and other to competent authorities.<sup>884</sup> Some of these are applied in a general manner to the entire banking sector and some are applied following a case-by-case assessment of the particular status and characteristics of specific institutions. In order to ensure consistent treatment of all credit institutions subjected to the subsystem of SSM Direct Supervision, the ECB issued a Regulation which adopts a common approach to the exercise of general options and national discretions which are in the remit of

---

<sup>882</sup> See *supra* n 851.

<sup>883</sup> Such room for maneuver was given by the EU legislators partly to facilitate the transition to a new regulatory regime (Basel III) and to accommodate existing diverging regulatory and supervisory approaches in EU Member States. See *supra* n. 489-490 and n.838.

<sup>884</sup> See European Central Bank, *Public consultation on a draft Regulation and Guide on exercise of options and discretions available in Union law*, Explanatory memorandum (2015), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/pub\\_con\\_explanatory\\_morandum\\_options\\_discretions.en.pdf?bf95087a9a34cd3d654446e5bb462c8a](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/pub_con_explanatory_morandum_options_discretions.en.pdf?bf95087a9a34cd3d654446e5bb462c8a), accessed 20 February 2017, p. 3.

supervisory competence and which are applied in a general manner to the entire banking sector.<sup>885</sup>

The scope of generally applicable options and national discretions varies. They concern different aspects of supervisory activities such as defining treatments in the capital requirements, large exposures and liquidity framework. There are also transitional options and national discretions which allows for smoother transition towards the new definition of own funds for banks.<sup>886</sup> This Regulation sets the approach which the JST should follow when exercising specific options and national discretions which are of general nature. By this token, it can be regarded as an example of the principal's *ex ante* procedure.

(v) Decision ECB/2016/40 (on a general framework for delegating decision-making powers)<sup>887</sup>

Early experience of the functioning of the subsystem of SSM Direct Supervision proved that there was a stringent operational need to increase the engagement the ECB supervisory apparatus in supervisory decision-making, especially as regards routine executive supervisory measures.<sup>888</sup> To improve operational efficiency of SSM Direct Supervision, a dedicated (internal) delegation framework allowing for the transfer of decision-making authority directly to the ECB supervisory apparatus

---

<sup>885</sup> See European Central Bank, *Public consultation on the draft Regulation and Guide of the European Central Bank on the exercise of options and discretions in Union law: Questions and Answers* (2015), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/pub\\_con\\_options\\_discretions\\_qa.en.pdf?82fb798092138f9e4a00719a06ee26c1](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/pub_con_options_discretions_qa.en.pdf?82fb798092138f9e4a00719a06ee26c1), accessed 27 February 2017.

<sup>886</sup> See European Central Bank, *Public consultation on on a draft Regulation and Guide on exercise of options and discretions available in Union law*, p. 4.

<sup>887</sup> See *supra* n. 852.

<sup>888</sup> See Recital (1) of the Decision ECB/2016/40.

(without the necessity to initiate the non-objection procedure) has been developed. In this respect, the Decision ECB/2016/40 sets a general framework on the delegation of clearly defined decision-making from the Governing Council to heads of ECB supervisory working units. It also sets out in detail the scope of the matter to be delegated and the conditions on the basis of which such powers may be exercised.<sup>889</sup>

On that basis, the Governing Council subsequently transferred its decision-making authority with respect to classifying a supervised entity as significant (the Decision ECB/2016/41),<sup>890</sup> and assessing the fitness and propriety of management boards of significant institutions (the Decision ECB/2016/42).<sup>891</sup> Despite of some legal concerns whether such “internal delegation” of formal decision-making supervisory authority within the ECB was permissible,<sup>892</sup> it was recognized by the Court 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.”<sup>893</sup> By this token, internal delegation framework can be seen as the reinforcement of the ECB supervisory apparatus direct *ex ante* control over draft decision proposals submitted by the NCA/JST supervisory apparatus in certain areas of supervision.

---

<sup>889</sup> See Article 4 of the Decision ECB/2016/40.

<sup>890</sup> See ‘Decision (EU) 2017/934 of the ECB of 16 November 2016 on the delegation of decisions on the significance of supervised entities (ECB/2016/41)’, in *OJ L 141*, 1.6.2017.

<sup>891</sup> See ‘Decision (EU) 2017/935 of the ECB 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)’, in *OJ L 141*, 1.6.2017.

<sup>892</sup> See Council, *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 (Brussels, October), <http://data.consilium.europa.eu/doc/document/ST-14752-2012-INIT/en/pdf>, accessed 01 December 2017.

<sup>893</sup> See Judgment of 26 May 2005, Case C-301/02 P *Carmine Salvatore Tralli v European Central Bank* EU:C:2005:306, paras 41-42.

(vi) Decision ECB/2014/5 (on close cooperation)<sup>894</sup>

This particular ECB legal act can be considered as a supplement to the general regime regulating the close cooperation arrangement. The general rules on close cooperation are laid down in the Article 7 of the SSM Regulation and further developed by the Part Nine of the SSM Framework Regulation. In this regard, the ECB Decision stipulates the procedural aspects relating to requests by non-participating Member States to opt-in the SSM and the assessment of these requests by the ECB. By these token, it can be regarded as another example of a specific *ex ante* control set out by the principal with respect to its future agents (the NCAs of the non-euro area Participating Member States).

#### The *ex-post* formal controls

The SSM Regulation, and the subsequent supplementary legal and non-legal acts adopted by the ECB (the principal), provide for a range of instruments which can be used to monitor and react to actions and performance of the Joint Supervisory Teams (the agents) from a back-ward looking perspective, and more generally of the NCAs. From the Principal-Agent perspective, these features allow classifying them as the principal's *ex post* procedures. In this context, the following *ex post* controls can be identified within the subsystem of SSM Direct Supervision: (i) ECB's horizontal and specialized services, (ii) feedback process on performance of JST staff originating from NCAs, (iii) information requests to the NCAs, and (iv) issuance of supervisory instructions to JST staff and NCAs.

---

<sup>894</sup> See *supra* n. 853.

(vii) ECB's horizontal and specialized supervisory services

To ensure that Union's supervisory policies are applied in consistent manner across the JSTs, ten horizontal and specialized divisions have been set-up in the ECB Directorate General Micro-Prudential Supervision IV (DG-MSIV). These business areas cover, such areas of prudential supervision as: risk analysis, supervisory planning, on-site inspections, internal models used by supervised institutions, compliance with applicable prudential requirements, authorisations, crisis management, supervisory quality assurance as well as supervisory policies, methodologies and standards.<sup>895</sup>

Among them, the Supervisory Quality Assurance Division (SPQ) is responsible for ensuring the consistent application of highest supervisory practices across the JSTs. It prepares quality assurance reports which evaluate *inter alia* JSTs' compliance with the common methodological framework and common supervisory practices. In case where any inconsistency of supervisory activities carried undertaken by a JST with common supervisory practices is detected, SPQ may issue a set of supervisory recommendations for that particular JST.

The Supervisory Policies Division (SPO) is mainly responsible for development draft ECB supervisory policies on significant institutions and ensuring their consistency with the Single Rulebook. It also monitors the application of these policies by the

---

<sup>895</sup> The Enforcement and Sanctions Division, which is also one of DG-MSIV horizontal divisions, is not analyzed here as an *ex-post mechanism* since it responsible for imposing sanctioning directly on credit institutions, and not the NCA/JSTs.

JSTs and provides authoritative interpretations in case inconsistency is detected across the JSTs.

The Methodology and Standards Development Division (MSD) ensures the harmonized application of the supervisory methodologies and common standards across the JSTs. It collects feedback on the functioning of existing methodologies from the JSTs and other business lines and evaluates whether they should be further improved or clarified. It is also in charge of reviews and amendments of the SSM Supervisory Manual, which develops the SSM supervisory model.

The Planning and Coordination of Supervisory Examination Programmes Division (PSC) is responsible for monitoring of annual supervisory planning process carried out by the JSTs on each significant supervised entity. It also receives the draft SEPs from all the JSTs, verifies them and consolidates them into a single consolidated supervisory plan for the SSM.

The Centralized On-site Inspections Division (COI) organizes, oversees and coordinates all on-site inspection missions for significant institutions with the relevant JSTs. It appoints heads of mission, monitors the mission's progress and performs consistency checks of the inspection reports prepared by heads of mission. In addition, COI develops and updated the on-site inspection methodologies.

The Authorisations Division (AUT) is responsible for the verification from a Union law perspective of draft supervisory decisions which originate from the JSTs (or the NCAs), and relate to the authorisation of credit institutions, the acquisitions of

qualifying holdings in the bank's shareholder structure, the withdrawal of authorisations of credit institutions, the fit and proper assessments of the bank's managers and key function holders.

The Internal Models Division (IMD) is responsible for harmonizing and ensuring the consistency of methodologies and processes related to the review of internal models for the calculation of minimum capital requirements (Pillar One capital) across the JSTs. It reviews the JST supervisory decisions on calculations of the own funds requirements for individual significant institutions.

The Crisis Management Division (CRM) performs a variety of crisis-related functions. Importantly, in the area of the crisis prevention, it double-checks the quality of recovery plans submitted by significant institutions to their respective JSTs and ensures their consistency across the SSM. It also ensures comparability and a level playing field during the implementation of early intervention measures. In the area of crisis management, it supports the JSTs and coordinates *ad hoc* Crisis Management Groups (CMGs).

The Risk Analysis Division (RIA) verifies the assessments of risks and vulnerabilities of individual significant credit institutions conducted by the JSTs from a systemic perspective which focuses on a wider range of institutions aggregated by size, origin, business model, governance or specific risks. For these purposes, it also takes a cross-JST approach to analyze quantitative aspects of SREP decisions on significant institutions, including RAS outcomes, business models and individual risk areas.

All these business areas interact closely with the JSTs by defining and implementing harmonized methodologies and standards, offering technical support and assistance on methodological issues and helping them to refine their approach.<sup>896</sup> Given their centralized and direct nature, they can be regarded as the “police-patrols” that allow the ECB supervisory apparatus to engage in detailed vigilance of the following supervisory activities conducted by all members of JSTs (and NCAs as a whole).<sup>897</sup>

(viii) Feedback process on the performance of JST staff originating from NCAs

The Joint Supervisory Teams are responsible for supervision of significant institutions and consist of supranational and national supervisory apparatus, which works under the leadership of an ECB-based JST Coordinator. The JST Coordinator is supported by sub coordinators designated by the NCAs, who are responsible for clearly defined thematic or geographic areas of supervision and manage the JST members employed by their home NCAs.

As regards the assessment of supervisory performance, the NCAs are solely responsible for the evaluation of their staff pertaining to a JST, and the ECB is solely responsible for the evaluation of its staff pertaining to the same JST.<sup>898</sup> It follows that the overall role of ECB supervisory apparatus in the assessment of NCA supervisory apparatus assigned to the JST is very limited and the NCAs retain full responsibility

---

<sup>896</sup> See European Central Bank, *Guide to banking supervision* (above, n.658), p. 18.

<sup>897</sup> Responsibilities of the abovementioned horizontal and specialized divisions belonging to DG-MSIV were primarily based on the analysis of business areas descriptions provided in the regular ECB vacancy notices, see <https://www.bankingsupervision.europa.eu/careers/vacancies/html/index.en.html>

<sup>898</sup> See Recital (4) of ‘Decision (EU) 2017/274 of the ECB of 10 February 2017 laying down the principles for providing performance feedback to national competent authority sub-coordinators (ECB/2017/6)’, in *OJ L* 40, 17.2.2017.



for their employees' performance appraisals, some may even be prevented by national legislation from using the ECB's performance feedback.<sup>899</sup> Therefore, national JSTs' sub coordinators, who are usually direct managers of NCA supervisors assigned to the JSTs, play crucial role in ensuring the effective functioning of the JSTs.<sup>900</sup>

For that reasons, the ECB has developed a mechanism providing *ex post* feedback on performance of NCA supervisory apparatus in the JSTs which may serve as input in the internal appraisal systems of the NCAs. Within this framework, a JST Coordinator assesses NCA JST Sub-coordinators and other NCA supervisors' professional knowledge, communication skills, cooperation and collaboration, determination in achieving objectives, judgement and intrusiveness, breadth of awareness and being forward-looking, acting objectively with integrity and independence and management of SSM teams.<sup>901</sup> However, it remains entirely at the discretion of the NCA whether or not to use any feedback provided by a JST Coordinator, and whether to include it in the NCA's own staff reports. The findings of the assessment are subsequently reported to the Supervisory Board.<sup>902</sup> Given its centralized and direct nature, this feedback mechanism can be regarded as the principal's "police-patrol" which allows the supranational supervisory apparatus to

---

<sup>899</sup> See European Court of Auditors, *Single Supervisory Mechanism - Good start but further improvements needed* (above, n.14), para 145.

<sup>900</sup> It was noted by some interviewees that conflicts between JST Coordinators and sub coordinators may more occur frequently in JSTs responsible for supervision of global significant institutions, see Informal interview with C (229 January 2016, 21 October 2016) and N (03 November 2016) in *Annex*.

<sup>901</sup> See Annex II (List of competencies particularly relevant for staff working in the SSM) attached to the 'Decision (EU) 2017/274 of the ECB of 10 February 2017 laying down the principles for providing performance feedback to national competent authority sub-coordinators (ECB/2017/6)' (above, n.898).

<sup>902</sup> See Article 3 of the Decision ECB/2017/6, *supra* n. 898.

engage in detailed vigilance of national supervisory apparatus performance in the last supervisory cycle.

(ix) Information requests to NCAs (as a whole)

In addition to the ECB's power to receive directly, or have direct access to information reported by supervised entities; the ECB supervisory apparatus may request the NCA supervisory apparatus to provide supervisory information on an on-going basis and in a timely and accurate manner concerning supervised entities established in the participating Member State, including information stemming from the NCAs' verification and on-site activities.

Such requests can be made informally by means of so-called "operational acts" (by JST Coordinators or at DG level) without the formal involvement of the Supervisory Board, or Governing Council of the ECB. Despite their initial non-binding nature, they may be enforced by converting them into formal and binding acts such as instructions, in cases where NCA supervisory apparatus does not provide requested information.<sup>903</sup> Such a conversion requires however the initiation of the formal, non-objection decision-making procedure at the ECB. Given their centralized and direct nature, information requests to NCAs can be considered as the principal's "police-patrol" which allows the ECB supranational supervisory apparatus to reduce its information asymmetry vis-à-vis the NCA national supervisory apparatus.

---

<sup>903</sup> The issuance of instructions by the ECB (supervisory apparatus) as a mechanism of *ex-post* control is further analyzed in the subsequent point (x).

(x) Issuance of supervisory instructions to JST staff and NCAs

The issuance of internal supervisory instructions to the NCA supervisory apparatus pertaining to a JST, and supervisory instructions to the NCAs (as a whole) can be considered as example of a more escalated *ex ante* controls. As noted above,<sup>904</sup> a JST Coordinator is responsible for organizing the work of JSTs. For these purposes, (s)he may steer internal JST workflows by issuing supervisory instructions to other JST members regarding their tasks and activities.<sup>905</sup> In principle, JST Coordinators' instructions have precedence over the instructions given by JST national sub coordinators to respective national supervisory apparatus.<sup>906</sup>

Furthermore, the ECB may also issue formal and legally binding supervisory instructions to NCAs (as a whole) for the purpose of carrying out its supervisory tasks.<sup>907</sup> They allow for a very detailed legal prescription or rectification of the addressee's expected, and they are always to be addressed to one or more NCAs.<sup>908</sup> In addition, the ECB may instruct those NCAs to make use of their residual powers where the SSM Regulation does not confer such powers on the ECB.<sup>909</sup> Early evidence indicates that on several occasions the ECB made use of this *ex-post* control

---

<sup>904</sup> See *supra* point (viii)(Feedback process on performance of JST staff originating from NCAs).

<sup>905</sup> See Article 6(1) of the SSM Framework Regulation.

<sup>906</sup> See Article 6(2) of the SSM Framework Regulation. It was recommended by one interviewee to distinguish between the less intrusive (operational) powers of instruction assigned to JST Coordinator, and formal ECB instructions to NCAs, see Informal interview with F (25 October 2016) and N (03 March 2017) in *Annex*.

<sup>907</sup> See Article 132 of the TFEU.

<sup>908</sup> See Zilioli and Selmayr, *The Law of the European Central Bank* (above, n.732), p. 108.

<sup>909</sup> See Article 9(1), third sentence of the SSM Regulation.

although not extensively.<sup>910</sup> Given its centralized and direct nature, the ECB (supervisory apparatus) power to issue supervisory instructions to the NCA (supervisory apparatus) can be regarded as an example the principal's intrusive "police-patrols" which allow influencing the behaviour of its agents.

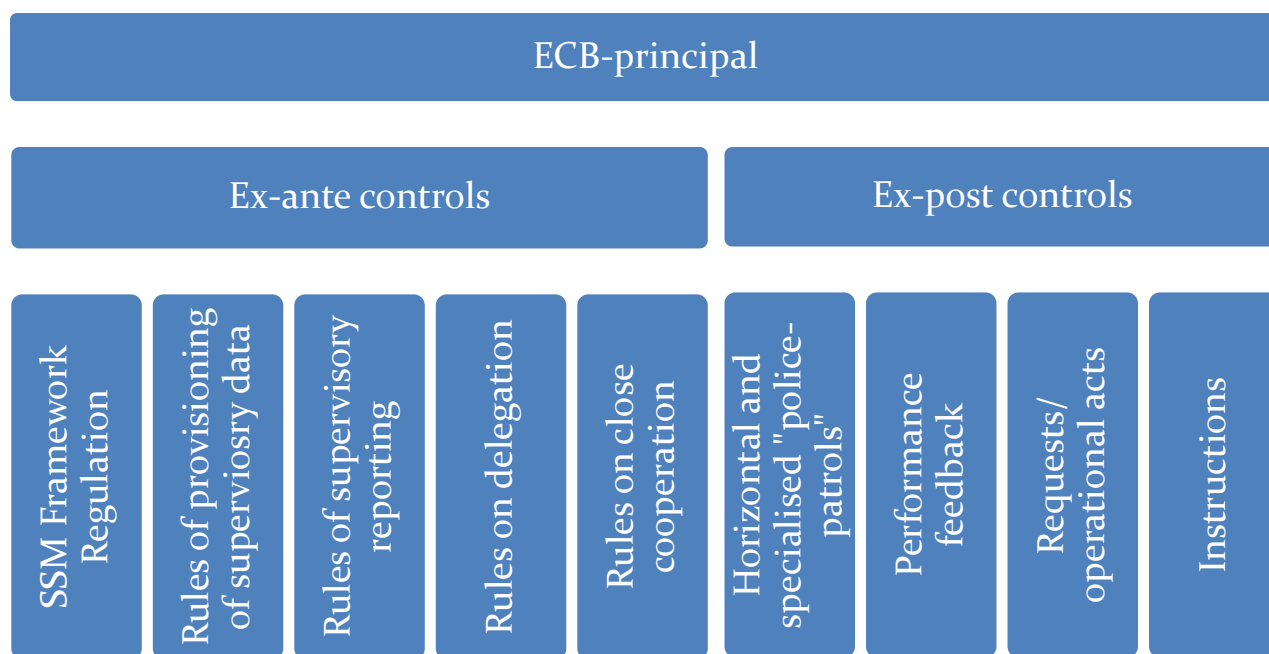


Figure 13 Capacity for control within the subsystem of SSM Direct Supervision

### 7.3.2. The ECB's control mechanisms in the system of SSM Indirect Supervision

#### The *ex-ante* formal controls<sup>911</sup>

As pointed out above, the SSM Regulation can be regarded as a basic agency contract between the ECB and the NCAs (supervisory apparatuses) which lays down the

<sup>910</sup> For example, in 2015 the ECB issued 13 instructions to NCA concerning the supervision of significant banks. See European Court of Auditors, *Single Supervisory Mechanism - Good start but further improvements needed* (above, n.14), p. 28 (table 2).

<sup>911</sup> The selection was based on the analysis whether these measures introduce specific *rules of law* which have a substantial impact on the national supervisory apparatus (NCAs) and which it is bound to observe. As noted by one interviewee, the design of the SSM rests primarily on binding *rules of law* rather than non-binding rules of practice. See Informal interview with M (08 November 2016) in *Annex*.

general principles of functioning of two administrative sub-arrangements governing prudential supervision in the SSM: the subsystem of SSM Direct and Indirect Supervision. In the context of the latter, the SSM Regulation provides the ECB with an opportunity to set up in advance the expectations concerning the supervision carried out by the NCAs over less significant institutions using a range of monitoring mechanisms provided by law.

Furthermore, within the subsystem of SSM Indirect Supervision, the ECB may issue binding legal instruments such regulations, guidelines or general instructions addressed to the NCAs on the performance of their supervisory tasks vis-à-vis less significant institutions.<sup>912</sup> These acts may not only affect the regulatory environment in which less significant supervised entities operate, but also model the administrative interactions between the ECB and NCAs. In the latter context, they may be regarded as *rules of law* which national supervisory apparatus responsible for the supervision of less significant institutions is always bound to observe.

It was already pointed out that the ECB has adopted a number of legal acts setting the operational aspects of the supervision in the SSM, which are applicable both to the subsystems of SSM Direct and Indirect Supervision. They notably include the SSM Framework Regulation<sup>913</sup> and other supplementary legal instruments adopted by the ECB.<sup>914</sup>

---

<sup>912</sup> See Article 6(5)(b) of the SSM Regulation (excluding however those related to the common procedures).

<sup>913</sup> See *supra* n. 848.

<sup>914</sup> See *supra* n. 849-853.

All of these *ex-ante* controls are also applicable to the subsystem of SSM Indirect Supervision. In particular, the SSM Framework Regulation further develops a number of supervisory processes and procedures in respect to the subsystem of SSM Indirect Supervision which could be classified as the *ex-ante* controls from the Principal-Agent perspective. They include (i) NCA notification requirements and (ii) the “common procedures” regime.<sup>915</sup> Both mechanisms constitute the basic *ex ante* controls within the subsystem of SSM Indirect Supervision. In addition, this subsection will also cover one of very few binding legal acts adopted by the ECB (supervisory apparatus) addressed to the NCA (supervisory apparatus), namely (iii) the Guideline ECB/2017/9 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions.<sup>916</sup> From the Principal-Agent perspective, this Guideline can be considered as an *ex ante* control set by the principal to steer the agent’s actions in the key areas of their responsibilities set by the agency contract.

#### (i) Central Notification Point (CNP)

The SSM Framework Regulation sets for the NCAs a very general requirement to report on an *ex-ante* basis to the ECB on any “material” supervisory procedures and

---

<sup>915</sup> It is noted that common procedures regime (supervisory tasks related to granting and withdrawal of licenses, acquisitions of qualifying holdings) applies both to the subsystem of SSM Direct and Indirect Supervision. However, due to much more prominent role of NCA supervisory apparatus in the exercise of these tasks, it appears more plausible to classify it as being closer to the subsystem of Indirect Supervision from the operational point of view.

<sup>916</sup> See ‘Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9)’ (above, n.74).

decisions concerning LSIs.<sup>917</sup> In addition, the ECB should be informed by the NCA about any financial deterioration of banks under their supervisory scope.<sup>918</sup> The SSM Framework Regulation does not however provide any specific procedure provided which would stipulate how these notifications should be carried out by the NCAs. According to the understanding presented by the ECB supervisory apparatus,<sup>919</sup> these *ex-ante* notifications could be perceived as a “catch-up” mechanism helping the ECB to exercise its oversight function in respect to the planned supervisory activities on LSIs.

In order to set up modalities for NCA *ex-ante* notification obligations, the ECB (supervisory apparatus) developed a special mechanism - Central Notification Point (CNP) – that is used by the NCA (supervisory apparatus) to submit their notifications. The CNP is a core element of day-to-day cooperation between the ECB and NCAs in respect of the supervision over less significant institutions. After a receipt of a notification, the ECB may decide to provide views the draft “material” decisions and procedures and request further supervisory assessment of them. Crucially, the CNP allows the ECB supervisory apparatus to compare and review practices applied by the NCA supervisory apparatus with respect to their conformity with the SSM’s common supervisory standards.<sup>920</sup>

---

<sup>917</sup> See Article 97 and 98 of the SSM Framework Regulation.

<sup>918</sup> See Article 96 of the SSM Framework Regulation.

<sup>919</sup> See European Central Bank, *Public hearing on the draft ECB SSM Framework Regulation* (above, n.707).

<sup>920</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2016* (above, n.865), p. 29.

In line with the principle of proportionality which governs the supervision in the SSM,<sup>921</sup> the scope of NCAs' *ex-ante* notification obligations is related to the priority status of credit institutions under their jurisdictions which reflects their systemic importance. The NCAs are obliged to *ex-ante* report draft supervisory procedures and decisions only in respect to LSIs classified as "high-priority" ones in accordance with a dedicated prioritisation framework developed by the ECB (for "material procedures and decisions").<sup>922</sup> It remains within the NCAs' discretion whether they consider it relevant to notify the ECB of decisions and procedures regarding LSIs classified as "low" or "medium-priority". Similarly, it is up for the NCAs whether or not to *ex-ante* report on procedures which they consider "material", or which may negatively affect the reputation of the SSM.<sup>923</sup> In any case, the NCAs should however always report on any rapid and significant deterioration in the financial situation of an LSI in order to allow for early risk mitigation.<sup>924</sup> Until December 2016, the CNP received and assessed a total of 179 *ex-ante* notifications from NCAs, of which 141 were notifications of material draft decisions or procedures relating covering a wide range of supervisory issues (e.g. capital, liquidity and governance), and 38 were related to the deterioration of the financial situation of the LSI.<sup>925</sup>

---

<sup>921</sup> See European Central Bank, *Guide to banking supervision* (above, n.658), p. 8 (Supervisory Principle 7).

<sup>922</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2016* (above, n.865), p. 29.

<sup>923</sup> See Articles 97(4) and 98(3) of the SSM Framework Regulation.

<sup>924</sup> See European Central Bank, *Report LSI supervision within the SSM*, November 2017, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.reportlsisupervision2017.en.pdf>, accessed 01 December 2017, p. 17.

<sup>925</sup> See European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013* (above, n. 717), p. 47.



Notification requirements can be perceived as a mechanism of the ECB (supervisory apparatus) *ex ante* control over the NCA (supervisory apparatus) actions. However, it needs to be pointed out that the wide of scope flexibility left to the NCA concerning which of their procedures and decisions should be submitted<sup>926</sup> may not necessarily provide the principal with the full picture of the actions undertaken by its agents.

## (ii) Common procedures regime

As the guardianship of access to the banking market is the crucial step in the supervisory process, the SSM Regulation and the SSM Framework Regulation sets a special supervisory regime (known as “common procedures”) to govern the “birth, maturity and death” of both significant and less significant institutions. The common procedures apply to the conduct of supervisory activities related to (i) granting of a bank license to entities willing to operate on the banking markets (“authorisations”),<sup>927</sup> (ii) managing the exit of credit institutions from banking markets irrespective of a cause (“withdrawals of authorisations”)<sup>928</sup> and (iii) approving significant changes in banks’ shareholding structures (“acquisitions of qualifying holdings”).<sup>929</sup> The most of common procedures fall within the third of the abovementioned activities. In 2016, the ECB adopted approved 142 qualifying holdings’ applications which mostly related to internal reorganizations of credit

---

<sup>926</sup> Crucially there are no common binding criteria to define the “materiality” of draft NCA procedures and decisions. Thus, each NCA (agent) may have different understanding as to what constitutes a material supervisory decision or procedure. See, also, European Central Bank, *Report LSI supervision within the SSM* (above, n.924), p. 17.

<sup>927</sup> See Article 4(a) of the SSM Regulation: “to authorize credit institutions and to withdraw authorizations of credit institutions subject to Article 14”.

<sup>928</sup> Ibid.

<sup>929</sup> See Article 4(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”.

institutions (e.g. intra-group consolidations), often reflecting cost-cutting policies.<sup>930</sup> In comparison, granting and withdrawal of bank licenses concerned 24 and 42 of common procedures in 2016 respectively.<sup>931</sup>

Within the common procedures regime, the NCA supervisory apparatus prepares draft supervisory decisions and submits them to the ECB which adopts formal supervisory decision in a non-objective procedure. Moreover, the ECB supervisory apparatus is also responsible for the verification of supervisory assessments undertaken at NCA level. In doing, ECB-based supervisors apply criteria defined in relevant Union law (including the CRDIV). From the Principal-Agent perspective, the common procedures can be perceived as mechanisms of the ECB *ex-ante* control over NCA supervisory assessment concerning the fulfillment of the common criteria governing the entry (both of natural<sup>932</sup> and legal persons<sup>933</sup>) into to EU banking Single Market as well as controlling the way-out.

(iii) ECB Guideline on the exercise of options and national discretions on less significant institutions

Article 6(5)(a) of the SSM Regulation provides that the ECB may create new *rules of law* which the NCAs and its supervisory apparatus responsible for the supervision of less significant institutions is always bound to observe (regulations, general

---

<sup>930</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2016* (above, n.865), p. 36.

<sup>931</sup> Ibid. It is noted that such a high number of withdrawals of bank licenses was triggered by (non-voluntary) liquidation or resolution of the institutions concerned (all of which were LSIs).

<sup>932</sup> As regards the assessment of the reputation of the acquirers and new bank managers in the context of qualifying holding procedures; and the assessment of the fitness and propriety of the proposed bank management in the context of granting a license and the approval of qualifying holding procedures.

<sup>933</sup> As regards, for example, appropriate funding, viability and sustainability of the business strategy both in the context of context of granting a license.

instructions, guidelines). This possibility has not been however extensively used by the ECB in the subsystem of SSM Indirect Supervision, but the ECB decided to exceptionally bind the NCA supervisory apparatus in respect to the harmonized exercise of a number options and national discretions (ONDs) provided in Union law in respect to LSIs.

The ECB's legislative action aiming to harmonize the exercise of ONDs initially concerned the subsystem of SSM Direct Supervision.<sup>934</sup> However, to ensure level playing field significant and less significant institutions operating in the Banking Union, it was subsequently decided to extend the harmonization of the ONDs' exercise also to the subsystem of SSM Indirect Supervision. This was necessary in order to ensure that the SSM as a whole operates in homogenous<sup>935</sup> and "effective and consistent way" as required by law.<sup>936</sup>

For these purposes, the ECB adopted a binding Guideline (and a non-binding Recommendation) addressed to the NCAs, which set common criteria for the exercise of general and case-by-case ONDs by the NCA (supervisory apparatus) in their respective supervisory jurisdictions. These legal acts, in particular the Guideline, adapt the binding rules developed in the ECB Regulation on the exercise

---

<sup>934</sup> In this respect, see point (iv) in subsection 7.3.1. which classifies the Regulation ECB/2016/4 (on the exercise of options and national discretions) as an example of *ex-ante* control within the subsystem of SSM Direct Supervision.

<sup>935</sup> As pointed out the ECB's Guide to Banking Supervision, homogeneity is one of the supervisory principles underpinning the functioning of the SSM. More specifically, "it requires that supervisory principle and procedures are applied to credit institutions across all participating Member States in an appropriately harmonized way to ensure consistency of supervisory actions in order to avoid distortions in treatment and fragmentation. This principle supports the SSM as a single system of supervision." See European Central Bank, *Guide to banking supervision* (above, n.658), p. 7 (Supervisory Principle 3).

<sup>936</sup> See Article 6(1) of the SSM Regulation.

of options and national discretions in relation to significant institutions to the supervision of less significant ones. In some instances the ECB Guideline allows for a different approach to LSI which reflects the principle of proportionality, reflecting systemic importance and risk profile of the credit institutions under supervision.<sup>937</sup>

Therefore, similarly like the ECB Regulation on the exercise of options and national discretions in relation to significant institutions,<sup>938</sup> the ECB Guideline to NCAs on the exercise of options and national discretions on less significant institutions can be considered as an example of the ECB's *ex ante* control over the NCAs setting a binding framework for the exercise of options and national discretions that are of general nature.

#### The *ex-post* formal controls<sup>939</sup>

The SSM Regulation, and the subsequent supplementary legal acts adopted by the ECB, provide for a number of instruments which are used to monitor and react to supervisory activities on less significant institutions carried out by the NCAs (the agent). From the Principal-Agent perspective, these features allow classifying them as the principal's *ex post* procedures. In this context, the following *ex post* controls can be identified within the subsystem of SSM Indirect Supervision: (i) NCA reporting obligations, (ii) NCA staff relocations; and (iii) the takeover by the ECB of direct responsibility from the NCAs for the supervision of one or more LSIs.

---

<sup>937</sup> See European Central Bank, *Public consultation on a draft Guideline and Recommendation of the ECB on the exercise of options and discretions available in Union law for less significant institutions* (above, n. 495), p. 4.

<sup>938</sup> See *supra* point (iv) in subsection 7.3.1.

<sup>939</sup> The selection was based on the analysis whether these measures introduce specific *rules of law* which have a substantial impact on the national supervisory apparatus (NCAs) and which it is bound to observe.

(iv) NCA reporting obligations

The SSM Framework Regulation obliges the NCAs to report to the ECB on a regular basis on the measures they have taken and on their decentralized implementation of the ECB's in relation to LSIs.<sup>940</sup> Irrespective of the above-mentioned obligation, the NCA are required to submit an annual report on their supervisory activities concerning less significant institutions in line with the requirements set by the ECB.<sup>941</sup> Receiving regular reports from the NCAs may serve for the ECB as a basis for the evaluation their supervisory performance in the comparative perspective, also allowing for the identification of top performing and outlying NCAs. Furthermore, this exercise allows DG-MSIII as the bureaucratic principal to draw cross-country comparisons concerning domestic supervisory approaches (including SREP application, frequency of interactions with supervised entities, average durations of on-site inspections and a number of supervisory decisions taken), to assess the degree of supervisory convergence across the NCAs and therefore better prioritize the oversight tasks.<sup>942</sup> In addition, the NCA are also obliged to report to the ECB on administrative penalties imposed on LSIs,<sup>943</sup> ad hoc changes to the list of LSIs,<sup>944</sup> and on those credit institutions which may potentially fulfill significance criteria<sup>945</sup> and, thus migrate to the subsystem of SSM Direct Supervision. All of these *ex-post* reporting obligations, and especially NCA annual reports on their supervisory

---

<sup>940</sup> See Article 99 of the SSM Framework Regulation.

<sup>941</sup> See Article 100 of the SSM Framework Regulation.

<sup>942</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2015* (above, n.681), p. 42-43.

<sup>943</sup> See Article 135 of the Framework Regulation.

<sup>944</sup> See Article 49 of the Framework Regulation.

<sup>945</sup> See Articles 52 *et seq.* of the Framework Regulation.

activities, may be considered as an insightful *ex post* control, which contributes to the performance assessment of the NCA (supervisory apparatus) by the ECB (supervisory apparatus).

(v) NCA staff relocations

The SSM Regulation provides the ECB with an option to require as appropriate that supervisory teams of national competent authorities taking supervisory actions regarding a supervised entity also involve staff from national competent authorities of other participating Member States.<sup>946</sup> Given the vagueness of this provision, one may imagine that the ECB would use this horizontal mobility mechanism, in such situations where it may suspect that the NCA (supervisory apparatus) does not exert the expected effort when carry out the ECB's exclusive supervisory tasks in relation to LSIs, but simultaneously there is no need to activate more escalated control measures.

In such a case, the ECB could request one NCA (for instance, an NCA famous for its tough supervisory approach) to put at its disposal a number of supervisors which would be delegated to another NCA as technical advisors or observers. In these capacities, they could assist supervisors in that NCA in the conduct of their tasks and report to the ECB on overall performance and supervisory practice. By activating this mechanism, the ECB (supervisory apparatus) would acquire a decentralized source of information on the ways how the supervisory apparatus of a given NCA carries out its supervisory responsibilities under the agency contract governing the subsystem of

---

<sup>946</sup> See Article 31(2) of the SSM Regulation.

SSM Indirect Supervision. Given its indirect and decentralized nature, it may be considered in terms of a particular variation of a “fire-alarm”, which could be used in the environments of multiple agents who may compete among each other for the recognition of their principal.

(vi) Takeover of LSI supervision

A possibility of takeover by the ECB of direct responsibility from the NCAs for the supervision of one or more LSIs<sup>947</sup> can be regarded as the most intrusive *ex post* control over supervisory activities carried out by the NCA (supervisory apparatus). As recognized by the ECB, it is a “disciplinary device that plays a helpful role in ensuring that the right incentives remain in place at the local level”, which could be activated when “there are concerns that national supervisors are not adequately controlling risks within their local banks”.<sup>948</sup> The takeover effectively shifts power balance between the ECB and NCAs by means of direct intervention into the NCA scope of responsibilities as legislatively set by the SSM Regulation, and under certain circumstances could be received as a vote of ECB’s non-confidence in the supervisory capabilities of the NCA concerned.

The SSM regulatory framework describes this highly intrusive mechanism in exceptionally vague terms, which leaves a lot of discretion as regards possible circumstances for its justifying its activation. According to Article 6(5)(b) of the SSM

---

<sup>947</sup> See Article 6 (5)(b) of the SSM Regulation.

<sup>948</sup> See Pentti Hakkarainen, *Banking union in 2017 – How to supervise a €27tn banking sector?*, Speech at the CIRS Annual International Conference (Lisbon, 2017), <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170601.en.html>, accessed 01 December 2017.

Regulation, the “takeover procedure” is activated where the ECB determines a need to “ensure consistent application of high supervisory standards”. The wording of this clause is very broad, but some further guidance is provided in the SSM Framework Regulation, which stipulates a non-exhaustive list of possible reasons for its activation. The list covers criteria which related to both the LSI concerned and the NCA responsible for the supervision of that LSI.<sup>949</sup>

The first group of criteria (LSI-specific) includes *inter alia* such legally defined triggers as an LSI’s proximity to the significance criteria,<sup>950</sup> its interconnectedness,<sup>951</sup> its cross-border activities,<sup>952</sup> and being a recipient of indirect ESM assistance.<sup>953</sup> The materialization of these circumstances can be easily measured in quantitative terms, thereby constraining the use of supervisory discretion. The significance criteria are clearly defined in the SSM Regulation.<sup>954</sup> The question of a bank’s interconnectedness is more ambiguous, but still useful benchmarks are provided by the Single Rulebook legislation. These include the participation of a bank in question in institutional protection schemes;<sup>955</sup> the existence of interconnections between credit institutions based on common or shared personnel, facilities and systems; capital, funding or liquidity arrangements; existing or contingent credit exposures; cross-guarantee agreements, cross-collateral arrangements, cross-default provisions

---

<sup>949</sup> See Article 67(2) of the SSM Framework Regulation.

<sup>950</sup> See Article 67(2)(a) of the SSM Framework Regulation.

<sup>951</sup> See Article 67(2)(b) of the SSM Framework Regulation.

<sup>952</sup> Particularly, when an LSI concerned has subsidiaries in non-participating Member States and in third countries. See Article 67(2)(c) of the SSM Framework Regulation.

<sup>953</sup> See Article 67(2)(f) of the SSM Framework Regulation.

<sup>954</sup> See Article 6(4) of the SSM Regulation; see also *supra* n. 428-432.

<sup>955</sup> See Recital (14) of the BRRD.



and cross-affiliate netting arrangements; or risk transfers and back-to-back trading arrangements; and service level agreements.<sup>956</sup> The ESM indirect assistance criterion relates to situations, in which a participating Member State is a recipient of direct financial assistance and makes it available for its domestic banking sector through a dedicated national scheme or a specific purpose vehicle.

The second group of criteria (NCA-specific) includes such legally defined triggers as NCA's non-compliance with ECB instructions,<sup>957</sup> and non-compliance with relevant Union law.<sup>958</sup> This group of takeover triggers is much all-encompassing and of political sensitivity. It remains however unclear how potential non-compliance could be detected since the ECB does not have competences to monitor of NCA's compliance with Union law in areas outside of ECB's scope of competence (e.g. consumer protection, prevention of the use of the financial system for the purpose of money laundering and terrorist financing). Similarly, it is also not entirely straightforward whether non-compliance with binding regulatory and implementing technical standards developed by the EBA and adopted by the Commission as well as Union law of soft nature (for example EBA or ECB Guidelines or Recommendations) would also fall within this criterion.<sup>959</sup>

---

<sup>956</sup> See Annex Section B (15) of the BRRD.

<sup>957</sup> See Article 67(2)(d) of the SSM Framework Regulation.

<sup>958</sup> See Article 67(2)(e) of the SSM Framework Regulation.

<sup>959</sup> It is noted that the reference is made to acts referred to in the *first* subparagraph of Article 4(3) of the SSM Regulation. The EBA's Binding Technical Standards and Guidelines are mentioned in the second first subparagraph of that Article.

Given a potential reputational damage for the NCA, which directly supervises the LSI being considered for a takeover, and of the SSM as a whole, this *ex post* control is likely only to be activated at the ECB’s initiative only in extreme situations (systemic LSI crisis threatening other jurisdictions). It should be considered as a rather “nuclear option”, to be used if all other less escalated measures failed, especially given that its activation may produce potentially negative and unintended consequences, such as adverse impact on the NCA/SSM reputation, negative market reactions and potential distortions on EU interbank markets.

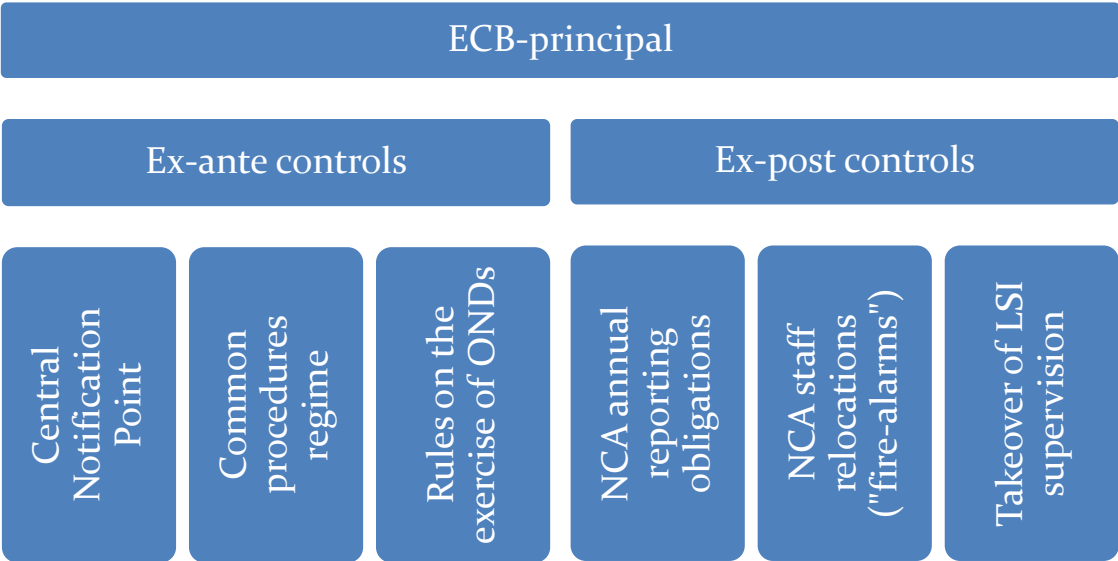


Figure 14 Capacity for control within the subsystem of SSM Indirect Supervision

#### **7.4. The formal capacity for cooperation in the SSM**

In line with the Management approach, the assessment of the capacity for cooperation between the ECB and NCAs (supervisory apparatuses) in SSM constitutes the second phase of determining the expectation for formal top-down compliance therein. The formal capacity for cooperation between the ECB and NCAs (supervisory apparatuses) within the subsystems of SSM Direct and Indirect Supervision can be measured by employing recent and more liberal Principal-Agent perspective on their relations.

The liberal Principal-Agent perspective assumes that the agents have a general propensity to comply with their contractual obligations vis-à-vis their principal. Rather than from the lack of effective control by the principal, the agents' lower level of compliance stems from an essential incompleteness of their agency contract with the principal. In addition, when embedded in environments characterized by high policy-making complexity, the agents have incentives to reduce their informational advantage over the principal in order to increase certainty as to the principal's contractual expectations. This perspective advocates that higher levels of the agent's compliance can be achieved where the principal establishes routine, non-confrontational and informal mechanisms for cooperation with its agent(s) which aim at systematic reduction the ambiguities of their agency contract and on-going clarification contractual expectations of the principal vis-à-vis its agent(s).

These mechanisms consist of structured forms of voluntary cooperation (networks, working groups, drafting teams) bringing the principal and agents together and allowing for informal deliberations on the principal's expectations and the agents' obligations stemming from the agency contract. These deliberations may cover a variety of aspects relating to the Principal-Agent contact framed by the SSM Regulation. They are reflected in behavioural and non-binding *rules of practice*, from which the agents may not depart without giving reasons to the principal. They can also take form of the principal's recommendations, guidance, compendia of best practices and methodologies, or other form of technical and expert assistance with aim to clarify or interpret ambiguities stemming from respective provisions of the SSM Regulation, or the subsequent legal acts governing the ECB-NCA relations which were adopted on its basis.

This section will identify and assess structured forms of voluntary cooperation between the bureaucratic principal (ECB supervisory apparatus) and bureaucratic agent (NCA supervisory apparatus) with respect to the subsystems of SSM Direct (III.6.4.1) and Indirect Supervision (III.6.4.2). While carrying out their credibility assessment, it will take into account whether there are any platforms (i.e. permanent or *ad hoc* networks, working groups, drafting teams or other fora) that bring ECB and NCAs supervisory apparatuses together within the respective supervisory subsystem; and (ii) whether there are any tangible outcomes of that cooperation aiming at reducing the ambiguities of the agency contract between the ECB and NCAs (supervisory apparatuses); and clarifying contractual expectations of the ECB

(supervisory apparatus) related to different areas of the Union's policies on prudential supervision of credit institutions.

#### 7.4.1. Framework for the Principal-Agent cooperation within the system of SSM Direct Supervision

This subsection identifies three structured dimensions of informal cooperation between the ECB and NCA supervisory apparatuses with respect to the subsystem of SSM Direct Supervision. It presents, indicatively, outcomes of their deliberations, which may be regarded as significantly contributing to the reduction of the incomplete nature of the agency contract underpinning the functioning of the subsystem of the SSM Direct Supervision.

##### Informal structures for the ECB and NCA supervisory cooperation

###### (i) Preparatory Task Force on Supervision

In the SSM Regulation, the Member States set only general rules governing the agency contract between the ECB and NCA applicable to the subsystem of SSM Direct and Indirect Supervision and left operational aspects to be further specified. Given the high complexity of supervision as a policy field, the liberal Principal-Agent perspective on the SSM would suggest that the ECB and NCA supervisory apparatuses had mutual interest in clarifying their respective contractual obligations set by the Member States in the SSM Regulation. This mutual interest is underpinned by the assumption that both of the actors would reap gains from

exchanging information and preferences in order better adapt to the new context.<sup>960</sup>

In addition, the ECB's lack of practical experience in day-to-day supervision was a factor which was further contributing to the initial information asymmetry in its relations with the NCAs in the SSM.

For these reasons, the ECB supervisory apparatus had strong incentives to engage in close collaboration with the NCAs already at the very early stage in order to build the ECB institutional capacity to carry out the tasks conferred upon it by the SSM Regulation. In doing so, it initiated and managed SSM technical preparatory work carried out together with the National Central Banks and National Competent Authorities in a dedicated temporary Task Force on Supervision.<sup>961</sup> The Task Force was divided into five work streams which brought together ECB and national experts to focus respectively on (i) an initial mapping of the euro area banking system,<sup>962</sup> (ii) the SSM legal framework,<sup>963</sup> (iii) the development of a supervisory model for the SSM,<sup>964</sup> (iv) the development of a supervisory reporting framework for the SSM,<sup>965</sup> and (v) the initial preparation of the comprehensive assessment of the credit

---

<sup>960</sup> In addition, it needs to be noted that the ECB's lack of practical experience in supervision was a factor further increasing information asymmetry between the principal and the agent in the SSM. See, in this context, *supra* n. 314-315.

<sup>961</sup> See European Central Bank, *SSM Quarterly Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation* (above, n.646, p. 3).

<sup>962</sup> Work Stream One (WSI) was mandated to create a mapping of the euro area banking system, consisting in a catalogue comprising all supervised entities falling within the scope of the SSM and including the internal structure and composition of all euro area banking groups.

<sup>963</sup> Work Stream Two (WSII) was a legal group composed by ECB representatives and NCAs representatives mandated to develop a draft of the SSM Framework Regulation.

<sup>964</sup> Work Stream 3 (WSIII) was in charge of developing the Supervisory Model of the Single Supervisory Mechanism (SSM), including all processes, procedures as well as the methodology for the supervision of significant and less significant institutions.

<sup>965</sup> Work Stream 4 (WSIV) was mandated to review the existing supervisory reporting models with a specific focus on the granularity of the information, the frequency of data and the delivery lags, the coverage in terms of institutions, the level of consolidation (group level vs. solo) of the available information.

institutions.<sup>966</sup> The Task Force on Supervision can be regarded as the first step to the establishment of a community of practice between supranational and national supervisory apparatus.<sup>967</sup>

## (ii) DG-MSIV supervisory networks

Mirroring to some extent the concept of the Joint Supervisory Teams<sup>968</sup> and building upon the informal collaboration processes within the preparatory Task Force on Supervision, the ECB decided to establish permanent networks pooling together ECB and NCA supervisory apparatus have been established to support the functioning of the ECB's centralized horizontal and specialized services localized in the DG-MSIV. Contrary to the JSTs these networks are of informal and non-hierarchical dimension. Nevertheless, they operate in the shadow of hierarchy since they are always chaired by a head of ECB's horizontal or specialized division.<sup>969</sup>

The main objective behind their creation was to develop informal communication lines and discussions platforms by the ECB supervisory apparatus (the bureaucratic principal) with NCA supervisory apparatus (the bureaucratic agent) that would allow

---

<sup>966</sup> Work Stream 5 (WS5) was mandated to develop the processes and methodologies for the comprehensive assessment of credit institutions subjected to EU Direct Supervision.

<sup>967</sup> As noted by Danièle Nouy, supranational and national supervisory apparatus worked hand-in glove: about 800 supervisors with expertise and experience in the field of regulation and supervision from the public and private sector cooperate with the national supervisors, who directly supervise the remaining 3,500 banks and implement the supervisory guidance and best practices agreed to on the European level. See Danièle Nouy, *European Banking Supervision: Levelling the playing field*, Speech at Corporate Program Roundtable organised by the Council on Foreign Relations (New York, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150911.en.html>, accessed 01 December 2017. See also Informal interview with A (13 November 2015, 12 January 2016, 15 July 2016) in *Annex*.

<sup>968</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2014*, <http://www.ecb.europa.eu/pub/pdf/other/ssmar2014.en.pdf>, accessed 01 December 2017, p. 23.

<sup>969</sup> See European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013* (above, n. 717), p. 32.

combining the specific in-depth knowledge of national supervisors with the broad-ranging experience of the ECB staff related to the supervision of significant institutions.<sup>970</sup> This fits neatly into the concept of the ECB supervisory apparatus as the principal as a manager who establishes problem-solving and collaborative processes involving its agents in deliberations aiming to clarify mutual obligations set in their incomplete agency contract. In turn, for the NCA supervisory apparatus as the agent, these networks are main tool to influence policy stances on horizontal areas of supervision, as the most important issues and stances of the ECB and NCAs are discussed in these structures.<sup>971</sup>

Since each of DG-MSIV horizontal divisions hosts a network, there exists an informal structure for cooperation in areas of risk analysis, supervisory planning, on-site inspections, internal models used by supervised institutions, compliance with applicable prudential requirements, authorisations, crisis management, supervisory quality assurance as well as supervisory policies, methodologies and standards.<sup>972</sup> These networks gather supranational and national experts specialized on certain topics that work together on common issues, and contribute to the operational

---

<sup>970</sup> See Danièle Nouy, *Tommaso Padoa-Schioppa Memorial Lecture*, Speech by Chair of the Supervisory Board of the Single Supervisory Mechanism (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150626.en.html>, accessed 01 December 2017; European Central Bank, *ECB Annual Report on supervisory activities: 2014* (above, n.968), p. 53.

<sup>971</sup> See European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013* (above, n. 717), p. 32. See also Informal interview with D (31 August 2016) in *Annex*.

<sup>972</sup> *Ibid.*, p. 31.



singleness of the SSM.<sup>973</sup> They serve as vehicles for information sharing, exchange of experiences, establishment of common work ethos and goals. Furthermore, they are expected to ensure best practices, high standards and consistent adoption of the Union's supervisory policies,<sup>974</sup> and ultimately contribute to the development of common supervisory culture.<sup>975</sup>

Given their informal and non-hierarchical dimension, supervisory networks hosted by the DG-MSIV can be considered as primary example of the use of “carrot” (managerial) strategies in promoting higher levels of compliance of the agents within the framework of SSM Direct Supervision. These networks are not part of the principal's monitoring mechanism, but rather they contribute to supervisory capacity building across the SSM as well as to the on-going interpretation and clarification of the Union's supervisory policies on a daily basis. In doing so, they are primary channels through which a community of permanently linked ECB and NCA supervisors gradually promotes the construction of European supervisory culture.

---

<sup>973</sup> See Ignazio Angeloni, *The SSM and international supervisory cooperation*, Remarks at the Symposium on “Building the Financial System of the 21st Century: an Agenda for Europe and the US” (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150417.en.html>, accessed 01 December 2017.

<sup>974</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2014* (above, n.968), p. 55. See also Informal interview with D (31 August 2016) in *Annex*.

<sup>975</sup> See Danièle Nouy, *The European banking landscape – initial conclusions after four months of joint banking supervision and the main challenges ahead*, Speech at the SZ Finance Day 2015 (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150317.en.html>, accessed 01 December 2017; see also Danièle Nouy, *Presentation of the first ECB annual report on supervisory activities by the Chair of the ECB's Supervisory Board at the European Parliament's Economic and Monetary Affairs Committee*, Introductory remarks (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150331.en.html>, accessed 01 December 2017; see also Informal interview with D (31 August 2016) in *Annex*. It was however noted by one interviewee that the EBA remains the sole EU authority which has a task of driving supervisory convergence in the EU, see Informal interview with J (09 November 2016) in *Annex*.

### (iii) Other fora

The third dimension of informal cooperation between the ECB and NCA supervisory apparatuses can be captured by establishing of *ad hoc* project-based working groups and drafting teams. These groups are established by the Supervisory Board to focus on specific horizontal issues and support the work of DG-MSIV horizontal divisions and the deliberations of network experts hosted by them.<sup>976</sup> From the beginning of the SSM operations, a number of such working groups consisting of ECB and NCAs supervisory experts have been established to deal with different supervisory problems and inconsistencies.

In 2015, the ECB set up temporary structures to carry out preparatory work on the exercise of options and discretions in EU law; the SREP methodology and a consistent supervisory approach towards supervised institutions with high levels of non-performing loans.<sup>977</sup> It should be noted that, unlike supervisory networks, the working groups are not necessarily always chaired by an ECB staff member (the bureaucratic principal). In the case non-performing loans, a dedicated work stream was led by a high-level representative of the Irish NCA, because it was explicitly acknowledged that Ireland had a strong and well-established technical expertise in dealing with non-performing exposures.<sup>978</sup>

---

<sup>976</sup> See Informal interview with D (31 August 2016) in *Annex*.

<sup>977</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2015*, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2015.en.pdf>, accessed 01 December 2017, p. 12; see also Informal interview with I (12 August 2015, 21 October 2016) in *Annex*.

<sup>978</sup> See Danièle Nouy and Sabine Lautenschläger, *Introductory statement to the press conference on the ECB Annual Report on supervisory activities 2015 (with Q&A)* (2016),

Given their informal and non-hierarchical dimension, working groups and drafting teams, led by a representative of either the ECB or an NCA, can be regarded as another example of the ECB's managerial approach to promote voluntary compliance of the NCA supervisory apparatus with the agreed stances. Rather than being structures of the ECB's control, they contribute to supervisory capacity building across the SSM, as well as to the on-going interpretation and clarification of the Union's supervisory policies on a daily basis. In particular, the structure of the working group deadline with the issues on non-performing loans confirms that by assuming the leadership of an important work stream the NCA supervisory apparatus (the bureaucratic agent) is willing to put its unique knowledge at the disposal of the ECB supervisory apparatus (the bureaucratic principal) which considerably reduced its informational advantage over the latter.

#### Key outcomes of deliberations between the ECB-NCA supervisory apparatuses

##### (iv) Supervisory Manual

One of the most remarkable policy products resulting from informal cooperation between the ECB and NCA supervisory apparatuses is the Supervisory Manual (SM). The SM lays down a harmonized SSM approach for the supervision of significant institutions that the members of the JSTs are expected to consistently apply to all of

---

<https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160323.en.html>, accessed 01 December 2017.

their supervisory activities. In doing so, it “provides hundreds of supervisors across Europe with a common set of work procedures and practices”.<sup>979</sup>

The key part of the SM is dedicated to the SSM Supervisory Review and Evaluation Process (SSM SREP).<sup>980</sup> Apart of this, it also covers off-site and on-site reviews, risk assessments and model validations.<sup>981</sup> In addition, it describes the procedures for cooperation within the SSM and with authorities outside the SSM,<sup>982</sup> and contains a number of annexes with detailed supervisory methodologies, notably including the methodology for the on-site inspections which sets objectives, techniques and outputs for on-site inspections.<sup>983</sup>

The first version of the Manual was developed by a dedicated work stream of the preparatory Task Force on Supervision which had been mandated with the development of a common supervisory model for the SSM.<sup>984</sup> It was submitted to the

---

<sup>979</sup> See Danièle Nouy, *European banking supervision after year one: what lies ahead?*, Speech at Handelsblatt conference – European banking supervision (Frankfurt am Main, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151110.en.html>, accessed 01 December 2017.

<sup>980</sup> See European Central Bank, *SSM Quartely Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation*, 2014/1, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmqr20141en.pdf>, accessed 01 December 2017, p. 8.

<sup>981</sup> See Danièle Nouy, *Toward the European Banking Union: achievements and challenges*, Speech at the OeNB Economics Conference (Vienna, 2014), [https://www.bankingsupervision.europa.eu/press/speeches/date/2014/html/se140512\\_1.en.html](https://www.bankingsupervision.europa.eu/press/speeches/date/2014/html/se140512_1.en.html), accessed 01 December 2017.

<sup>982</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2015* (above, n.681), pp. 77-78.

<sup>983</sup> See European Central Bank, *SSM Quartely Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation*, 2014/2, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmqr20142en.pdf>, accessed 01 December 2017, p. 14.

<sup>984</sup> See <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmqr20141en.pdf> European Central Bank, *SSM Quartely Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation* (above, n. 980) , p. 8.

Supervisory Board for the approval already in January 2014,<sup>985</sup> which decided that the Supervisory Manual would be a non-binding “internal SSM staff document”. Rather than *rules of law*, it constitutes *rules of practice* from which both the JSTs may not depart without giving reasons that are compatible with the principle of equal treatment of all credit institutions. As a “living document”, the Manual is subject to regular joint reviews by the ECB and NCA supervisors under auspices of Methodology and Standards Development Division and its expert network.<sup>986</sup> To promote the transparency of the SSM supervisory model, a shorter “Guide to banking supervision” was published which introduces the public to the main principles governing the prudential supervision in the SSM.<sup>987</sup> From the perspective of the management school of compliance, the SM can be perceived as an example of the provision of basic technical and know-how assistance to the bureaucratic agents (the NCA/JSTs) which aims to increase their capabilities to carry complex tasks for their bureaucratic principal (the ECB).

#### (iv) Methodology for the Comprehensive Assessment

The SSM Regulation obliges the ECB to carry out a comprehensive assessment (CA) of credit institutions which are about to become significant.<sup>988</sup> This exercise aims to overcome the legacy problems of banks by reviewing and possibly repairing bank’s balance sheet in order to reduce uncertainty over their solvency prior to handover of

---

<sup>985</sup> See European Central Bank, *SSM Quartely Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation* (above, n. 980), p. 15.

<sup>986</sup> Nouy, *European banking supervision after year one: what lies ahead?* (above, n.979).

<sup>987</sup> See European Central Bank, *Guide to banking supervision* (above, n.658).

<sup>988</sup> See Art. 6(4) of the SSM Regulation: “comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution”.

supervisory responsibility to the ECB.<sup>989</sup> It consists of two phases: Asset Quality Review (AQR) and Stress Testing (ST). In October 2013, the ECB announced that the comprehensive assessment would cover around 130 institutions holding approximately 85% of euro area bank assets in 19 EU Member States and would be exercised jointly by ECB and national supervisors before the SSM start (“first comprehensive assessment”).<sup>990</sup>

However, the SSM supervisory legislation neither stipulates the detailed process nor the methodology of the comprehensive assessment. To set the modalities of the comprehensive assessment, the ECB decided to take recourse to the NCAs’ long-lasting experience and know-how in day-to-day supervision and established a dedicated work stream in the preparatory Task Force on Supervision.<sup>991</sup> The initial work carried out by this work stream was subsequently continued by the Comprehensive Assessment Steering Committee (CASC) consisting of four ECB and eight NCA high-level experts supported by two technical sub-structures. It resulted in the development of detailed methodologies to conduct asset quality review and stress tests complemented, where necessary, by supervisory risk assessment intended to cross-check the AQR and ST results.

---

<sup>989</sup> See Danièle Nouy, *First ordinary hearing in 2015 of the Chair of the ECB’s Supervisory Board at the European Parliament’s Economic and Monetary Affairs Committee*, Introductory remarks (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150625.en.html>, accessed 01 December 2017.

<sup>990</sup> See European Central Bank, *Note Comprehensive Assessment*, October 2013, <https://www.ecb.europa.eu/pub/pdf/other/notecomprehensiveassessment201310en.pdf>, accessed 01 December 2017. For some of NCAs, the first comprehensive assessment was extremely resource consuming, see Informal interview with K (17 January 2016) in *Annex*.

<sup>991</sup> See European Central Bank, *SSM Quartely Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation* (above, n. 980), p. 5.

To perform the asset quality review, the work stream and CASC substructures formulated a set of uniform methodologies and harmonized definitions, including EBA-formulated criteria for non-performing exposures and forbearance reporting.<sup>992</sup> This toolbox was codified in a special manual designed to guide national supervisors' ground work through the complexities of the AQR.<sup>993</sup> The stress testing stage comprised of the base and the adverse stress test scenario conducted according to the EBA EU-wide Stress Test Methodology 2014.<sup>994</sup> In order to assure the quality of the stress test outcomes and integrate both stages of the CA exercise, a special stress test manual was also developed by the ECB and NCA supervisory experts.<sup>995</sup> In the course of the exercise, these common methodologies and procedures were universally used by both supranational and national supervisory apparatus to examine more than 800 individual portfolios, analyze approximately 120,000 debtors, revalue over 5,000 securities 170,000 collateral items on banks' balance sheets and to challenge over 850 provisioning and CVA models.<sup>996</sup> In 2015, these methodologies were also employed to review balance sheets of another nine credit institutions ("second comprehensive assessment"), including four which became significant in January 2016.

---

<sup>992</sup> See EBA Final draft Implementing Technical Standards on supervisory reporting on forbearance and non-performing exposures under article 99(4) of Regulation (EU) No 575/2013 [EBA/ITS/2013/03/rev1].

<sup>993</sup> See European Central Bank, *Asset Quality Review, Phase 2 Manual* (2014), <http://www.ecb.europa.eu/pub/pdf/other/assetqualityreviewphase2manual201403en.pdf>, accessed 01 December 2017.

<sup>994</sup> See European Banking Authority, *Methodological note EU-wide Stress Test 2014, Version 2.0* (2014), <https://www.eba.europa.eu/documents/10180/669262/Methodological+Note.pdf>, accessed 01 December 2017.

<sup>995</sup> See European Central Bank, *Comprehensive Assessment Stress Test Manual* (2014), <http://www.ecb.europa.eu/pub/pdf/other/castmanual201408en.pdf>, accessed 01 December 2017.

<sup>996</sup> See European Central Bank, *Aggregated Report on Comprehensive Assessment* (2014), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/aggregatereportonthecomprehensiveassessment201410.en.pdf>, accessed 01 December 2017.

Following the Euro Summit of July 2015,<sup>997</sup> granting the ESM financial assistance for Greece was made conditional upon another comprehensive assessment carried out by the ECB covering four significant Greek banks (“third [Greek] comprehensive assessment”). For this purpose, the comprehensive assessment methodology developed in 2014 was also applied. However the criteria for base and adverse stress test scenarios were calibrated.<sup>998</sup> In 2016, the ECB and NCA supervisory apparatus again made use of these methodologies to assess four new significant credit institutions (“fourth comprehensive assessment”).<sup>999</sup>

These methodologies, subsequently codified in technical manuals, can be regarded as the ECB supervisory apparatus managerial instruments providing its NCA supervisory apparatus with technical assistance and know-how to execute the comprehensive assessment “close to the ground” by supplying them with centrally developed data requirements and methodology.<sup>1000</sup> Until the present day, they were used to scrutinize balance sheets of more than 140 credit institutions operating in the Banking Union.

---

<sup>997</sup> See Euro Group, *Euro Summit Statement*, SN 4070/15 (2015).

<sup>998</sup> See European Central Bank, *Aggregated Report on Greek Comprehensive Assessment* (2015), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/aggregatereportonthecomprehensiveassessmenttexsum201510.en.pdf>, accessed 01 December 2017.

<sup>999</sup> See European Central Bank, *ECB concludes comprehensive assessment of four banks* (2016), <https://www.bankingsupervision.europa.eu/press/pr/date/2016/html/sr161104.en.html>, accessed 01 December 2017.

<sup>1000</sup> See European Central Bank, *SSM Quartely Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation* (above, n. 980), p. 13.



(v) Guide to JSTs on the exercise of options and national discretions

In January 2015, the preparatory work on the harmonization of options and national discretions (ONDs) concerning significant institutions was undertaken by a special high working group consisting of ECB and NCA senior supervisory experts.<sup>1001</sup> It resulted in the issuance of an ECB Regulation and an ECB Guide. The ECB Regulation covered the exercise of so-called general ONDs vis-à-vis significant institutions and was classified as the ECB's *ex ante* control due to its binding character on the NCA supervisory apparatus.<sup>1002</sup> The second element of the package – the ECB Guideline on the exercise of options and national discretions formulates non-binding policy stances on the exercise of the so-called “case-by-case” ONDs vis-à-vis significant institutions.<sup>1003</sup> Whereas the first item of the package can be regarded as stipulating *rules of law* which the administration is always bound to observe, the second item establishes *rules of practice* from which the administration may not depart in an individual case without giving reasons.

Since the overall scope of the ONDs that are applicable on a case-by-case basis is broader than the scope of the general ones, it means that the majority of policy recommendations for the JSTs can be considered in terms of non-binding *rules of practice* rather than binding *rules of law*. They cover policy recommendations in such areas of prudential supervision as: granting waivers on liquidity and capital

---

<sup>1001</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2015* (above, n.681) European Central Bank, *ECB Annual Report on supervisory activities: 2014* (above, n.968), p. 12. See also Informal interview with H (10 October 2016) in *Annex*.

<sup>1002</sup> See *supra* point (iv) in subsection o.

<sup>1003</sup> See European Central Bank, *ECB Guide on options and discretions available in Union law* (2016), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/ecb\\_guide\\_options\\_discretions.en.pdf?59277660d00228705435a3ab8627afe7](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/ecb_guide_options_discretions.en.pdf?59277660d00228705435a3ab8627afe7), accessed 01 December 2017.

requirements at solo level, development of common specifications or preferential treatments for liquidity requirements. The members of JSTs are expected to use them as guidance when assessing individual requests and/or decisions involving the exercise of an option or discretion.<sup>1004</sup> In this sense, the Guide significantly contributes to the reduction of the agency contract's incompleteness as regards the ways for the exercise of case-by-case ONDs by the JSTs. Given the predominantly non-binding nature of policy recommendations on ONDs for significant institutions, this harmonization project can be considered as an example of the use of managerial strategies by the ECB supervisory apparatus to increase the level of compliance of NCA supervisory apparatus (in the JSTs) with respect to the exercise of the majority of the ONDs provided by Union law in relation to significant institutions.

(vi) Guidance on non-performing loans (NPLs)

The subsequent comprehensive assessment exercises revealed that many EU credit institutions still have high amounts of non-performing loans (NPLs) on their balance sheets. NPLs are a type of assets which do not generate income and they require provisioning. They also limit the ability of banks to provide loans to the economy because they remain on the banks' balance sheets. It is therefore in the interests of both the banks and the economy to reduce the amount of NPLs. However, over last the past few years there have been diverging supervisory approaches and practices towards NPL across national jurisdictions. This diversity can be manifested by the

---

<sup>1004</sup> Ibid., para 2.2. See also Informal interview with I (13 August, 21 October 2016) in *Annex*.

fact that across the euro area, the percentage of banks' balance sheet made up of NPLs ranges from 1% to nearly 50%.<sup>1005</sup>

Therefore, the main aim of publishing the ECB guidance on NPLs is to ensure a level-playing field and also make transparent the expectations towards significant institutions. Although it is primarily addressed to significant institutions, nevertheless this guidance also serves the JSTs as a common yardstick for evaluating banks' handling of NPLs as part of the regular supervisory dialogue.<sup>1006</sup> In particular, it contains qualitative supervisory expectations on how to define and implement appropriate quantitative policies and targets to address the issue of NPLs by individual credit institutions.<sup>1007</sup> It is of a non-binding character, although the ECB expects it to be "considered very seriously".<sup>1008</sup> To develop this guidance, a dedicated working stream (NPL Task Force) consisting of supervisory experts from the ECB and eight national supervisory authorities conducted a comprehensive stocktaking of national supervisory practices and legal frameworks concerning NPL related issues.<sup>1009</sup> The task force was led by the Central Bank of Ireland.<sup>1010</sup>

---

<sup>1005</sup> See Julie Dickson, *Dealing with diversity – the European banking sector*, Speech at the 17th Handelsblatt Annual Conference on European Banking Regulation (2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161128.en.html>, accessed 01 December 2017.

<sup>1006</sup> See European Central Bank, *ECB launches public consultation on guidance to banks on non-performing loans*, 12 September 2016, <https://www.bankingsupervision.europa.eu/press/pr/date/2016/html/sr160912.en.html>, accessed 01 December 2017.

<sup>1007</sup> See European Central Bank, *FAQs on the NPL guidance* (2016), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/npl\\_faq.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/npl_faq.en.pdf), accessed 01 December 2017.

<sup>1008</sup> *Ibid.*, p. 3.

<sup>1009</sup> Originating from Cyprus, Germany, Greece, Ireland, Italy, Portugal, Slovenia and Spain. See European Central Bank, *Stocktake of national supervisory practices and legal frameworks related to NPLs* (2016), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/stock\\_taking.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/stock_taking.en.pdf), accessed 01 December 2017, fn. 1.

Given its non-binding nature, this guidance project can be considered as an example of the use of managerial strategies by the ECB supervisory apparatus to set uniform expectations of the NCA/JST supervisory apparatus towards supervised entities. However, the issue of NPLs depends not only on bank supervisors, but also on the national legal and judicial systems which may constrain the speedy resolution of NPLs. The guidance can be thus regarded as a set of particular *rules of practice* bringing more transparency and rule clarification regarding the treatment of high levels of NPLs across significant institutions.

#### (vii) Guide to JSTs on fit and proper assessments

Fit and proper supervision refers to the supervisory assessment of whether the bank's management (i.a. board members and key function holders) is capable of running the bank. This aspect of prudential supervision does not only impact the safety and soundness of the institution, but also banking sector in general since it reinforces the trust of the public at large in those who take key decisions related to the financial sector of the euro area.<sup>1010</sup> The European supervisory legislation provides a set of criteria to conduct such assessments, which include: (i) reputation, (ii) experience, (iii) conflict of interest and independence of mind, (iv) time commitment, and (v) collective suitability of the management body.<sup>1012</sup> However, since fit and proper regime is based on the principle of minimum harmonization,

---

<sup>1010</sup> See *supra* n.978.

<sup>1011</sup> See European Central Bank, *Draft guide to fit and proper assessments* (2016), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/fap/fap\\_guide.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/fap/fap_guide.en.pdf), accessed 01 December 2017.

<sup>1012</sup> See Article 91 of the CRDIV.

there exist numerous divergences in national transpositions across national jurisdictions.<sup>1013</sup> Indeed, the criteria laid down in the CRDIV governing the assessment of the suitability of the management body, notably including on reputation and the number of directorships, are interpreted differently in the national laws.<sup>1014</sup> For instance, some NCAs make use of questionnaires to be answered by the candidates. In other jurisdictions, interviews are used as tools to assess the suitability of new members of the board. In addition, the national timelines for conducting the assessment also differ greatly.<sup>1015</sup> As a result, there might be a situation where the same natural or legal person is assessed for similar positions in different member states with a different outcome due to the applicable criteria.<sup>1016</sup> This unnecessarily complicates the work of a single supervisor and also hampers the consistency of the JST approaches to significant institutions which deal with credit institutions headquartered in different national jurisdictions. Ultimately, these regulatory differences are also a great obstacle to the Single Market, they also increase operational costs and overall bureaucracy.<sup>1017</sup>

---

<sup>1013</sup> See Julie Dickson, *The relevance of the supervision of behaviour and culture to the SSM*, Speech at the conference "Looking forward: effective supervision of behaviour and culture at financial institutions" in the Tropenmuseum and organised by De Nederlandsche Bank (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150924.en.html>, accessed 01 December 2017.

<sup>1014</sup> See Julie Dickson, *Will the Eurozone caucus on financial regulation?*, Speech at a lunch discussion organised by the Centre for European Reform (London, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150901.en.html>, accessed 01 December 2017.

<sup>1015</sup> Ibid. See also Informal interview with E (19 October 2016) in *Annex*.

<sup>1016</sup> See Danièle Nouy, *Introductory statement: First ordinary hearing in 2016 of the Chair of the ECB's Supervisory Board at the European Parliament's Economic and Monetary Affairs Committee* (2016) (above n.669).

<sup>1017</sup> See Sabine Lautenschläger, *Two years and three days of European banking supervision – what has changed?*, Speech at Banking and Corporate Evening of the Deutsche Bundesbank's Regional Office in Bavaria (Munich,

To reduce ambiguities regarding national interpretations of rules on fit and proper assessments, the network of authorisation experts hosted by DG-MSIV's Authorisation Division has established a number of work stream which developed common policies regarding the fit and proper criteria, practices and processes applicable to significant institutions.<sup>1018</sup> Through those collaborative processes, the ECB and NCA authorisation experts developed various policy stances on different aspects of fit and proper assessments, including the collective suitability of the board as a whole.<sup>1019</sup> The aggregated outcome of their work has been codified in a Guide to fit and proper assessments<sup>1020</sup> which is dedicated to the JSTs. Although the JSTs are not legally bound by the Guide, it nevertheless establishes a set of specific *rules of practice* from which the agents' cannot depart without providing a justification. A degree of supervisory judgment, the principle of proportionality and a case-by-case approach are necessary features of fit and proper assessments conducted by the JSTs.<sup>1021</sup> Thus, the Guide can be considered as an example of the use of managerial strategies by the ECB supervisory apparatus to ensure consistent interpretation of rules governing the entry into Single Market of new entities (both natural and legal persons).

---

2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161107.en.html>, accessed 01 December 2017.

<sup>1018</sup> See Informal interview with E (19 October 2016) in *Annex*.

<sup>1019</sup> See Danièle Nouy, *Enhanced dialogue between Boards and Supervisors: Towards a sound governance framework*, Speech at the SSM Conference on governance and risk appetite (Frankfurt am Main, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160623.en.html>, accessed 01 December 2017.

<sup>1020</sup> See European Central Bank, *Draft guide to fit and proper assessments* (above, n.1011).

<sup>1021</sup> See Danièle Nouy, *New Year's resolutions for a stable banking sector*, Speech at the European banking supervision and European Banking Federation boardroom dialogue (Frankfurt am Main, 2017), <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/se170125.en.html>, accessed 01 December 2017.

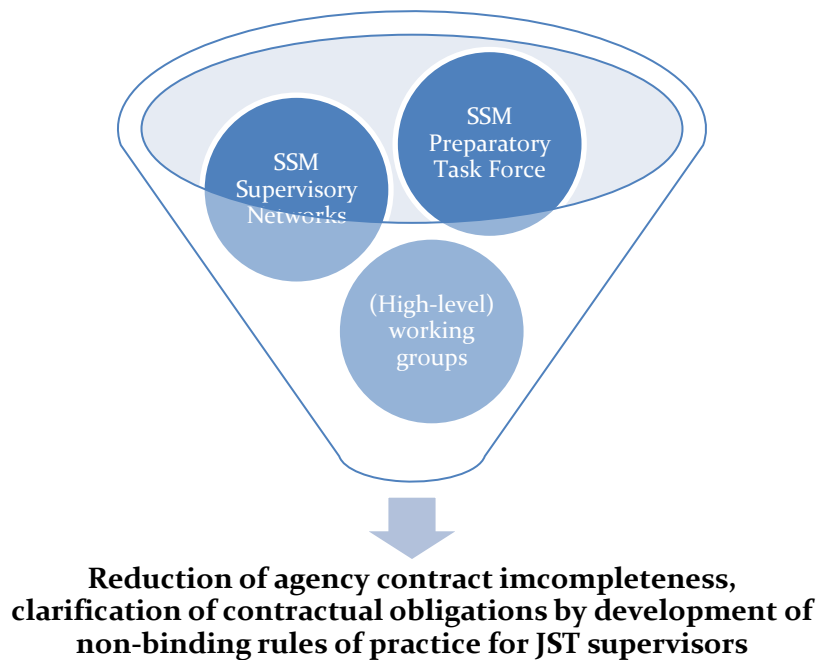


Figure 15 Capacity for cooperation within the subsystem of SSM Direct Supervision

#### 7.4.2. Framework for the Principal-Agent cooperation within the system of SSM Indirect Supervision

This subsection identifies three structured dimensions of informal cooperation between the ECB and NCA supervisory apparatuses with respect to the subsystem of SSM Indirect Supervision and presents, indicatively, outcomes of their deliberations, which can be regarded as significantly contributing to the reduction of the incomplete nature of the agency contract underpinning the functioning of the subsystem of the SSM Indirect Supervision.

##### Informal structures for the ECB and NCA supervisory cooperation

###### (i) Senior Management Network

The Senior Management Network (SMN) is a permanent network pooling together the ECB and NCA supervisory apparatus. Its main role is to assist the Supervisory

Board of the SSM in the fulfilment of its tasks regarding the supervision of less significant institutions in the SSM and the ECB's oversight function over the NCAs. The SMN comprises of senior management responsible for LSI supervision from all NCAs and DG-MSIII. It is intended to act as a sounding board for central proposals and a platform for discussing overarching topics emerging from day-to-day LSI supervision by NCAs.<sup>1022</sup> Although the SMN is of informal and non-hierarchical dimension, it nevertheless operates in the shadow of hierarchy since it is always chaired by Director General of DGMSIII, or his representative. The SMN meetings take place on a quarterly basis, in the form of a physical meeting based on the agenda prepared by the SMN secretariat hosted by DG-MSIII.<sup>1023</sup> In addition, teleconferences addressing specific technical topics can be also organized on an *ad-hoc* basis.

Given its informal and non-hierarchical dimension, the SMN can be considered as the primary example of the use of problem-solving (managerial) strategy in promoting the compliance of the NCA supervisory apparatus. Rather than being the ECB's monitoring mechanism, it is a platform facilitation on-going and informal interactions between the bureaucratic principal and agent in the framework of SSM Indirect Supervision. It contributes to the reduction of uncertainty accompanying the incomplete agency contract setting the SSM's functioning, and clarifies the ECB's

---

<sup>1022</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2014* (above, n.968) p. 66.

<sup>1023</sup> See *supra* n. 720.



expectations relating to the application of Union's prudential policies on credit institutions to less significant institutions.

(ii) Working Group on High Supervisory Standards

The technical Working Group on High Supervisory Standards (WG-HSS) is a permanent SMN substructure, which gathers ECB and NCA senior supervisory experts and is chaired by DG-MSIII's officials at managerial level. It is tasked with identification of areas for regulatory action concerning supervisory harmonization and presenting proposals for discussion to be held at the SMN level.<sup>1024</sup> For these purposes, the WG-HSS conducts the benchmarking of best supervisory practices among NCAs and initiates the work on the formulation of joint supervisory standards (JSS) covering different aspects of prudential supervision to be used by NCAs.<sup>1025</sup> The WG-HSS meetings are held on a monthly basis as teleconferences whereas its physical meetings occur on a quarterly basis.<sup>1026</sup>

Given its informal and non-hierarchical dimension, the WG-HSS hosted by the DGMSIII can be considered as another example of the use of problem-solving (managerial) strategies in promoting the compliance of the NCA supervisory apparatus within the framework of SSM Indirect Supervision. Similarly to the SMN, it fosters supervisory capacity building across the SSM as well as to the on-going interpretation and clarification of the Union's supervisory policies on a daily basis at the senior expert level.

---

<sup>1024</sup> See Informal interview with B (09 November 2015, 28 June 2016) in *Annex*.

<sup>1025</sup> See European Central Bank, *Report LSI supervision within the SSM* (above, n.924), p. 14.

<sup>1026</sup> See Informal interview with B (09 November 2015, 28 June 2016) and with G (10 March 2017) in *Annex*.

(iii) Other fora

Similarly like in the subsystem of SSM Direct Supervision, the third dimension of intensive collaboration between the ECB and NCA supervisory apparatuses can be captured in the establishment of ad hoc project-based working groups and drafting teams. These structures are established by the Working Group on High Supervisory Standards to focus on specific policy issues concerning the supervision of less significant institutions each of those dealing with one or few similar supervisory issues which require more consistent approach across the NCAs. Drafting teams may be led by a DG-MSIII or an NCA representative Since I is up to the NCA to decide whether they have interest in taking part in the work of such drafting teams or project-based working groups, their composition may vary depending on the deliberated supervisory issue. The NCA participation usually depends on individual technical capacities, expertise and the supervisory issue at stake, and therefore there may exist drafting teams consisting of only a few of NCA representatives.<sup>1027</sup>

Since the start of the SSM operations, a number of such ECB-NCA joint projects have been launched by the ECB to deal with different supervisory issues. In 2015, the ECB established drafting teams to formulate harmonized practices on annual supervisory planning by the NCAs and on the application of simplified obligations for recovery planning to non-systemic less significant institutions<sup>1028</sup> by the NCA supervisory

---

<sup>1027</sup> See Informal interview with B (09 November 2015, 28 June 2016). On the issue of NCA capacities, see also (comparatively) Informal interview with J (09 November 2016) in *Annex*.

<sup>1028</sup> The Bank Recovery and Resolution Directive (BRRD) grants national competent authorities the discretion to apply simplified obligations. See Article 4 of the BRRD.

apparatus.<sup>1029</sup> In addition, the ECB and NCAs formulated a common approach to the recognition of institutional protection schemes, which are of particular importance to Germany, Austria and Spain.<sup>1030</sup> In 2016, intensive cooperation between the ECB and NCA supervisory apparatus in different informal drafting teams continued and resulted in the formulation of common supervisory approaches for the conduct of on-site inspections at LSIs by the NCAs, the supervision of car financing institutions (CFIs).<sup>1031</sup> Dedicated ECB-NCAs drafting teams were also instituted to develop a crisis management cooperation framework between the ECB and the NCAs, common methodology for the Supervisory Review and Evaluation Process (SREP) for LSIs and licensing of LSIs with FinTech business models.<sup>1032</sup> Given their informal and non-hierarchical dimension, drafting teams and project-based working groups led by a representative of either ECB, or NCA supervisory apparatus can be regarded as another problem-solving mechanism employed by the ECB supervisory apparatus to further clarify its supervisory expectations from the NCAs on key areas of prudential supervision. Seen from this perspective, they serve as informal structures designed to the reduction of the incompleteness of the agency contract underpinning the functioning of the subsystem of SSM Indirect Supervision

---

<sup>1029</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2015* (above, n.681), p. 42-43.

<sup>1030</sup> *Ibid.*, p. 43.

<sup>1031</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2016* (above, n.865), p. 27-28.

<sup>1032</sup> *Ibid.*, p. 28.

## Key outcomes of deliberations between the ECB-NCA supervisory apparatuses

### (iv) Joint Supervisory Standards

Based on the backward looking information collected from NCA reports, the ECB may find out that certain areas of supervision require more harmonized practice to improve compatibility of NCA supervisory activities on LSIs.<sup>1033</sup> For this purpose, DG-MSIII proposed to initiate the development of a compendium of joint supervisory standards (JSS) for the NCAs, which would mirror to certain extent the SSM Supervisory Manual used to the supervision of significant institutions. The JSS are non-binding instruments, which identify high quality and flexible standards for NCA supervision designed to take into account regional aspects such as the size, business and risk profile of the institution.<sup>1034</sup> They may set very granular rules or set general principles governing particular area of LSI supervision. The ultimate choice regarding the level of JSS granularity depends on the level of consensus among NCAs concerning the policies adopted and a degree of flexibility to be left for national supervisors.<sup>1035</sup> As such, the JSS are considered by the ECB to be a key tool for the supervision of less significant institutions.<sup>1036</sup>

---

<sup>1033</sup> See European Central Bank, *Report LSI supervision within the SSM* (above, n.924), pp. 14-15. It was however noted by one interviewee that the EBA remains the sole EU authority which has a task of driving supervisory convergence in the EU, see Informal interview with J (09 November 2016) in *Annex*.

<sup>1034</sup> See Sabine Lautenschläger, *Caught in the middle? Small and medium-sized banks and European banking supervision*, Speech at the Banking Evening of the Deutsche Bundesbank Regional Office in Baden-Württemberg (Stuttgart, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160222.en.html>, accessed 01 December 2017.

<sup>1035</sup> See Informal interview with A (13 November 2015, 12 January 2016, 15 July 2016) and with G (10 March 2017) in *Annex*.

<sup>1036</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2016* (above, n.865), p. 27; see also Informal interview with G (10 March 2017) in *Annex*.

The development of a JSS consists of two phases. Once the ECB identified the need for a specific, targeted standard related to LSI supervision, the existing regulatory framework is analyzed, in particular whether there exist any standards, guidelines, or recommendations developed by the ECB in that supervisory field. If the question is negative, in the second step SSM-wide best practices are identified and drafting of a JSS begins in close cooperation with the NCAs.<sup>1037</sup> Up to now, the ECB and NCA supervisors developed five JSS and a number of common policy stances on important aspects of LSI supervision,<sup>1038</sup> all of which are of non-binding nature and, thus, constitute *rules of practice* rather than *rules of law*. They clarify the expectations of the ECB supervisory apparatus vis-à-vis LSI supervision carried out by the NCA supervisory apparatus in different supervisory areas. The fact that the ECB has never strongly advocated for making the JSS legally binding upon the NCA demonstrated problem-solving approach aim to build the NCA capacity to fulfill its supervisory expectations rather than imposing strict control on the way how the NCAs exercise the ECB's exclusive competences on LSIs.

(v) Recommendation ECB/2017/10 on the exercise of options and national discretions by NCAs in relation to LSIs<sup>1039</sup>

The Recommendation ECB/2017/10 is a particular example of non-binding common *rules of practice* mutually agreed by the ECB and NCA supervisory apparatuses. As

---

<sup>1037</sup> See European Central Bank, *Report LSI supervision within the SSM* (above, n.924), p. 14.

<sup>1038</sup> This includes JSS on the supervision of car financing institutions, JSS on supervisory planning, JSS on LSI recovery planning, policy stance on licensing of FinTech credit institutions, common policies and framework on NCA crisis management and guidance on notification requirements regarding LSIs. *Ibid.*, p. 15.

<sup>1039</sup> See 'Recommendation of the ECB of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/10)', in *OJ C 120*, 13.4.2017.

already noted, initially the ECB decided to harmonize the application of options and national discretions (OND) for the banks it directly supervises in the subsystem of SSM Direct Supervision. For this purpose, it adopted a binding ECB Regulation<sup>1040</sup> and non-binding ECB Guide<sup>1041</sup> which developed policy stances on respectively “general” and “case-by-case” ONDs available in Union law. Later, the ECB and NCAs agreed to extend these policy stances also to the subsystem of SSM Indirect Supervision, but taking into account the principle of proportionality. For this purpose, the ECB and NCA drafted together a binding Guideline<sup>1042</sup> and non-binding Recommendation (ECB/2017/10) to the NCAs which formulate common specifications for the exercise of some options and discretions available in Union law in relation to less significant institution.

Since policy stances set in the Recommendation ECB/2017/10 are not legally binding upon the NCAs, this Recommendation can be regarded constituting *rules of practice*. This rules reflect the ECB’s supervisory expectations from which the NCA supervisory apparatus should not depart in an individual case without giving reasons, similarly as JST supervisors in respect to the ECB Guide on the exercise of options and national discretions vis-à-vis significant institutions.<sup>1043</sup> National supervisory teams are expected to take them into account when assessing individual

---

<sup>1040</sup> See ‘Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4)’ (above, n.74).

<sup>1041</sup> See European Central Bank, *ECB Guide on options and discretions available in Union law* (above, n.1003).

<sup>1042</sup> See ‘Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9)’ (above, n.74). This Guideline, due to its binding nature, was classified as an example of *ex ante* control in the subsystem of SSM Indirect Supervision. See *supra* point (iii) in subsection 7.3.2.

<sup>1043</sup> See *supra* n.1041.

requests and/or decisions involving the exercise of an option or discretion. Thus, the ECB Recommendation can be considered as an example of the use of managerial strategies by the ECB supervisory apparatus to clarify its expectations on how the NCAs apply certain “case-by-case” ONDs in relation to less significant institutions.

(vi) Guide on the recognition of institutional protection schemes

Institutional protection schemes (IPS) are contractual or statutory liability arrangements, which protect their member institutions and ensure that these institutions have the liquidity and solvency needed to avoid bankruptcy where necessary.<sup>1044</sup> The IPSs arrangements are currently recognized in three participating Member States: Austria, Germany and Spain.<sup>1045</sup> The relevance of the IPSs is significant in absolute terms, given that about 50% of credit institutions in the euro area are members of an IPS which represents around 10% of the total assets of the euro area banking system.<sup>1046</sup> In particular, they are however relevant for less significant institutions.<sup>1047</sup> For instance, in the German banking system four out of five institutions belong to such a protection scheme.<sup>1048</sup>

---

<sup>1044</sup> See Article 113(7) of the CRR, first paragraph.

<sup>1045</sup> See European Central Bank, *Guide on the approach for the recognition of institutional protection schemes (IPS) for prudential purposes* (July 2016), [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/institutional\\_protection\\_guide.en.pdf?9bfc77665726f90c0785c8e8ed480173](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/institutional_protection_guide.en.pdf?9bfc77665726f90c0785c8e8ed480173), accessed 01 December 2017, par. 1.1.

<sup>1046</sup> Ibid., par. 1.2.

<sup>1047</sup> See Nouy and Lautenschläger, *Introductory statement to the press conference on the ECB Annual Report on supervisory activities 2015 (with Q&A)* (above, n.978).

<sup>1048</sup> See Sabine Lautenschläger, *European banking supervision – much achieved, but still much to do*, Speech at Bundesbanksymposium “Dialogue on banking supervision” (Frankfurt am Main, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160601.en.html>, accessed 01 December 2017.

For these reasons, it was decided to set up a dedicated drafting teams consisting of ECB and NCA supervisory experts who were mandated to develop a common policy stance regarding the recognition of such institutional protection schemes for prudential purposes.<sup>1049</sup> The outcome of joint work is reflected in a *Guide* setting the approach for the recognition of the IPS for prudential supervisory purposes.<sup>1050</sup> The Guide was designed as a non-binding document, which sets out best practices to be followed when assessing individual applications for the prudential permission referred to in Article 113(7) of the CRR. Given the non-binding nature of the proposed assessment criteria, the Guide on the recognition of the IPS can be perceived as an example of setting specific benchmarks by the ECB to ensure that the NCA treat the IPS in a consistent manner across the Banking Union.

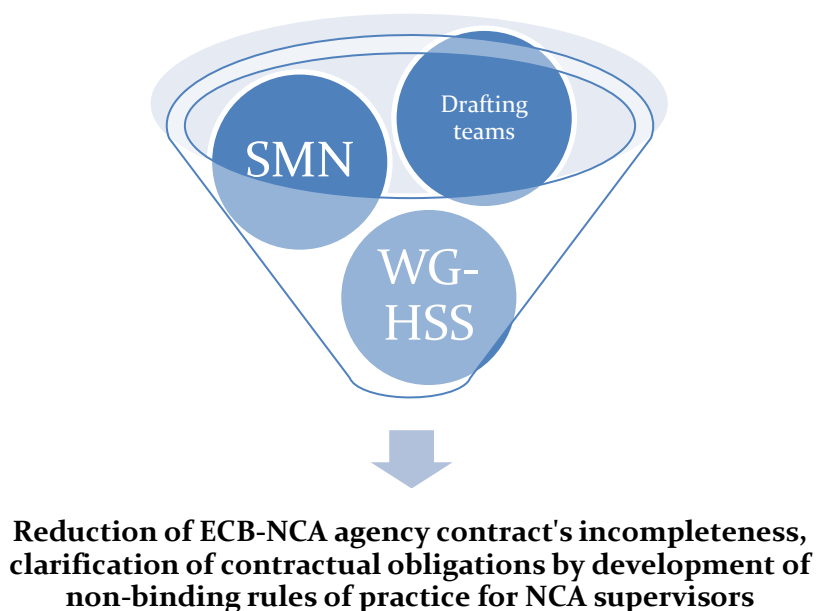


Figure 16 Capacity for cooperation within the subsystem of SSM Indirect Supervision

<sup>1049</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2014* (above, n. 968), p. 43.

<sup>1050</sup> See European Central Bank, *Guide on the approach for the recognition of institutional protection schemes (IPS) for prudential purposes* (above, n.1045).



## **7.5. Preliminary observations as regards the second structural condition affecting formal top-down compliance expectation**

In order to gauge the organisational design of the SSM, this chapter analyzed the internal mechanisms that the ECB (supervisory apparatus) may employ to align possibly heterogeneous preferences and objectives of the NCA (supervisory apparatus) and to reduce the ambiguities of their essentially incomplete agency contract.

For the purpose of testing the Enforcement hypothesis, this chapter applied the traditional Principal-Agent perspective to look at the formal capacity of the ECB (supervisory apparatus) to control the NCA (supervisory apparatus) in the subsystem of SSM Direct and Indirect Supervision. In doing so, it identified a number of *ex-ante* and *ex-post* control mechanisms at the disposal of the ECB (supervisory apparatus) to monitor and steer the action of the NCA (supervisory apparatus) within the subsystem of SSM Direct and Indirect Supervision. This assessment takes into account a number of criteria, including their dimension, intrusiveness, origin and actual use and is reflected in subsection 6.5.1(i) for the subsystem of SSM Direct Supervision, and in subsection 6.5.2(i) for the subsystem of SSM Indirect Supervision.

The Management hypothesis was tested by the application of liberal Principal-Agent perspective, which investigated the formal capacity for cooperation between the ECB and the NCA (supervisory apparatuses) in the subsystem of SSM Direct and Indirect Supervision. In doing so, it focused on whether there exist any routine, non-

confrontational and informal mechanisms involving the participation of ECB and NCA supervisory experts, and whether there are any tangible outcomes of their deliberations would could be classified as reducing the ambiguities of the agency contract between the ECB and NCAs/JST (supervisory apparatuses), or clarifying contractual expectations of the ECB (supervisory apparatus), or providing the NCA/JST supervisory apparatus with necessary technical assistance and supervisory know-how. This assessment is reflected in subsection 6.5.1(ii) for the subsystem of SSM Direct Supervision, and in subsection 6.5.2(ii) for the subsystem of SSM Indirect Supervision.

#### 7.5.1. Operational model of the subsystem of SSM Direct Supervision

##### (i) Insights provided by the Enforcement approach

The application of the traditional Principal-Agent approach reveals that there exists considerable capacity for control of the NCA/JST (supervisory apparatus) by the ECB (supervisory apparatus) in the subsystem of SSM Direct Supervision. However, the use of some of them is far from unproblematic. A number of the *ex-ante* and the *ex-post* controls have been detected and they can be regarded as contributing to the reduction of divergence in supervisory approach by individual JST and to the alignment of possibly heterogeneous preferences of the NCA supervisory apparatus assigned to the JSTs (the bureaucratic agent).

The *ex-ante* dimension of the internal control mechanism in the subsystem of SSM Direct Supervision has a predominantly legal nature and rests on a number of binding acts directly applicable in their entirety in the Participating Member States.

These acts can be regarded as framing the scope and modalities of the agency contract between the ECB and NCAs which underpins the functioning of the subsystem of SSM Direct Supervision. They also considerably limit the scope of discretion for the agents, which may also adversely affect the JSTs capacity to adapt the SSM supervisory approach to credit institutions having very unique business models and whose risks cannot be comprehensively captured by standardized SSM procedures and processes. However, it does not seem to be the case in the context of legal framework governing the exercise of direct supervision of significant institutions. Furthermore, the recently developed internal “delegation framework” providing for greater direct involvement of the ECB supervisory apparatus in decision-making in certain areas of prudential supervision considerably reinforces the *ex-ante* control over the draft proposals submitted by the JST/NCA supervisory apparatus.

The overview of adopted legal acts supplementing the SSM Regulation (the basic agency contract) demonstrated that the ECB has a strong capacity for setting *ex-ante* procedures by engaging in regulatory actions. However, in order not to undermine the credibility of legal framework governing the subsystem of SSM Direct Supervision, the ECB as the bureaucratic principal needs to be mindful that the scope of its mandate to set binding rules upon the NCAs (its bureaucratic agents) is not unlimited, but possible only “the extent necessary to organize or specify the arrangements for the carrying out of the tasks conferred on it by the SSM Regulation”. In the context of the ECB-led harmonization of options and national

discretions, it was noted by the European Parliament that “the ECB needs to remain within its mandate when conducting work on the reduction of options and national discretions”.<sup>1051</sup> On the occasion of discussion on the ECB’s Addendum to the Guidance on non-performing loans,<sup>1052</sup> the Council stated the ECB did not have legal power to *ex-ante* request SSM credit institutions to write down new non-performing loans completely within two years if they are unsecured, and within seven years if they are secured, and to ignore the value of the collateral in the latter case.<sup>1053</sup> Both the Legal Services of the European Parliament and the Council found that the ECB’s regulatory action cannot serve the purpose to set rules in the fields which the legislator has, for the time being, decided not to harmonize, even in a form of soft law instruments since their non-binding nature does not imply that they are automatically devoid of legal effects.<sup>1054</sup> This situation is reminiscent of the dispute between the ECB and the UK government over the “location policies” regarding the clearing of euro-denominated derivatives.<sup>1055</sup> It therefore follows that the ECB’s power to substantially modify *ex-ante* rules governing its agency contract with the NCAs is constrained, which itself is not a negative feature as too prescriptive rulebook may

---

<sup>1051</sup> See European Parliament, *Resolution of 15 February 2017 on Banking Union – Annual Report 2016*, 2016/2247(INI) (Strasbourg, 2017), <http://bit.ly/2jaCLUv>, accessed 01 December 2017, recital 11.

<sup>1052</sup> See European Central Bank, *Addendum to the ECB Guidance to banks on nonperforming loans: Prudential provisioning backstop for non-performing exposures*, October 2017, [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl2/ssm.npl\\_addendum\\_draft\\_201710.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl2/ssm.npl_addendum_draft_201710.en.pdf), accessed 01 December 2017.

<sup>1053</sup> See Reuters, *EU Council says ECB does not have mandate for its bad loan measures*, 27 November 2017, <https://www.reuters.com/article/us-eurozone-banks-npls/eu-council-says-ecb-does-not-have-mandate-for-its-bad-loan-measures-idUKKBN1DR1G9>, accessed 01 December 2017.

<sup>1054</sup> See European Parliament, *Addendum to the ECB Guidance to banks on non-performing loans: Competence of the ECB to adopt such Addendum* (above, n.780); Council, *Addendum to the ECB Guidance to banks on non-performing loans: Prudential provisioning backstop for non-performing exposures* (above, n.780).

<sup>1055</sup> This dispute was ultimately settled by the Court in favour of the UK, see Judgment of 4 March 2015, Case T-496/11 *United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB)* (“CCPs location policy”) EU:T:2015:133.

diminish the JSTs' overall capacity to achieve the expected supervisory outcomes, and thus contribute to the agency loss.

The *ex-post* dimension of the internal control mechanisms over the NCA supervisory apparatus in the subsystem of SSM Direct Supervision seems to be less prominent than the *ex-ante* dimension. There exist two main tools which can be immediately activated by the ECB supervisory apparatus: "police-patrols" mechanisms developed by the ECB's horizontal and specialized services which shall ensure consistency between all the JSTs, and "operational acts" that may be directed to the NCA supervisory apparatus. Other of the analyzed *ex-post* controls cannot be immediately activated. The issuance of supervisory instructions to NCA JST members by a JST Coordinator is constrained by national data protection, employment and civil service framework. The ECB supervisory apparatus cannot steer the behaviour of the NCA supervisory apparatus where the NCA concerned did not delegate its authority in staff matters to the ECB. The NCAs remain effectively free to move or otherwise deploy their supervisory staff as they see fit. The only discretion available to the ECB supervisory apparatus regarding the NCA supervisory apparatus in JSTs is the power to reject an NCA appointment to a JST.<sup>1056</sup>

More importantly however, the NCA/JST supervisory apparatus is subject to double reporting lines. They report to a JST Coordinator on their JST work, but for any other work they report to their NCA line managers. In addition, on all matters of hierarchy and human resources, they report exclusively to the NCA management. As noted by

---

<sup>1056</sup> See Article 4(3) of the SSM Regulation.

the Commission, these “double reporting lines (functional and hierarchical) may expose NCA staff in the JST to possible conflicts in terms of staff issues (workload, appraisals etc.), and may also interfere with due information sharing.”<sup>1057</sup>

Last but not least, the possibility for timely activation of another of *ex-ante* control mechanism, which is the issuance of formal supervisory instructions, remains also constrained due to the applicable decision-making procedure at the ECB in supervisory matters. A supervisory instruction is adopted by the Governing Council on the basis of proposal submitted by the Supervisory Board. Both are collegiate bodies consisting of Governors of euro area Member States (the Governing Council) and representatives of the NCAs of the participating Member States (the Supervisory Board). Since instructions allow for a very detailed legal prescription of the addressee’s behaviour and do not leave much space to safeguard its institutional autonomy, it is highly unlikely that they could become a regular *ex-post* tool used by the ECB supervisory apparatus.

## (ii) Insights provided by the Management approach

The application of the liberal Principal-Agent approach reveals that there exists well-established formal cooperation capacity between the ECB and NCA (supervisory apparatus) in the subsystem of SSM Direct Supervision. This capacity is primarily reflected in a number of informal supervisory networks bringing together the ECB and NCA supervisory experts. These networks operate under the auspices of DG-

---

<sup>1057</sup> See European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013* (above, n. 717), p. 28. See also Informal interview with F (25 October 2016) in *Annex*.

MSIV and serve as platforms for discussion and development of new policies and procedures related to supervision of significant institutions.<sup>1058</sup> Importantly, the foundations for supervisory cooperation between the ECB and NCAs in DG-MSIV networks were already established prior to the beginning of the SSM operations by setting-up the Preparatory Task Force on Supervision, which managed SSM technical preparatory work carried out by the ECB together with the NCBs and NCAs of euro area Member States. In addition, the formal capacity for cooperation between the ECB and NCA supervisors in the subsystem of SSM Direct Supervision further supported by the existence of various working and project-based groups which have been jointly developing policy stances applicable to the supervision of significant institutions.

There exist several tangible outcomes of deliberations between ECB and NCA supervisors gathered in those informal structures. The most notable example is the SSM Supervisory Manual, which was drafted in 2013-4 by the ECB and NCA supervisory apparatus jointly collaborating in the Work Stream 3 (WSIII) of the Preparatory Task Force on Supervision, which was in charge of developing the supervisory model of the Single Supervisory Mechanism (SSM).<sup>1059</sup> The Manual is a crucial supervisory tool setting a number of *rules of practice*, which they can use to execute their work.<sup>1060</sup> Seen from this perspective, it constitutes the indispensable

---

<sup>1058</sup> Ibid. p. 31.

<sup>1059</sup> See *supra* n. 964.

<sup>1060</sup> See Danièle Nouy, *The Single Supervisory Mechanism after one year: the state of play and the challenges ahead*, Speech at Banca d'Italia conference "Micro and macroprudential banking supervision in the euro area", the Università Cattolica (Milan, 2015),

element to develop a common supervisory approach as it provides hundreds of ECB and NCA supervisors across Europe with a common set of work procedures and practices to be used then supervising significant credit institutions.<sup>1061</sup> Apart from the Supervisory Manual, ECB and NCA supervisors informally formulated a range of further technical *rules of practice* addressed to JST members in such supervisory areas, as for example: the exercise of options and discretions; treatment of non-performing loans or fit and proper assessment.

The above-mentioned findings suggest that the supervisory networks or other forms of informal cooperation provide positive results and contributes to the reduction of ambiguities governing the agency contract in the subsystem of SSM Direct Supervision. They also clarify supervisory expectations of the ECB supervisory apparatus in relation to the JST/NCA supervisory apparatus. However, to increase levels of transparency as regards *rules of practice* that the JSTs are expected to apply in their supervision of significant institutions, it could be contemplated to make the Supervisory Manual public in the same fashion as other products of ECB-NCA informal cooperation.<sup>1062</sup> It was also observed by a number of representatives of the NCA supervisory apparatus that the results of deliberations in networks, which are shared by a majority of the members, are not always reflected in the final policy

---

<https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151124.en.html>, accessed 01 December 2017.

<sup>1061</sup> See Nouy, *European banking supervision after year one: what lies ahead?* (above, n.979).

<sup>1062</sup> As also submitted by the European Parliament, see European Parliament, *Resolution of 15 February 2017 on Banking Union – Annual Report 2016* (above, n.1051), recital 11.



proposals presented by ECB supervisors.<sup>1063</sup> Furthermore, ECB supervisors are not always willing to thoroughly discuss supervisory issues in the networks before submitting them to the attention of the Supervisory Board.<sup>1064</sup> This indicates that the ECB casts indeed a long shadow of hierarchy within the networks which on some occasions may however impede the use of managerial techniques of promoting compliance. To ensure that the ECB supervisory apparatus does not use its strong hierarchical position to excessively influence, the representatives of the NCA supervisory apparatus could become co-chairs of these networks, or at least play more significant role in the agenda-setting.

#### 7.5.2. Operational model of the subsystem of SSM Indirect Supervision

##### (i) Insights provided by the Enforcement approach

The application of the traditional Principal-Agent approach reveals that there exists moderate capacity for control of the NCA (supervisory apparatus) by the ECB (supervisory apparatus) in the subsystem of SSM Indirect Supervision. A number of the *ex-ante* and the *ex-post* controls have been detected whose role contributes to the reduction of divergence in supervisory approach by individual NCAs and to the alignment of possibly heterogeneous preferences of the NCA supervisory apparatus assigned to the supervision of less significant institutions (the bureaucratic agent).

---

<sup>1063</sup> See European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013* (above, n. 717), p. 32; see also Informal interview with N (03 November 2016) in Annex.

<sup>1064</sup> Ibid.

The *ex-ante* dimension of the internal control mechanism in the subsystem of SSM Indirect Supervision rests primarily on the procedures established in the SSM Regulation and SSM Framework Regulation, namely common procedures regime and NCA *ex-ante* notifications requirements. Apart of them, there is only one binding legal act addressed to the NCAs which targets specifically the subsystem of SSM Indirect Supervision: the ECB's Guideline to the NCAs on the exercise of options and national discretions in relation to less significant institutions. It therefore follows that there are not too many *ex-ante* controls which set binding *rules of law* that frame the scope and modalities of the ECB-NCAs agency contract underpinning the functioning of the subsystem of SSM Indirect Supervision. Consequently, the functioning of this subsystem appears to be far less "legalized" than of the subsystem of SSM Direct Supervision. On the one hand, the reliance on softer steering instruments leaves more flexibility to both the bureaucratic principal and bureaucratic agents to adjust their contractual obligations to the changing landscape of European banking sector. On the other hand, leaving the NCAs to much flexibility as regards the ways how they shall exercise the ECB's exclusive supervisory competences may result in unintended agency loss on the ECB side. In this context, it needs to be pointed out few legally binding obligations on the bureaucratic agent's side may hinder ensuring effective control by the bureaucratic principal in the subsystem of SSM Indirect Supervision. This is due to the fact that the ECB supervisory apparatus responsible for NCA oversight consist of only around 80 full-time supervisors in comparison to around 1800 full-time NCA supervisors

whose compliance needs to be monitored against rather soft and general criteria laid down in the JSS.<sup>1065</sup>

In this context, the lack of binding criteria to categorize NCA draft supervisory decisions and procedures as “material” may be indicated as a specific example which additionally decreases the efficiency of the Central Notification Point seen as the ECB’s primary mechanism of the *ex-ante* control. Since the NCA retain discretion in qualifying their draft supervisory decisions and procedures as having or not having “material” effects on individual less significant supervised entities, it therefore follows that the ECB may receive a distorted view on NCA supervisory activities. Crucially, the lack of harmonized criteria on “material” supervisory decisions makes it difficult for the ECB to aggregate and compare capital-add on decisions by NCAs which are still communicated in a non-harmonized way.<sup>1066</sup> This issue is also directly related to the lack of a common SREP methodology for LSI supervision which could be consistently used by the NCAs. It would be welcomed if the current joint ECB-NCA work on the development of the harmonized SREP for LSIs facilitated in more consistent implementation of the SREP across the NCAs, notably in terms of the capital requirement definition.<sup>1067</sup>

---

<sup>1065</sup> See European Central Bank, *Report LSI supervision within the SSM* (above, n.924), p. 2; European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013* (above, n. 824), p. 47.

<sup>1066</sup> See European Central Bank, *Report LSI supervision within the SSM* (above, n.924), p. 18.

<sup>1067</sup> See European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013* (above, n. 717), p.47; see also Informal interview with N (03 November 2016) in *Annex*.

Moreover, functioning of the common procedures regime is another area where the ECB's *ex-ante* control capacity may face challenges. This challenge concerns in particular common procedures related to licensing cases in particular in the view of the upcoming Brexit which may force many UK-based banking groups to apply for a license in the Banking Union in order not to lose the access to the Single Market. With respect to licensing of new credit institutions, the ECB's *ex-ante* control capacity over the quality of NCA draft supervisory decisions is constrained by tight legal deadlines. According to the SSM Regulation, draft licensing decisions prepared by the NCAs are deemed to be adopted unless the ECB objects within 10 working days (extendable once in justified cases) after having received the submission from the NCA. Since the complex supervisory decision-making process at the ECB is likely to consume the most of 10 days available for evaluation of a draft submitted by the NCA, it is of utmost importance that the NCAs have proper incentives to informally share their working proposal earlier, so that the ECB can initiate its own assessment in advance.

The *ex-post* dimension of the internal control mechanism appears to be centered on the NCAs' *ex post* reporting obligations laid down in the SSM Framework Regulation, which allow the NCA to take a backward looking perspective at NCA supervisory activities conducted in the last supervisory cycle. Reports submitted annually by the NCAs may also help the ECB to identify significant variations in supervisory approaches used by the NCA which may be a reason to develop joint supervisory standards in a certain area of LSI supervision. However, due to different

national supervisory traditions, cross-border comparisons do not always provide reliable information on the NCAs' supervisory activities. For example, some NCAs impose capital and liquidity demands (Pillar 2 measures) in a form of formal supervisory decisions whereas other communicate them as a part of supervisory dialogue without resorting to a formal administrative act.<sup>1068</sup> Therefore, unless there is harmonized methodology for communicating the results of the SREP for LSIs, NCA annual reports will continue to provide a somewhat distorted backward-looking picture of some of NCAs' supervisory activities.

It is highly unlikely that the ECB will use another of its *ex-post* control which is the power to involve staff from one NCA to join an LSI supervisory team of another NCA. Under the currently applicable SSM supervisory framework, staff matters remain within the NCAs' exclusive competence and there exists a link of subordination, disciplinary power, and confidentiality obligations between national supervisors and their NCAs. Additionally, in some Member States, national supervisors are also functionaries of the State (Luxembourg, Germany) which further constrains the possibility of the ECB's intervention into their employment relations. Therefore, in order to activate the possibility to relocate NCA supervisory staff across NCAs, the ECB would have to receive from the NCAs their exclusive rights to coordinate the work of their staff and issue binding instructions, which may not be possible under certain Member State jurisdictions.

---

<sup>1068</sup> See European Central Bank, *Report LSI supervision within the SSM* (above, n.924), p. 12; see also Informal interview with B (09 November 2015, 28 June 2016) in *Annex*.

Finally, in the absence of any specific dispute resolution mechanism between the ECB Banking Supervision and the NCAs, the takeover of LSI supervision clause is the ECB's *ex-post* reactive measure of last resort to ensure compliance when softer means of persuasion (including "naming-and-shaming" options) fail. However, until the present day, the ECB has never decided to assume direct supervision of one or more LSIs from any of the NCAs. The current supervisory decision-making modalities at the ECB require both the endorsement of the Supervisory Board and non-objection of the Governing Council for a takeover decision to be adopted.<sup>1069</sup> In other words, the majority of both NCA representatives in the former would need to give their consent for such an action, and the majority of the NCB Governors would be required not to object. Since political sensitiveness of such a decision could potentially entail reputational and domestic policy consequences, it seems to be highly unlikely that the ECB's would ever on its own initiative activate this procedure, unless the NCA concerned explicitly requests the ECB to do so. Yet, as noted by one NCA, on several occasions ECB supervisors informally mentioned the possibility of taking over of LSI supervision when faced with national opposition during meetings of the Supervisory Board.<sup>1070</sup> This suggests that the simple threat to activate this *ex-post* control may be equally, or even more, influential than its effective use.

---

<sup>1069</sup> See Article 26(6)-(8) of the SSM Regulation.

<sup>1070</sup> See Informal interview with G (10 March 2017) in *Annex*.

(ii) Insights provided by the Management approach

The application of the liberal Principal-Agent approach reveals that there exists promising formal cooperation capacity between the ECB and NCA (supervisory apparatus) in the subsystem of SSM Indirect Supervision. This capacity is mainly constructed on two permanent structures for informal cooperation between the ECB and NCA supervisory apparatuses: the Senior Management Network (SMN) and Working Group on High Supervisory Standards (WG-HSS). These platforms operate under the auspices of DG-MSII and serve as sounding boards for deliberations on the overarching topics emerging from day-to-day LSI supervision by NCAs.<sup>1071</sup> In addition, the formal capacity for cooperation between the ECB and NCA supervisors in the subsystem of SSM Indirect Supervision is further supported by the existence of various drafting and project-based teams which have been jointly developing joint standards and methodologies applicable to the supervision of less significant institutions.

There exist several tangible outcomes of deliberations between ECB and NCA supervisors gathered in those informal structures. The most notable example is the concept of the compendium of Joint Supervisory Standards which currently consists of five completed products. The JSS are considered by the ECB to be a key tool for the supervision of less significant institutions.<sup>1072</sup> They set a number of *rules of practice*, which NCA supervisors should apply when carrying out their tasks. Seen

---

<sup>1071</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2014* (above, n.968), p. 66.

<sup>1072</sup> See European Central Bank, *ECB Annual Report on supervisory activities: 2016* (above, n. 865), p. 27.

from this perspective, the JSS constitute an indispensable element to construct a common supervisory culture across the entire SSM, so that the smaller and medium-sized banks can also benefit from harmonization in a longer term.<sup>1073</sup> Apart from the Joint Supervisory Standards, ECB and NCA supervisors informally formulated a range of further *rules of practice* addressed to the NCAs supervisory with a view to provide further technical assistance regarding LSI supervision. This includes the development of a Recommendation on the exercise of some options and national discretions and the approach to the recognition of institutional protection schemes for prudential purposes.

The above-mentioned findings suggest that the informal cooperation between the ECB and NCA supervisory apparatus within the subsystem of SSM Indirect Supervision resulted in a number of joint projects which contribute to the reduction of ambiguities governing the agency contract in the subsystem of SSM Direct Indirect. They also clarify supervisory expectations of the ECB supervisory apparatus in relation to the NCA supervisory apparatus when discharging their supervisory responsibilities vis-à-vis LSIs.

However, since the approximation of supervisory practices across different NCAs and also other domestic stakeholders in the Banking Union is a complicated and time-consuming process, it could be considered to increase levels of public

---

<sup>1073</sup> See Danièle Nouy, *Times they are a-changin' – the “new normal” and what it means for banks and supervisors*, Speech at a Deutsche Bundesbank reception (Frankfurt am Main, 2016), [https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161115\\_1.en.html](https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161115_1.en.html), accessed 01 December 2017. It was however noted by one interviewee that the EBA remains the sole EU authority which has a task of driving supervisory convergence in the EU, see Informal interview with J (09 November 2016) in *Annex*.



transparency on the common supervisory practices agreed between the ECB and NCAs. As noted by the European Parliament, the ECB should decide to publish performance indicators and metrics set the Joint Supervisory Standard that are used for its peer-to-peer assessments of LSI supervision conducted by the NCAs.<sup>1074</sup>

---

<sup>1074</sup> See European Parliament, *Resolution of 15 February 2017 on Banking Union – Annual Report 2016* (above, n.1051), recital 15.

# **PART IV.**

# **CONCLUSIONS**

# CHAPTER 8

## Assessing the capacity for compliance within the SSM

### 8.1. Introductory remarks

It has been widely recognized that regulatory regimes characterized by multilevelness may be faced with centrifugal challenges and dilemmas at lower (national) levels. These contexts generate a question regarding the design of a formal institutional framework governing such regimes, especially the extent to which lower level actors are sufficiently incentivised to promote their compliance with the policy preferences and objectives stipulated by higher level actors. The Single Supervisory Mechanism is a system of banking supervision consisting of the ECB and NCAs of participating Member States, which constitutes the first and crucial pillar of the European Banking Union. In this system, supranational and national bureaucratic apparatuses are linked together in performance of supervisory tasks conferred upon the ECB by the SSM Regulation. These institutional characteristics indicate that the institutional design of the SSM is of much more complex nature which essentially goes beyond its legal categorization as a “single” mechanism.

In the light the foregoing, the main purpose of this dissertation is to analyze the structural conditions which affect the formal top-bottom compliance expectation within the SSM. The formal top-bottom compliance expectation was understood as the NCAs (supervisory apparatus) formal likelihood to comply with the preferences

and objectives of the ECB (supervisory apparatus) concerning the Union's policies on prudential supervision of credit institutions, and to make all the effort to implement these preferences and objectives in their own day-to-day supervisory activities.

For the purpose of this analysis, this dissertation insulates two structural (institutional) conditions deemed to affect the formal top-down compliance expectations within the SSM: the specific organisational design of the respective supervisory subsystem pertaining to the SSM which determines the formal position of the ECB and NCAs therein; and the specific operational design of the respective supervisory subsystem pertaining to the SSM which provides for formal internal mechanisms to address possibly conflicting preferences and objectives of the ECB and NCA supervisory apparatuses interacting therein.

The following sections will synthesize the preliminary observations collected in the first and second phase of testing of the "Enforcement" and the "Management" hypotheses with respect to the formal top-down compliance expectations within supervisory subsystems pertaining to the SSM: SSM Direct and Indirect Supervision.

## **8.2 The capacity for compliance within the SSM under the Enforcement approach**

According to the "Enforcement" hypothesis, the formal compliance expectation of the NCAs (supervisory apparatus) with the preferences and objectives of the ECB (supervisory apparatus) in a multilevel SSM supervisory (sub)system is likely to achieve higher levels where there exists a credible ECB control capacity backed by its

strong systemic position within that (sub)system. These assumptions with respect to the subsystems of SSM Direct and Indirect Supervision were tested in two phases. *Firstly*, chapter five of this dissertation analyzed the specific organisational design of both subsystems in order to ascertain the formal position of the ECB (supervisory apparatus) is strong therein. *Secondly*, chapter six employed analytical tools offered by the traditional Principal-Agent approach to look at the specific operational design of both systems in order to assess the capacity to control the NCA supervisory (apparatus) by the ECB (supervisory apparatus) therein.<sup>1075</sup> The observations are the following.

#### 7.1.1. Formal top-bottom compliance expectation within the subsystem of SSM Direct Supervision

##### (i) Systemic position of the ECB within the subsystem of SSM Direct Supervision

By virtue of being an example of EU centripetal administration, the subsystem of SSM Direct Supervision provides for a *strong systemic position* of the ECB (higher level actor) vis-à-vis the NCAs (lower level actors). There are several institutional features underpinning the subsystem of SSM Direct Supervision, which contribute to the strength of the ECB in that multilevel regime.

The ECB's strong hierarchical position is founded on a direct Treaty-based mandate laid down in Article 127(6) of the TFEU. This clause authorizes the Council to confer upon the ECB specific tasks relating to the prudential supervision of credit

---

<sup>1075</sup> From a Principal-Agent perspective, the operational dimension of institutional design is understood as “an exercise of choosing from a menu of both ex ante and ex post controls” by the principal to oversee activities of its agent, see Mark Thatcher and Alec Stone Sweet, ‘Theory and practice of delegation to non-majoritarian institutions’, *West European Politics* 25, no. 1 (2002): pp. 1–22 (p. 5).

institutions. Moreover, Article 6(4) of the SSM Regulation attributes to the ECB the responsibility to carry out directly all SSM supervisory tasks within the subsystem of SSM Direct Supervision as well as decision-making authority in the areas of authorisations, approvals, investigations, early supervisory interventions and sanctioning. The ECB may also adopt regulations only to the extent necessary to organize or specify the arrangements for the carrying out of these tasks.<sup>1076</sup> Early practice has indicated that the ECB's regulatory competences have been interpreted broadly. However, the scope of the ECB's regulatory action might be more limited in the future, especially in fields which lie at the interface of supervision and regulation. The recent legal opinions of the European Parliament and the Council, which challenge the ECB's supervisory policies on NPLs, clearly indicate the subtle and somewhat illusive nature of the border between both concepts.<sup>1077</sup>

In the system of SSM Direct Supervision, the administrative interactions between the ECB and NCAs are underpinned by the principle of cooperation in good faith<sup>1078</sup> and far-reaching mutual assistance duties reflected, for example, in the NCAs' obligations to provide staff resources to the Joint Supervisory Teams. These JST staff members may become addressees of instructions issued by a supranational JST Coordinator with respect to their supervisory duties falling within the scope of the SSM Regulation. The ECB may also issue instructions to the NCA as a whole which may

---

<sup>1076</sup> See Article 4(3) of the SSM Regulation.

<sup>1077</sup> See *supra* n. 1053-1054.

<sup>1078</sup> See Article 6(2) of the SSM Regulation.

target the preparation and implementation of any supervisory act.<sup>1079</sup> In addition, the ECB may also instruct the NCAs to use their administrative powers, under and in accordance with the conditions set out in national law.<sup>1080</sup>

The strong systemic position of the ECB within the system of SSM Direct Supervision may, however, be put under pressure in the event that Banking Union expands beyond the borders of the euro area. As the acts of the ECB are not binding upon non-euro area Member States, the exercise of supervisory powers by the ECB in those jurisdictions will hinge upon implementation by the respective NCAs. Similarly, the ECB as a higher level actor will have limited possibilities to issue instructions, addressed both to NCA supervisory staff via an ECB-based JST Coordinator and the NCA as a whole.

(ii) Capacity for control over NCA (supervisory apparatus) by the ECB (supervisory apparatus) within the subsystem of SSM Direct Supervision

The *ex-ante* and the *ex-post* controls, which are at the disposal of the ECB (supervisory apparatus), point out at the existence of a *considerable capacity* for control over the NCA/JST (supervisory apparatus) within the subsystem of SSM Direct Supervision. The *ex-ante* dimension of the internal control mechanism rests on a number of binding acts, which are directly applicable in their entirety in the participating Member States. They are thus automatically binding upon the NCAs without the necessity of further national transposition. These acts can be regarded as

---

<sup>1079</sup> See Article 6(3) of the SSM Regulation.

<sup>1080</sup> See Article 9(1), third paragraph of the SSM Regulation.

clarifying the scope and modalities of agency contract between the ECB and NCAs by setting further technical *rules of law* which govern daily operations of the SSM Direct Supervision. The recent development of the internal “delegation framework” which provides for a greater direct involvement of the ECB supervisory apparatus in decision-making in certain areas of prudential supervision enhances the ECB supervisory apparatus’ *ex-ante* control over the draft supervisory decisions submitted by the JST/NCA supervisory apparatus.

The overview of the instruments issued by the ECB, which complement the basic agency contract governing the supervision of significant institutions, displays that the ECB has a strong capacity to set new binding obligations for the JST/NCA supervisors. This capacity is reflected in the adoption of such acts as: the ECB Decision on provision of supervisory data, ECB Regulation on the reporting of supervisory financial information, and the ECB Regulation on the exercise of options and national discretions. All of these acts impose obligations directly upon the JST/NCA supervisors and thereby supplement the agency contract underpinning the subsystem of SSM Direct Supervision. However, the development of excessively prescriptive rules filling-in the existing (largely incomplete) agency contract might also adversely affect the JSTs capacity to adapt the SSM supervisory approach where supervised entities have particularly innovative business models and whose risks cannot be comprehensively captured by the applicable provisions.

It is equally important that the ECB makes cautious use of its power to shape and reshape unilaterally the agency contract governing the subsystem of SSM Direct



Supervision in order to avoid accusations on overstepping its mandate. On the occasion of setting new and harmonized requirements concerning the provisioning of non-performing loans, the Legal Services of both the European Parliament and the Council noted that the ECB's intervention cannot serve the purpose to set rules in the areas where the legislator has, for the time being, decided not to harmonize.<sup>1081</sup> Therefore, the ECB needs to be mindful to continue its harmonization effort only in those areas of banking supervision which have been explicitly assigned in its competence. Otherwise, the JST/NCA apparatus may be reluctant to apply new supervisory requirements in their supervisory activities on significant institutions.

The *ex-post* dimension of the internal control mechanisms over the NCA supervisory apparatus in the subsystem of SSM Direct Supervision seems to be less prominent than the *ex-ante* dimension. It has primarily a direct and centralized nature ("police-patrols") and rests on a number of controls, of which only a few can be immediately activated. The basic and easy to activate *ex-post* control mechanism is encapsulated in the ECB's horizontal and specialized services whose main role is to ensure consistency of the JST activities in different areas of prudential supervision. In addition, the ECB supervisory apparatus (notably JST Coordinators) may also issue "operational acts" on day-to-day supervisory activities, which may be either of an internal nature or addressed directly to supervised institutions. The first group covers requests directed to the NCA supervisory apparatus. These can be qualified as ongoing and *ex-post* control mechanisms since they are issued without the

---

<sup>1081</sup> See *supra* n.1054.

involvement of the Supervisory Board and the Governing Council of the ECB. SSM-internal “operational” acts are backed by the possibility of issuing supervisory instructions to NCA JST members by a JST Coordinator, and ultimately by the possibility of adopting formal instructions by the ECB to the NCAs where the NCA supervisory apparatus refuses to follow informal requests formulated by the ECB supervisory apparatus.

There exists however a number of constraints which may possibly undermine the credibility of instructions seen as “sticks” that can be employed by the bureaucratic principal. Firstly, the scope of JST Coordinators action is limited by the applicable national data protection, employment and civil service frameworks. JST Coordinators cannot issue instructions to the NCA (supervisory apparatus) in the matters related to staffing policies, with a notable exception of the power to refuse NCA appointments to JSTs.<sup>1082</sup> Furthermore, they are unable to receive reports from the NCA supervisors on work which is not directly related to the activities of their JSTs, possibly be of relevance to the supervision of significant institutions. The existence of such independent reporting lines within the JSTs may complicate information flows within the subsystem of SSM Direct Supervision, and in doing so impede due information sharing.<sup>1083</sup>

With regard to formal supervisory instructions addressed to the NCAs by the ECB, the current supervisory decision-making modalities at the ECB require for their

---

<sup>1082</sup> See Article 4(3) of the SSM Regulation.

<sup>1083</sup> See *supra* n.1063.

adoption both the endorsement of the Supervisory Board and non-objection of the Governing Council of the ECB.<sup>1084</sup> Given this somewhat burdensome decision-making procedure and the fact that instructions usually entail a very detailed legal prescription of the addressee's behaviour and do not leave much space to safeguard its institutional autonomy, it is highly unlikely that they will be used as an *ex-post* control on a daily basis. The early evidence, which has indicated a rather modest recourse to this instrument by the ECB, supports this observation. However, this is not to say that supervisory instructions should be seen as completely ineffective *ex-post* controls. As a matter of fact, the sole awareness of the NCAs of the availability of this tool may sometimes be equally, or even more, influential than its effective use.

#### 7.1.2. Formal top-bottom compliance expectation within system of SSM Indirect Supervision

##### (i) Systemic position of the ECB within system of SSM Indirect Supervision

By virtue of being an example of EU intervention-based administration, the subsystem of SSM Indirect Supervision provides for a *semi-strong systemic position* of the ECB (higher level actor) vis-à-vis the NCAs (lower level actors). There are several institutional features underpinning the subsystem of SSM Indirect Supervision, which contribute to the relative strength of the ECB in this multilevel regime. As within the subsystem of SSM Direct Supervision, the ECB's strong hierarchical position is founded on a direct Treaty-based mandate laid down in

---

<sup>1084</sup> See Article 26(6)-(8) of the SSM Regulation.

Article 127(6) of the TFEU. This clause authorizes the Council to confer upon the ECB specific tasks relating to the prudential supervision of credit institutions. However, the jurisdictional outreach of a higher level actor in the subsystem of SSM Indirect Supervision is limited and does not cover by default the entire EU. What however distinguishes the subsystem of SSM Indirect Supervision from the former, is a distinct allocation of responsibilities between the ECB and NCAs therein and different modalities of administrative interactions between them.

In this respect, Article 6(6) of the SSM Regulation attributes to the NCAs the responsibility to carry out directly a great number of SSM supervisory tasks conferred upon the ECB on less significant institutions. In principle, the ECB is only responsible for exercising the oversight over the functioning of the system,<sup>1085</sup> and cannot instruct the NCAs with regard to their supervisory decisions on individual institutions. This legislative attribution points out at a decentralized nature of the exercise of the ECB's supervisory competences in the subsystem of SSM Indirect Supervision. The ECB may however decide to “exercise directly itself all the relevant powers for one or more less significant credit institutions”<sup>1086</sup> where the consistency of high supervisory standards needs to be ensured.

Due to the application of the decentralization principle to the supervision of LSIs, as also recently confirmed by the Court,<sup>1087</sup> the regular administrative interactions between the ECB and NCAs in the subsystem of SSM Indirect Supervision are

---

<sup>1085</sup> See Article 6(5)(c) of the SSM Regulation.

<sup>1086</sup> See Article 6(5)(b) of the SSM Regulation.

<sup>1087</sup> See *supra* n. 788.

structured in terms of relations of information than hierarchical subordination.<sup>1088</sup>

The ECB's influence over NCA supervisory processes is largely restricted to the issuance of regulations, guidelines and general instructions, and to the receipt of NCAs' ex-ante notifications on certain supervisory procedures and decisions. These limitations decrease the systemic position of the ECB as a higher level actor within the subsystem of SSM Indirect Supervision, and place the ECB in a somewhat weaker systemic position when compared to its position vis-à-vis the NCAs within the subsystem of SSM Direct Supervision. Nevertheless, it is still possible to consider the ECB's position therein as "semi-strong" in that the ECB is authorized to change unilaterally initial power balance vis-à-vis the NCAs by deciding to take over from them direct supervision of one or more LSIs.

(ii) Capacity for control over NCA (supervisory apparatus) by the ECB (supervisory apparatus) within the subsystem of SSM Indirect Supervision

The *ex-ante* and the *ex-post* controls, which are at the disposal of the ECB (supervisory apparatus), demonstrate the existence of a *moderate capacity for control* over the NCA (supervisory apparatus) within the subsystem of SSM Indirect Supervision. The *ex-ante* dimension of the internal control mechanism rests mainly on binding mechanisms established in the SSM Regulation and SSM Framework Regulation, and in particular the common procedures regime and NCA ex-ante notifications requirements. In addition, the ECB's Guideline to the NCAs on the exercise of some options and national discretions in relation to LSIs is the only

---

<sup>1088</sup> See European Central Bank, *Public hearing on the draft ECB SSM Framework Regulation* (above, n.707).

binding public act adopted by the ECB which targets specifically the subsystem of SSM Indirect Supervision.

It therefore appears that the subsystem of SSM Indirect Supervision is far less “legalized” than the subsystem of SSM Direct Supervision. This circumstance has several institutional implications, which affect the relations between the ECB and NCA supervisory apparatuses in that subsystem. The reliance on softer and managerial steering instruments, such as Joint Supervisory Standards, leaves more flexibility to both the bureaucratic principal and bureaucratic agent with respect to the adjustments of their contractual obligations to the changing landscape of the European banking sector. Too many soft obligations, in turn, may hinder effective control by the bureaucratic principal in the subsystem of SSM Indirect Supervision, especially where different (possibly even equally plausible) interpretations of the supervisory expectations formulated by the ECB supervisory apparatus are allowed. The asymmetry between staffing of the ECB supervisory function, responsible for the NCA oversight (the bureaucratic principal), and the number of NCA supervisors to be monitored (the bureaucratic agent) further complicates the observance of the “soft” contractual commitments by the latter.

In this respect, it needs to be highlighted that the absence of binding benchmarks has already affected the functioning of the Central Notification Point, which is the primary mechanism of the *ex-ante* control within the subsystem of SSM Indirect Supervision. Since the NCAs retain discretion in qualifying their draft supervisory decisions and procedures as having, or not having, “material” effects on individual

less significant supervised institutions, it therefore follows that the ECB may receive a distorted view on NCA supervisory activities. Such incomplete insights make it more difficult for the ECB to aggregate and compare all supervisory decisions issued by the NCAs.<sup>1089</sup> Further oversight difficulties stem from the lack of a harmonized methodology to carry out the Supervisory Review and Evaluation Process (SREP) on LSIs, which impedes consistent implementation of the same SREP criteria (such as a uniform capital requirement definition) across the NCAs.<sup>1090</sup>

Legal constraints imposed upon the operational design of the common procedures regime may also affect the *ex-ante* capacity for control within the subsystem of SSM Indirect Supervision. In particular, tight legal deadlines set for the ECB by the SSM Framework Regulation on whether to oppose or not to oppose the NCAs draft licensing decisions may affect the ECB supervisory apparatus' ability to evaluate carefully the proposals submitted by the NCA supervisory apparatus. Ensuring the proper functioning of the operational framework governing the common procedures regime is instrumental, especially in the view of the upcoming Brexit. The "hard" version of Brexit may force many UK-based banking groups to apply for a license in the Banking Union at very short notice in order not to lose the access to the Single Market. It is therefore of utmost importance that the NCAs supervisors develop incentives to engage their ECB counterparts in their work at the earlier stages and agree on the kind of UK-originating banking "refugees", they are willing to accept

---

<sup>1089</sup> See *supra* n. 1066.

<sup>1090</sup> See *supra* n. 1067.

under jurisdictions, so that the ECB is able to activate respective *ex-ante* controls in advance.

The *ex-post* dimension of the internal control mechanism within the subsystem of SSM Indirect Supervision is centered on the NCAs' *ex post* reporting obligations laid down in the SSM Framework Regulation. By employing this type of backward-looking controls, the ECB may track NCA supervisory activities on LSIs, which were conducted in the last supervisory cycle. Yet, early evidence suggests that reports submitted by the NCAs needs to be handled with care due to the fact that different national supervisory traditions may to certain extent distort the comparability of information submitted by the NCAs. Importantly, some NCAs impose capital and liquidity demands (Pillar 2 measures) in a form of formal supervisory decisions, whereas other NCAs communicate them as a part of a supervisory dialogue without resorting to a formal administrative act.<sup>1091</sup> In this specific context, lower numbers of formal supervisory decisions do not necessarily imply a possibly more lenient national supervision, but rather a specific supervisory approach based more on informal supervisory dialogue rather than the tradition of bureaucratic oversight.

In addition, there exist a number of constraints which may possibly undermine the ECB's capacity to use other identified *ex-post* controls. As staff issues remain within the NCAs' exclusive competence and there exists a link of subordination, disciplinary power and confidentiality obligations between national supervisors and their NCAs, it is highly problematic that the NCAs would authorize the ECB to take unilateral

---

<sup>1091</sup> See *supra* n. 1068.



decisions on the involvement of supervisory staff of one NCA in the work of supervisory staff of other NCAs. Such a possibility would require delegation by the NCAs of their exclusive power to instruct their staff in all matters, which may not be possible under certain Member State jurisdictions. Therefore, the currently applicable national data protection, employment and civil service frameworks seem to impede the effective use of this indirect *ex-post* control mechanism (“fire-alarm”) by the ECB supervisory apparatus.

Finally, the activation of another one of the identified *ex-post* controls - the takeover of LSI supervision - remains a politically sensitive issue. To the present day, the ECB has yet to decide to assume direct supervision of one or more LSIs from any of the NCAs. Since such an ECB decision might entail reputational and domestic policy consequences for an NCA concerned, it seems to be highly unlikely that the ECB would ever on its own initiative activate this procedure, unless that NCA explicitly requested the ECB to do so. However, political constraints regarding an actual activation of the takeover procedure does not automatically render this *ex-post* control effective. Under certain circumstances the simple threat to activate it may be equally, or even more, influential than its effective use by the ECB supervisory apparatus.

### 8.3 The capacity for compliance within the SSM under the Management approach

According to the “Management” hypothesis, the formal compliance expectation of the NCAs (supervisory apparatus) with the preferences and objectives of the ECB (supervisory apparatus) in a multilevel SSM supervisory subsystem can be understood in the following way. The managerial strategy assumes that the expected compliance is likely to achieve higher levels where there exists credible cooperation capacity between both actors that allows for the clarification of obligations and reduction of uncertainty accompanying their essentially (incomplete) agency contract. This capacity should ideally be backed by the strong shadow of the ECB (supervisory apparatus) hierarchy within that (sub)system. These assumptions with respect to the subsystems of SSM Direct and Indirect Supervision were tested in two phases. *Firstly*, chapter five of this dissertation analyzed the specific organisational design of both subsystems in order to ascertain whether the ECB (supervisory apparatus) casts a long shadow of hierarchy therein. It was assumed that the length of its shadow of hierarchy is correlated to the strength of its systemic position therein. *Secondly*, chapter six investigated the specific operational design of both systems in order to assess the capacity for cooperation between the ECB and NCA supervisory apparatuses therein. The observations are the following.

#### 8.1.1. Formal top-bottom compliance expectation within the system of SSM Direct Supervision

Insights provided by the management school of compliance suggest that the existence of a long institutional “shadow of hierarchy” facilitates the establishment of routine, non-confrontational and informal processes by the bureaucratic principal to engage in cooperation with its bureaucratic agents. In particular, a long “shadow of hierarchy” allows the former to take recourse to available enforcement mechanisms to transmit its preferences where informal cooperation (“carrots”) fails.<sup>1092</sup> The analysis of the organisational design of the SSM demonstrates that the ECB enjoys strong systemic position within the subsystem of SSM Direct Supervision. Therefore, it is legitimate to assume that the ECB also has an institutional capacity to cast a long “shadow of hierarchy” vis-à-vis the NCAs therein.

Within this long shadow of the ECB’s hierarchy, there exists a *well-established* formal cooperation capacity between the ECB and NCA supervisory apparatuses in the subsystem of SSM Direct Supervision. This capacity is primarily reflected in a number of informal supervisory networks operating under the managerial authority of the ECB, which bring together the ECB and NCA experts specialized in different areas of supervision. The foundations for informal cooperation between the ECB and NCAs were already established by their joint efforts in the Preparatory Task Force on Supervision that carried out SSM technical preparatory work in 2012-3. These supervisory networks, although very heterogeneous in nature, have developed a

---

<sup>1092</sup> See Frankenberg, *Political technology and the erosion of the rule of law: normalizing the state of exception* (above, n.70), p. 8.

number of joint policy stances which contributed to the reduction of ambiguities governing the subsystem of SSM Direct Supervision, and to clarification of supervisory expectations of the ECB supervisory apparatus in relation to the JST/NCA supervisory apparatus.

The most crucial outcome of ECB-NCA informal deliberations is the ongoing development of the SSM Supervisory Manual. The Manual provides supranational and national supervisors with a common set of behavioural and technical *rules of practice*, which they are expected to apply in their supervisory activities.<sup>1093</sup> In addition, ECB and NCA supervisors developed jointly a non-binding Guide: on the exercise of “case-by-case” options and discretions; on the treatment of non-performing loans; and on the fit and proper assessments of members of banks’ management boards. It was however observed by a number of representatives of the NCA supervisory apparatus that the results of deliberations in networks, which are shared by a majority of the members, are not always reflected in the final policy proposals presented by ECB supervisors.<sup>1094</sup>

Furthermore, ECB supervisors are not always willing to discuss thoroughly in the networks whose supervisory issues, which may be of possible of interest to the NCA supervisory apparatus.<sup>1095</sup> It might thus be recommended to increase the role of the NCA supervisory apparatus in the agenda-setting stage of these networks, or ideally grant the NCAs the power to nominate a co-chair of each network in order to

---

<sup>1093</sup> See *supra* n. 1060.

<sup>1094</sup> See *supra* n. 1063.

<sup>1095</sup> See *supra* n. 1064.

introduce more checks and balances on informal governance within the subsystem of SSM Direct Supervision.

Finally, the credibility of non-binding *rules of practice*, which the ECB and NCA supervisory apparatuses are expected to follow in their day-to-day supervision, could be enhanced if the ECB decided to make public the SSM Supervisory Manual in the same manner as other elements of its non-binding supervisory *rules of practice*. In particular, this could foster the accountability of the NCA/JST supervisory apparatus vis-à-vis external stakeholders (i.e. supervised entities, bank associations, ombudsmen, elected policymakers, auditors and the public), and in doing so introduce further *ex-post* decentralized controls (“fire-alarms”) that the ECB as the bureaucratic principal could use to monitor the performance of its bureaucratic agents - the NCA/JST supervisory apparatus.

#### 8.1.2. Formal top-bottom compliance expectation within the system of SSM Indirect Supervision

As noted above, the existence of a long institutional “shadow of hierarchy” facilitates the establishment of routine, non-confrontational and informal processes by the bureaucratic principal to engage in cooperation with its bureaucratic agents. The existence of such a “shadow of hierarchy” allows the bureaucratic principal to have recourse to available enforcement mechanisms to transmit its preferences where informal cooperation (“carrots”) fails.<sup>1096</sup> The analysis of the organisational design of the SSM demonstrated that the ECB enjoys semi-strong systemic position within the

---

<sup>1096</sup> See *supra* n. 1092.

subsystem of SSM Indirect Supervision. Therefore, it is legitimate to assume that it also has an institutional capacity to cast a *medium* “shadow of hierarchy” vis-à-vis the NCAs therein.

Within this medium shadow of the ECB’s hierarchy, there exists a *promising* formal cooperation capacity between the ECB and NCA supervisory apparatuses in the subsystem of SSM Indirect Supervision. This capacity is mainly constructed on two permanent structures for informal cooperation between the ECB and NCA supervisory experts operating under the auspices of the ECB: the Senior Management Network (SMN) and Working Group on High Supervisory Standards (WG-HSS). These platforms serve as sounding boards for deliberations on the overarching topics emerging from day-to-day LSI supervision by NCAs,<sup>1097</sup> and are further supported by the existence of various drafting and project-based teams which have been jointly developing best practices and methodologies applicable within the subsystem of SSM Indirect Supervision.

The most prominent outcome of ECB-NCA informal deliberations in the WG-HSS and SSM is the ongoing development of the compendium of Joint Supervisory Standards (JSS), which are considered by the ECB to be a key tool for the supervision of less significant institutions.<sup>1098</sup> These standards set a number of non-binding supervisory *rules of practice*, which NCA supervisors are expected to apply when carrying out their supervisory activities on LSIs. Seen from this perspective, the JSS

---

<sup>1097</sup> See *supra* n. 1071.

<sup>1098</sup> See *supra* n. 1072.

constitute an indispensable element to construct a common supervisory culture across the entire SSM, so that the smaller and medium-sized banks can also benefit from harmonization in the longer term.<sup>1099</sup> It was noted by the members of both the WG-HSS and the SMN that these structures generally work well and the input of NCA experts is taken on board.<sup>1100</sup> This may suggest that the NCA supervisory apparatus enjoys there a somewhat stronger influence since the ECB’s “shadow of hierarchy” was found to be weaker than in the subsystem of SSM Direct Supervision.

The monitoring of all soft processes and supervisory expectations laid down in the JSS may be difficult due to the already mentioned asymmetry between staffing of the ECB supervisory function responsible for the NCA oversight (the bureaucratic principal) and the number of NCA supervisors to be monitored (the bureaucratic agent). Therefore, the credibility of the ECB’s managerial strategies of compliance could be reinforced by making the soft obligations imposed upon the NCA supervisory apparatus more transparent to different external stakeholders. This would indeed provide the ECB supervisory apparatus with further *ex-post* decentralized controls (“fire-alarms”) that could be employed at the domestic level to monitor the supervisory performance of its bureaucratic agents (the NCAs) on LSIs.

---

<sup>1099</sup> See *supra* n. 1073.

<sup>1100</sup> See Informal interviews with L (4 November 2016) with N (03 March 2017) in *Annex*.

#### 8.4. Implications of the study

The results of testing the “Enforcement” and “Management” hypothesis reveal that the formal institutional design of the SSM augments the expectation that the NCA supervisory apparatus is likely to comply with the preference and objectives of the ECB supervisory apparatus concerning the Union’s policies on prudential supervision of credit institutions, and to make all the effort to implement them in their day-to-day own supervisory activities. The top-down compliance expectation is not the same with regard to the whole SSM. The NCA supervisory apparatus is formally more induced to display higher levels of compliance within the subsystem of SSM Direct Supervision in comparison to the subsystem of SSM Indirect Supervision. The Enforcement approach indicates that the expected higher compliance is due to the stronger systemic position of the ECB and its considerable capacity for control therein. Similarly, the Management approach demonstrates that where the ECB casts longer shadow of hierarchy, the capacity for cooperation can be regarded as better established in formal terms.

In light of these findings, it is legitimate to formulate a general observation that in multilevel administrative systems the formal top-down compliance expectation ultimately hinges on the power balance between the higher and lower level actors pertaining to those systems. Consequently, where the formal institutional design of a multilevel regime provides for the weak systemic position of the supranational (higher) level, the occurrence of centrifugal challenges and dilemmas at the national (lower) level might occur more frequently. As a result, rational choice institutionalist



explanations of EU administrative phenomena are still likely to offer greater analytical insights than other institutionalist, or constructivist explanations. This observation entails major implications to wider issues of compliance within supranational and international multi-level regimes. It demonstrates that the Union and Member States' administration formally tend to operate at their very best in a multi-level context when supranational centralized decision-making on substantial issues is combined with national decentralized operational framework allowing for substantive involvement of national administration. This tendency is supported by the existence of well-established informal governance arrangements linking together different units of administration interacting within a multi-level setting.

From this perspective, the present study makes significant advances in mapping some unique features of the EU administrative system, and better explains the peculiarities of the division of tasks and competences between national and supranational levels of administration. In this context, it contributes to addressing a broader theoretical interest in analyzing the patterns and dynamics of the EU administrative system. In particular, it helps to approach “common and unchallengeable thread of (European) federalism: striking a fair balance between unity and diversity”<sup>1101</sup>, or to put in differently, in finding “the ways in which unity and differentiation may be combined within it”.<sup>1102</sup> It offers a meaningful

---

<sup>1101</sup> 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.

<sup>1102</sup> 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.

contribution to research on functioning of EU multi-level administration in the post-decisional phase of European integration, and more broadly it adds an added value to literature on administrative compliance within supranational and international multi-level regimes.

## **8.5. Policy recommendations**

To conclude this study would like to formulate a number of recommendations following the Enforcement approach, which is based on the rational choice perspective. Accordingly, to improve the functioning of the SSM multilevel system, this approach would encourage further systemic consolidation of the ECB's already strong position and its respective capacity for control, both within the subsystem of SSM Direct and Indirect Supervision.

At the general level, such a systemic consolidation could be achieved in at least four ways. *First*, there is a need to establish a formal dispute resolution mechanism which could be used to address NCAs' non-compliance. *Second*, the position of the ECB top-level supervisory apparatus in the Supervisory Board and the Board's Steering Committee could be strengthened by making them competent to adopt certain supervisory decisions within the limits of the newly created ECB delegation framework. *Third*, a broader politically sensitive reform of national data protection, employment and civil service frameworks would be needed in order to increase the ECB "room for maneuver" with regard to the steering of NCA supervisors, both those in JSTs and in national supervisory teams. *Fourth*, national administrative

procedures applicable in participating Member States would need to ensure that the ECB as a competent authority may enjoy the same legal protection as other units of administration under domestic jurisdictions.

More specifically, at the level of the subsystem of SSM Direct Supervision, the ECB's position and its capacity for control could be reinforced by strengthening the presence of the ECB supervisory apparatus in the JST to achieve at least parity in aggregate terms of staff composition. It is positively noted that the total ratio of ECB staff vis-à-vis NCA staff over has recently increased in steady manner on a year-on-year basis,<sup>1103</sup> and is expected to further increase in next year.<sup>1104</sup> Similarly, the development of the "internal delegation" framework in other supervisory areas should be continued in order to strengthen the influence of the ECB supervisory apparatus in supervisory decision-making on significant institutions. At the level of the subsystem of SSM Indirect Supervision, it could be contemplated to introduce the possibility of administrative review of NCA supervisory decisions adopted in the exercise of the ECB's exclusive competences by the ECB itself. Furthermore, the ECB's position and its capacity for control could be further reinforced by allowing the ECB supervisory apparatus to participate in national supervisory teams of high-priority but less significant institutions, at least in an observer role.

---

<sup>1103</sup> The ECB reported that 160 Additional positions were approved for supervisory-related activities in 2016 and 141.5 additional positions for 2017, see European Central Bank, *ECB Annual Report on supervisory activities: 2016* (above, n.865), pp. 56-57.

<sup>1104</sup> See Bloomberg, *ECB Plans to Add 170 Supervision Staff as Brexit Boosts Workload*, 22 November 2017, <https://www.bloomberg.com/news/articles/2017-11-22/ecb-plans-to-add-170-supervision-staff-as-brex-it-boosts-workload>, accessed 01 December 2017.

# BIBLIOGRAPHY

## Primary sources

### Legal acts of the Union<sup>1105</sup>

'Commission Implementing Regulation (EU) No 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council'. In *OJ L* 191, 28.6.2014.

'Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions'. In *OJ L* 318, 27.11.1998.

'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: SSM Regulation'. In *OJ L* 287 29.10.2013, pp. 63–89.

'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: (CRDIV)'. In *OJ L* 176, 27.6.2013.

'Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes'. In *OJ L* 173, 12.6.2014.

'Directive 2014/59/EU of the European Parliament and 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: (BRRD)'. In *OJ L* 173, 12.6.2014.

'Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC: (EBA Regulation)'. In *OJ L* 331, 15.12.2010.

'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: (CRR)'. In *OJ L* 176, 27.6.2013.

'Treaty on Stability, Coordination and Governance' (D/12/2).

'Treaty establishing the European Stability Mechanism (ESM)'

'Treaty of the European Union (TEU)'. In *OJ C* 326, 26.10.2012.

---

<sup>1105</sup> Listed in chronological order.

'Treaty on the Functioning of the European Union (TFEU)'. In *OJ C* 326, 26.10.2012.

### Legal acts of the European Central Bank<sup>1106</sup>

'Decision of the ECB of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2)'. In *OJ L* 80, 18.3.2004.

'Decision of the ECB of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5)'. In *OJ L* 198, 5.7.2014.

'Decision of the ECB of 2 July 2014 on the provision to the European Central Bank of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014 (ECB/2014/29)'. In *OJ L* 214, 19.7.2014.

'Decision of the ECB of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39)'. In *OJ L* 300, 18.10.2014.

'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)'. In *OJ L* 141, 1.6.2017.

'Decision (EU) 2017/934 of the ECB of 16 November 2016 on the delegation of decisions on the significance of supervised entities (ECB/2016/41)'. In *OJ L* 141, 1.6.2017.

'Decision (EU) 2017/935 of the ECB 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)'. In *OJ L* 141, 1.6.2017.

'Decision (EU) 2017/274 of the ECB of 10 February 2017 laying down the principles for providing performance feedback to national competent authority sub-coordinators (ECB/2017/6)'. In *OJ L* 40, 17.2.2017.

'European Central Bank Regulation (EC) No 2157/1999 of 23 September 1999 on the powers of the European Central Bank to impose sanctions (ECB/1999/4)'. In *OJ L* 264, 12.10.1999.

'Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9)'. In *OJ L* 101, 13.4.2017.

'Recommendation of the ECB of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/10)'. In *OJ C* 120, 13.4.2017.

'Regulation (EU) No 468/2014 of the ECB 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): SSM Framework Regulation'. In *OJ L* 141, 14.5.2014.

'Regulation (EU) No 673/2014 of the ECB of 2 June 2014 concerning the establishment of a Mediation Panel and its Rules of Procedure (ECB/2014/26)'. In *OJ L* 179, 19.6.2014.

---

<sup>1106</sup> Listed in chronological order.

'Regulation (EU) 2015/534 of the ECB of 17 March 2015 on reporting of supervisory financial information (ECB/2015/13)'. In *OJ L* 86, 31.3.2015.

'Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4)'. In *OJ L* 78, 24.3.2016.

### Jurisprudence the Court of Justice of the EU<sup>1107</sup>

Judgment of 13 June 1958, Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* EU:C:1958:7.

Judgment of 11 July 1974, Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* EU:C:1974:82.

Judgment of 19 January 1982, Case C-8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* EU:C:1982:7.

Judgment of 26 February 1986, Case C-152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* EU:C:1986:84.

Judgment of 23 September 1986, Case 5/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities* EU:C:1986:328.

Judgment of 5 October 2000, Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union ("Tobacco Advertising I")* EU:C:2000:544.

Judgment of 26 May 2005, Case C-301/02 *P Carmine Salvatore Tralli v European Central Bank* EU:C:2005:306.

Judgment of 6 December 2005, Case C-66/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union ("Smoke flavourings")* EU:C:2005:743.

Judgment of 2 May 2006, Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union ("ENISA")* EU:C:2006:279.

Judgment of 8 June 2010, Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* EU:C:2010:321.

Judgment of 22 January 2014, C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union ("Short-selling case")* EU:C:2014:18 (2014).

Judgment of 4 March 2015, Case T-496/11 *United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB) ("CCPs location policy")* EU:T:2015:133.

Judgment of 16 May 2017, Case T-122/15 *Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank ("L-Bank")* EU:T:2017:337.

---

<sup>1107</sup> Listed in chronological order.

Other documentation (including press releases, reports, communications, statements)<sup>1108</sup>

Angeloni, Ignazio, *The SSM and international supervisory cooperation*, Remarks at the Symposium on “Building the Financial System of the 21st Century: an Agenda for Europe and the US” (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150417.en.html>, accessed 01 December 2017.

Angeloni, Ignazio, *Exchange of views on supervisory issues with the Finance and Treasury Committee of the Senate of the Republic of Italy* (Rome, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150623.en.html>, accessed 01 December 2017.

Angeloni, Ignazio, *Challenges facing the Single Supervisory Mechanism: Speech at De Nederlandsche Bank's 'Netherlands Day'* (Amsterdam, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161006.en.html>, accessed 01 December 2017.

Bloomberg, *ECB Plans to Add 170 Supervision Staff as Brexit Boosts Workload*, 22 November 2017, <https://www.bloomberg.com/news/articles/2017-11-22/ecb-plans-to-add-170-supervision-staff-as-brexite-boosts-workload>, accessed 01 December 2017.

Coeuré, Benoît, *Why the euro needs a banking union: Speech at Conference “Bank funding - markets, instruments and implications for corporate lending and the real economy”* (Frankfurt am Main, 2012), [https://www.ecb.europa.eu/press/key/date/2012/html/sp121008\\_1.en.html](https://www.ecb.europa.eu/press/key/date/2012/html/sp121008_1.en.html), accessed 01 December 2017.

Constâncio, Vítor, *Towards a European Banking Union: Lecture held at the start of the academic year of the Duisenberg School of Finance* (Amsterdam, 2012), <https://www.ecb.europa.eu/press/key/date/2012/html/sp120907.en.html>, accessed 21 December 2016.

Council, *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 (Brussels, October), <http://data.consilium.europa.eu/doc/document/ST-14752-2012-INIT/en/pdf>, accessed 01 December 2017.

Council, *Council agrees position on bank supervision*, 17739/12 PRESSE 528 (Brussels, 2012).

Council, *Addendum to the ECB Guidance to banks on non-performing loans: Prudential provisioning backstop for non-performing exposures: General considerations on the powers of the ECB*, 14837/17 JUR 556 EF 299 ECOFIN 1016 (Brussels, 23 November), <http://bit.ly/2Ap5kHf>, accessed 01 December 2017.

Dickson, Julie, *Will the Eurozone caucus on financial regulation?*, Speech at a lunch discussion organised by the Centre for European Reform (London, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150901.en.html>, accessed 01 December 2017.

---

<sup>1108</sup> Listed in alphabetical order.

- Dickson, Julie, *The relevance of the supervision of behaviour and culture to the SSM*, Speech at the conference "Looking forward: effective supervision of behaviour and culture at financial institutions" in the Tropenmuseum and organised by De Nederlandsche Bank (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150924.en.html>, accessed 01 December 2017.
- Dickson, Julie, *Dealing with diversity – the European banking sector: Speech at the 17th Handelsblatt Annual Conference on European Banking Regulation* (Frankfurt, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161128.en.html>, accessed 01 December 2017.
- Dombret, Andreas, *The first six months of European banking supervision - an NCA's perspective: Speech at the ILF (Institute for Law and Finance) Conference on the Banking Union* (Frankfurt, 2015), <http://www.bis.org/review/r150507b.htm>, accessed 01 December 2017.
- Euro Group, *Euro Summit Statement*, SN 4070/15 (2015).
- European Banking Authority, *Methodological note EU-wide Stress Test 2014*, Version 2.0 (2014), <https://www.eba.europa.eu/documents/10180/669262/Methodological+Note.pdf>, accessed 01 December 2017.
- European Central Bank, 'How does banking supervision work?', <https://www.bankingsupervision.europa.eu/banking/approach/cycle/html/index.en.html>, accessed 01 December 2017.
- European Central Bank, *The role of central banks in prudential supervision*, [https://www.ecb.europa.eu/pub/pdf/other/prudentialsupcbrole\\_en.pdf](https://www.ecb.europa.eu/pub/pdf/other/prudentialsupcbrole_en.pdf), accessed 01 December 2017.
- European Central Bank, *Note Comprehensive Assessment*, October 2013, <https://www.ecb.europa.eu/pub/pdf/other/notecomprehensiveassessment201310en.pdf>, accessed 01 December 2017.
- European Central Bank, *Public hearing on the draft ECB SSM Framework Regulation* (19 February 2014).
- European Central Bank, *Asset Quality Review, Phase 2 Manual* (2014), <http://www.ecb.europa.eu/pub/pdf/other/assetqualityreviewphase2manual201403en.pdf>, accessed 01 December 2017.
- European Central Bank, *SSM Quartely Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation*, 2014/1, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmqr20141en.pdf>, accessed 01 December 2017.
- European Central Bank, *SSM Quartely Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation*, 2014/2, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmqr20142en.pdf>, accessed 01 December 2017.
- European Central Bank, *SSM Quarterly Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation*, 2014/4,



- <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmqr20144.en.pdf>, accessed 01 December 2017.
- European Central Bank, *Comprehensive Assessment Stress Test Manual* (2014), <http://www.ecb.europa.eu/pub/pdf/other/castmanual201408en.pdf>, accessed 01 December 2017.
- European Central Bank, *Aggregated Report on Comprehensive Assessment* (2014), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/aggregatereportonthecomprehensiveassessment201410.en.pdf>, accessed 01 December 2017.
- European Central Bank, *Guide to banking supervision* (Frankfurt, 2014), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>, accessed 01 December 2017.
- European Central Bank, *ECB Annual Report on supervisory activities: 2014*, <http://www.ecb.europa.eu/pub/pdf/other/ssmar2014.en.pdf>, accessed 01 December 2017.
- European Central Bank, *Aggregated Report on Greek Comprehensive Assessment* (2015), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/aggregatereportonthecomprehensiveassessmentexsum201510.en.pdf>, accessed 01 December 2017.
- European Central Bank, *Financial Stability Review*, November 2015, <https://www.ecb.europa.eu/pub/pdf/other/financialstabilityreview201511.en.pdf>, accessed 11 December 2016.
- European Central Bank, *ECB Annual Report on supervisory activities: 2015*, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2015.en.pdf>, accessed 01 December 2017.
- European Central Bank, *Public consultation on a draft Regulation and Guide on exercise of options and discretions available in Union law*, Explanatory memorandum (2015), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/public\\_con\\_explanatory\\_memoirandum\\_options\\_discretions.en.pdf?bf95087a9a34cd3d654446e5bb462c8a](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/public_con_explanatory_memoirandum_options_discretions.en.pdf?bf95087a9a34cd3d654446e5bb462c8a), accessed 20 February 2017.
- European Central Bank, *Public consultation on the draft Regulation and Guide of the European Central Bank on the exercise of options and discretions in Union law: Questions and Answers* (2015), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/public\\_con\\_options\\_discretions\\_qa.en.pdf?82fb798092138f9e4a00719a06ee26c1](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/public_con_options_discretions_qa.en.pdf?82fb798092138f9e4a00719a06ee26c1), accessed 27 February 2017.
- European Central Bank, *Draft guide to fit and proper assessments* (2016), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/fap/fap\\_guide.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/fap/fap_guide.en.pdf), accessed 01 December 2017.
- European Central Bank, *SSM SREP Methodology Booklet: 2016 edition* (2016), [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/srep\\_methodology\\_booklet\\_2016.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/srep_methodology_booklet_2016.en.pdf), accessed 01 December 2017.
- European Central Bank, *ECB Guide on options and discretions available in Union law* (2016), <https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/ecb>

- [\\_guide\\_options\\_discretions.en.pdf?59277660d00228705435a3ab8627afe7,](#) accessed 01 December 2017.
- European Central Bank, *ECB launches public consultation on guidance to banks on non-performing loans,* 12 September 2016, <https://www.bankingsupervision.europa.eu/press/pr/date/2016/html/sr160912.en.html>, accessed 01 December 2017.
- European Central Bank, *FAQs on the NPL guidance* (2016), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/npl\\_faq.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/npl_faq.en.pdf), accessed 01 December 2017.
- European Central Bank, *Guide on the approach for the recognition of institutional protection schemes (IPS) for prudential purposes* (July 2016), [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/institutional\\_protection\\_guide.en.pdf?9bfc77665726f90c0785c8e8ed480173](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/institutional_protection_guide.en.pdf?9bfc77665726f90c0785c8e8ed480173), accessed 01 December 2017.
- European Central Bank, *Public consultation on a draft Guideline and Recommendation of the ECB on the exercise of options and discretions available in Union law for less significant institutions: Explanatory Memorandum* (November), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/ond\\_lsi/ond\\_lsi\\_en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/ond_lsi/ond_lsi_en.pdf), accessed 01 December 2017.
- European Central Bank, *ECB concludes comprehensive assessment of four banks* (2016), <https://www.bankingsupervision.europa.eu/press/pr/date/2016/html/sr161104.en.html>, accessed 01 December 2017.
- European Central Bank, *Stocktake of national supervisory practices and legal frameworks related to NPLs* (2016), [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/stock\\_taking.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/stock_taking.en.pdf), accessed 01 December 2017.
- European Central Bank, *ECB Annual Report on supervisory activities: 2016*, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2016.en.pdf?e6209395b9450c2655f04a4e24ffa463>, accessed 01 December 2017.
- European Central Bank, *Addendum to the ECB Guidance to banks on nonperforming loans: Prudential provisioning backstop for non-performing exposures*, October 2017, [https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl2/ssm.npl\\_addendum\\_draft\\_201710.en.pdf](https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl2/ssm.npl_addendum_draft_201710.en.pdf), accessed 01 December 2017.
- European Central Bank, *Report LSI supervision within the SSM*, November 2017, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.reportlsisupervision2017.en.pdf>, accessed 01 December 2017.
- European Commission, *Proposal for a Regulation of the European Parliament and the Council establishing a European Banking Authority: Impact assessment*, COM(2009) 501 final (Brussels, 2009), [http://ec.europa.eu/internal\\_market/finances/docs/committees/supervision/20090923/com2009\\_501\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/committees/supervision/20090923/com2009_501_en.pdf), accessed 01 December 2017.
- European Commission, *Commission Staff Working Paper Impact Assessment: Proposal for a Directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (...)*, SEC/2011/0952 final.

- European Commission, *Communication from Commission to the Parliament and the Council: A Roadmap towards a Banking Union*, COM(2012) 510 final (Brussels, 2012).
- European Commission, *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 (Brussels, 2012).
- European Commission, *Proposal for a Regulation amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority)*, COM/2012/0512 final (Brussels, 2012).
- European Commission, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013*, COM(2017) 591 final SWD(2017) 336 final.
- European Court of Auditors, *Single Supervisory Mechanism - Good start but further improvements needed*, Special Report No. 29/2016.
- European Parliament, *Resolution of 15 February 2017 on Banking Union – Annual Report 2016*, 2016/2247(INI) (Strasbourg, 2017), <http://bit.ly/2jaCLUv>, accessed 01 December 2017.
- European Parliament, *Addendum to the ECB Guidance to banks on non-performing loans: Competence of the ECB to adopt such Addendum: Opinion of Legal Service*, SJ-0693/17 LV/MMEN/rj D(2017)44064 (Brussels, 08 November), <http://bit.ly/2jH26og>, accessed 01 December 2017.
- Hakkarainen, Pentti, *Banking union in 2017 – How to supervise a €27tn banking sector?*, Speech at the CIRS Annual International Conference (Lisbon, 2017), <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170601.en.html>, accessed 01 December 2017.
- Lautenschläger, Sabine, *Making the comprehensive assessment a success: Speech at the Expansión – 5th Financial Event* (Madrid, 23 May), <https://www.ecb.europa.eu/press/key/date/2014/html/sp140523.en.html>, accessed 01 December 2017.
- Lautenschläger, Sabine, *Looking ahead - Closing Remarks at the ECB Forum on Banking Supervision: Closing remarks at the SSM Banking Supervision Forum* (Frankfurt, 2015), [https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151104\\_1.en.html](https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151104_1.en.html), accessed 01 December 2017.
- Lautenschläger, Sabine, *Caught in the middle? Small and medium-sized banks and European banking supervision*, Speech at the Banking Evening of the Deutsche Bundesbank Regional Office in Baden-Württemberg (Stuttgart, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160222.en.html>, accessed 01 December 2017.
- Lautenschläger, Sabine, *European banking supervision – much achieved, but still much to do*, Speech at Bundesbanksymposium "Dialogue on banking supervision" (Frankfurt am Main, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160601.en.html>, accessed 01 December 2017.

Lautenschläger, Sabine, *Two years and three days of European banking supervision – what has changed?*, Speech at Banking and Corporate Evening of the Deutsche Bundesbank's Regional Office in Bavaria (Munich, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161107.en.html>, accessed 01 December 2017.

Nouy, Danièle, *Toward the European Banking Union: achievements and challenges: Speech at the OeNB Economics Conference* (Vienna, 2014), [https://www.bankingsupervision.europa.eu/press/speeches/date/2014/html/se140512\\_1.en.html](https://www.bankingsupervision.europa.eu/press/speeches/date/2014/html/se140512_1.en.html), accessed 01 December 2017.

Nouy, Danièle, *Launch of the SSM – what will change in banking supervision and what are the imminent impacts on the banking sector?*, Speech at the Third FIN-FSA Conference on EU Regulation and Supervision (Helsinki, 5 June), <https://www.bankingsupervision.europa.eu/press/speeches/date/2014/html/se140605.en.html>, accessed 20 February 2017.

Nouy, Danièle, *The European banking landscape – initial conclusions after four months of joint banking supervision and the main challenges ahead*, Speech at the SZ Finance Day 2015 (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150317.en.html>, accessed 01 December 2017.

Nouy, Danièle, *Presentation of the first ECB annual report on supervisory activities by the Chair of the ECB's Supervisory Board at the European Parliament's Economic and Monetary Affairs Committee, Introductory remarks* (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150331.en.html>, accessed 01 December 2017.

Nouy, Danièle, *First ordinary hearing in 2015 of the Chair of the ECB's Supervisory Board at the European Parliament's Economic and Monetary Affairs Committee, Introductory remarks* (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150625.en.html>, accessed 01 December 2017.

Nouy, Danièle, *Tommaso Padoa-Schioppa Memorial Lecture*, Speech by Chair of the Supervisory Board of the Single Supervisory Mechanism (2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150626.en.html>, accessed 01 December 2017.

Nouy, Danièle, *European Banking Supervision: Levelling the playing field*, Speech at Corporate Program Roundtable organised by the Council on Foreign Relations (New York, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150911.en.html>, accessed 01 December 2017.

Nouy, Danièle, *Introductory statement: Second ordinary hearing in 2015 of the Chair of the ECB's Supervisory Board at the European Parliament's Economic and Monetary Affairs Committee* (Brussels, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151019.en.html>, accessed 01 December 2017.

Nouy, Danièle, *European banking supervision after year one: what lies ahead?*, Speech at Handelsblatt conference – European banking supervision (Frankfurt am Main, 2015),

- <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151110.en.html>, accessed 01 December 2017.
- Nouy, Danièle, *The Single Supervisory Mechanism after one year: the state of play and the challenges ahead*, Speech at Banca d'Italia conference "Micro and macroprudential banking supervision in the euro area", the Università Cattolica (Milan, 2015), <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151124.en.html>, accessed 01 December 2017.
- Nouy, Danièle, *Introductory statement: First ordinary hearing in 2016 of the Chair of the ECB's Supervisory Board at the European Parliament's Economic and Monetary Affairs Committee* (2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160613.en.html>, accessed 01 December 2017.
- Nouy, Danièle, and Sabine Lautenschläger, *Introductory statement to the press conference on the ECB Annual Report on supervisory activities 2015 (with Q&A)* (2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160323.en.html>, accessed 01 December 2017.
- Nouy, Danièle, *Enhanced dialogue between Boards and Supervisors: Towards a sound governance framework*, Speech at the SSM Conference on governance and risk appetite (Frankfurt am Main, 2016), <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160623.en.html>, accessed 01 December 2017.
- Nouy, Danièle, *Times they are a-changin' – the "new normal" and what it means for banks and supervisors*, Speech at a Deutsche Bundesbank reception (Frankfurt am Main, 2016), [https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161115\\_1.en.html](https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se161115_1.en.html), accessed 01 December 2017.
- Nouy, Danièle, *New Year's resolutions for a stable banking sector*, Speech at the European banking supervision and European Banking Federation boardroom dialogue (Frankfurt am Main, 2017), <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/se170125.en.html>, accessed 01 December 2017.
- Reuters, *EU Council says ECB does not have mandate for its bad loan measures*, 27 November 2017, <https://www.reuters.com/article/us-eurozone-banks-npls/eu-council-says-ecb-does-not-have-mandate-for-its-bad-loan-measures-idUKKBN1DR1G9>, accessed 01 December 2017.
- van Rompuy, Herman, *Remarks by President of the European Council Herman Van Rompuy following the informal dinner of the members of the European Council: EUCO 93/12 EUCO 93/12 PRESSE 215 PR PCE 78* (2012).
- van Rompuy, Herman, *Towards a Genuine Economic and Monetary Union*, EUCO 120/12 PRESSE 296 PR PCE 102 (Brussels, 2012).

## Secondary sources<sup>1109</sup>

- Adriaensen, Johan, *National Administrations in EU Trade Policy: Maintaining the Capacity to Control* (Springer, 2016).
- Agnin, Merih, *How Does IMF Lending Operate? A Two-Level Principal-Agent Model*, ECPR General Conference (Glasgow, 2014).
- Alchian, Armen A., and Harold Demsetz, 'Production, information costs, and economic organization', *The American Economic Review* 62, no. 5 (1972): pp. 777–795.
- Aldrich, Howard E., and Jeffrey Pfeffer, 'Environments of organizations', *Annual review of sociology* 2, no. 1 (1976): pp. 79–105.
- Alesina, Alberto, and Lawrence H. Summers, 'Central bank independence and macroeconomic performance: some comparative evidence', *Journal of Money, Credit and Banking* 25, no. 2 (1993): pp. 151–162.
- Alter, Karen, 'Explaining national court acceptance of European Court jurisprudence: A critical evaluation of theories of legal integration', *The European court and national courts doctrine and jurisprudence: Legal change in its social context* (1998): pp. 227–252.
- Alter, Karen J., 'Do international courts enhance compliance with international law?', *Review of Asian and Pacific Studies*, No. 25 (2003).
- Arrow, Kenneth J., 'Informational structure of the firm', *The American Economic Review* 75, no. 2 (1985): pp. 303–307.
- Aubert, Jean Francois, 'Traité de droit constitutionnel suisse' (1967).
- Avbelj, Matej, 'Constitutional and Administrative Pluralism in the EU System of Banking Supervision', *German LJ* 17 (2016): pp. 779–798.
- Axelrod, Robert, and Robert O. Keohane, 'Achieving cooperation under anarchy: Strategies and institutions', *World Politics: A Quarterly Journal of International Relations* (1985): pp. 226–254.
- Azoulai, Loïc (ed.), *The question of competence in the European Union* (OUP Oxford, 2014).
- Bach, Tobias, and Eva Ruffing, 'Networking for autonomy? National agencies in European networks', *Public Administration* 91, no. 3 (2013): pp. 712–726.
- Bauer, Michael W., 'Co-managing programme implementation: conceptualizing the European Commission's role in policy execution', *Journal of European Public Policy* 13, no. 5 (2006): pp. 717–735.
- Bauer, Michael W., and Stefan Becker, 'The unexpected winner of the crisis: The European Commission's strengthened role in economic governance', *Journal of European Integration* 36, no. 3 (2014): pp. 213–229.
- Beaud, Olivier, 'The Allocation of Competences in a Federation—A General Introduction', edited by Loïc Azoulai. In *The question of competence in the European Union* (OUP Oxford, 2014), pp. 1–18.

---

<sup>1109</sup> Listed in alphabetical order.

- Begg, Iain (ed.), *Banking union: inevitable, but profoundly challenging?* (Institut für Wirtschaftsforschung (Ifo), 2012).
- Bendor, Jonathan, Amihai Glazer, and Thomas Hammond, 'Theories of delegation', *Annual Review of Political Science* 4, no. 1 (2001): pp. 235–269.
- Benz, Arthur, 'European public administration as a multilevel administration: a conceptual framework'. In *The Palgrave Handbook of the European Administrative System* (Springer, 2015), pp. 31–47.
- Benz, Arthur, 'Differentiating Multilevel Administration: Patterns of Administrative Co-Ordination in the European Union' (2016). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2795429](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795429).
- Benz, Arthur, and Christina Zimmer, 'The EU's competences: The 'vertical' perspective on the multilevel system', *Living reviews in European governance* Vol. 5, No. 1 (2010).
- Bergman, Torbjörn, 'The European Union as the next step of delegation and accountability', *European Journal of Political Research* 37, no. 3 (2000): pp. 415–429.
- Bignami, Francesca, and Sabino Cassese, *The Administrative Law of the European Union*, vol. 1 (JSTOR, 2004).
- Bilbao-Ubillos, Javier, *The Economic Crisis and Governance in the European Union: a critical assessment* (Routledge, 2013).
- Blinder, Alan S., 'Distinguished lecture on economics in government: What central bankers could learn from academics--and vice versa', *The Journal of Economic Perspectives* 11, no. 2 (1997): pp. 3–19.
- Boccuzzi, Giuseppe, *The European Banking Union: Supervision and Resolution* (Springer, 2016).
- Bogdandy, Armin von, and Jürgen Bast, 'The federal order of competences', *Principles of European Constitutional Law*. Hart Publishing, Oxford (2010): pp. 275–307.
- Börzel, Tanja A., and Rachel A. Cichowski, *The State of the European Union, 6: Law, Politics, and Society* (Oxford University Press, 2003).
- Bouwen, Pieter, 'Corporate lobbying in the European Union: the logic of access', *Journal of European Public Policy* 9, no. 3 (2002): pp. 365–390.
- Breyer, Stephen G., *Regulation and its Reform* (Harvard University Press, 2009).
- Brunnee, Jutta, 'The Kyoto Protocol: A Testing Ground for Compliance Theories?' (2003).
- Brunnée, Jutta, and Stephen J. Toope, *Legitimacy and legality in international law: an interactional account* (Cambridge University Press, 2010).
- Burret, Heiko T., and Jan Schnellenbach, 'Implementation of the fiscal compact in the euro area member states', *German Council of Economic Experts, Working Paper* 8 (2014): p. 2013.
- Busch, Danny, and Guido Ferrarini, *The European Banking Union* (Oxford: Oxford University Press, 2015).
- Caporaso, James A., and John T. S. Keeler, 'The European Community and regional integration theory', edited by Carolyn Rhodes and Sonia Mazey. In *The State of the European Union Vol. 3. Building a European Polity?* (Boulder: Lynne Rienner).

- Cardona, Francisco, 'Civil services for the European administrative space', *Public Management Forum* 2 (1999).
- Carletti, Elena, Giovanni Dell'Ariccia, and Robert Marquez, 'Supervisory incentives in a banking union' (2016).
- Chamon, Merijn, 'EU Agencies: does the Meroni doctrine make sense', *Maastricht J. Eur. & Comp. L.* 17 (2010): p. 281.
- Chamon, Merijn, 'The empowerment of agencies under the Meroni Doctrine and Article 114 TFEU: comment on United Kingdom v. Parliament and Council (short-selling) and the proposed Single Resolution Mechanism', *European Law Review* 39, no. 3 (2014): pp. 380–403.
- Chayes, Abram, and Antonia Handler Chayes, 'On compliance', *International Organization* 47, no. 2 (1993): pp. 175–205.
- Chayes, Abram, and Antonia Handler Chayes, *The new sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998).
- Chayes, Abram, Antonia Handler Chayes, and Ronald B. Mitchell, 'Managing compliance: a comparative perspective', *Engaging countries: Strengthening compliance with international environmental accords* (1998): pp. 39–62.
- Checkel, Jeffrey T., 'Why comply? Social learning and European identity change', *International Organization* 55, no. 03 (2001): pp. 553–588.
- Chiti, Edoardo, 'Decentralisation and integration into the community administrations: a new perspective on European agencies', *European Law Journal* 10, no. 4 (2004): pp. 402–438.
- Chiti, Edoardo, 'The administrative implementation of European Union law: a taxonomy and its implications', *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (2009): pp. 9–34.
- Chiti, Edoardo, 'In the Aftermath of the Crisis—The EU Administrative System Between Impediments and Momentum', *Cambridge Yearbook of European Legal Studies* 17, no. 01 (2015): pp. 311–333.
- Christensen, Tom, and Per Lægreid, 'Regulatory agencies—The challenges of balancing agency autonomy and political control', *Governance* 20, no. 3 (2007): pp. 499–520.
- Christensen, Tom, and Per Lægreid, *The Ashgate research companion to new public management* (Ashgate Publishing, Ltd, 2011).
- Conant, Lisa, 'Compliance and what EU member states make of it', *Compliance and the Enforcement of EU Law* (2012): pp. 1–30.
- Coremans, Evelyn, and Bart Kerremans, 'Agents as Information Asymmetry Managers in EU Trade Policy-Making', edited by Tom Delreux and Johan Adriaensen. In *The Principal Agent Model and the European Union* (Cham: Springer International Publishing, 2017), pp. 227–253.
- Cram, Laura, 'The Politics of EU Policy-Making: Conceptual Lenses and the Integration Process', *LondonINew York: Routledge* (1997).



- da Conceição-Heldt, Eugénia, 'Variation in EU member states' preferences and the Commission's discretion in the Doha Round', *Journal of European Public Policy* 18, no. 3 (2011): pp. 403–419.
- Dalla Pellegrina, Lucia, and Donato Masciandaro, 'Politicians, central banks, and the shape of financial supervision architectures', *Journal of Financial Regulation and Compliance* 16, no. 4 (2008): pp. 290–317.
- Danmarks Nationalbank, *Danish participation in the Banking Union*, <https://www.nationalbanken.dk>, accessed 01 February 2017.
- Delors, Jacques, 'Report on economic and monetary union in the European Community', *Office for the Official Publications of the European Communities* (1989).
- Delreux, Tom, *The EU as international environmental negotiator* (Ashgate Publishing, Ltd, 2013).
- Delreux, Tom, and Johan Adriaensen, 'Introduction. Use and Limitations of the Principal-Agent Model in Studying the European Union', edited by Tom Delreux and Johan Adriaensen. In *The Principal Agent Model and the European Union* (Cham: Springer International Publishing, 2017), pp. 1–34.
- Delreux, Tom, and Johan Adriaensen, 'The Principal Agent Model and the European Union', *Palgrave Studies in European Union Politics* (2017).
- Dijkstra, Hylke, 'Non-exclusive delegation to the European External Action Service', edited by Tom Delreux and Johan Adriaensen. In *The Principal Agent Model and the European Union* (Cham: Springer International Publishing, 2017), pp.55–81.
- Doleys, Thomas J., 'Member states and the European Commission: theoretical insights from the new economics of organization', *Journal of European Public Policy* 7, no. 4 (2000): pp. 532–553.
- Donahue, John D., and Mark A. Pollack, 'Centralization and its discontents: the rhythms of federalism in the United States and the European Union', *The Federal Vision: Legitimacy and levels of governance in the United States and the European Union* 73 (2001): p. 131.
- Donnelly, Shawn, 'Power Politics and the Undersupply of Financial Stability in Europe', *Review of International Political Economy* 21, no. 4 (2014): pp. 980–1005.
- Downs, Anthony, and Rand Corporation, *Inside bureaucracy* (Little, Brown Boston, 1967).
- Downs, George W., 'Enforcement and the Evolution of Cooperation', *Mich. J. Int'l L.* 19 (1997): p. 319.
- Downs, George W., and Michael A. Jones, 'Reputation, compliance, and international law', *The Journal of Legal Studies* 31, S1 (2002): pp. S95–S114.
- Downs, George W., David M. Rocke, and Peter N. Barsoom, 'Is the good news about compliance good news about cooperation?', *International Organization* 50, no. 03 (1996): pp. 379–406.
- Downs, George W., and Andrea W. Trento, 'Conceptual Issues Surrounding the Compliance Gap', *International Law and Organization*, New York: Rowman & Littlefield (2004): pp. 19–40.

- Duisenberg, Wim F., 'The contribution of the euro to financial stability', *Globalization of Financial Markets and Financial Stability—Challenges for Europe* (2001): pp. 37–51.
- Dunleavy, Patrick, 'Democracy, bureaucracy and public choice', *New York: Harvester Wheatsheaf* (1992).
- Dunoff, Jeffrey L., and Mark A. Pollack, *Interdisciplinary perspectives on international law and international relations: the state of the art* (Cambridge University Press, 2013).
- Egan, Michelle, 'Regulatory strategies, delegation and European market integration', *Journal of European Public Policy* 5, no. 3 (1998): pp. 485–506.
- Egeberg, Morten, *Multilevel union administration: the transformation of executive politics in Europe* (Springer, 2006).
- Egeberg, Morten, 'European government (s): Executive politics in transition?', *West European Politics* 31, 1–2 (2008): pp. 235–257.
- Egeberg, Morten, 'EU Administration: Centre Formation and Multilevelness', *Revue française d'administration publique*, no. 1 (2010): pp. 17–26.
- Egeberg, Morten, and Jarle Trondal, 'National agencies in the European administrative space: government driven, commission driven or networked?', *Public Administration* 87, no. 4 (2009): pp. 779–790.
- Egeberg, Morten, and Jarle Trondal, 'National agencies in the European administrative space: government driven, commission driven or networked?', *Public Administration* 87, no. 4 (2009): pp. 779–790.
- Egeberg, Morten, and Jarle Trondal, 'National administrative sovereignty: Under pressure', edited by Erik Oddvar Eriksen and John Erik Fossum. In *The European Union's Non-Members: Independence Under Hegemony?* (Routledge, 2015), pp. 173–189.
- Egeberg, Morten, and Jarle Trondal, 'Why strong coordination at one level of government is incompatible with strong coordination across levels (and how to live with it): The case of the European Union', *Public Administration* (2015).
- Egeberg, Morten, and Jarle Trondal, 'Agencification of the European Union Administration: Connecting the Dots', *TARN WP Series 1* (2016).
- Egeberg, Morten, Jarle Trondal, and Nina M. Vestlund, 'The quest for order: unravelling the relationship between the European Commission and European Union agencies', *Journal of European Public Policy* 22, no. 5 (2015): pp. 609–629.
- Eggertsson, Gauti B., and Eric Le Borgne, 'A political agency theory of central bank independence', *Journal of Money, Credit and Banking* 42, no. 4 (2010): pp. 647–677.
- Eisenhardt, Kathleen M., 'Agency theory: An assessment and review', *Academy of management review* 14, no. 1 (1989): pp. 57–74.
- Elgie, Robert, 'The politics of the European Central Bank: principal-agent theory and the democratic deficit', *Journal of European Public Policy* 9, no. 2 (2002): pp. 186–200.
- Elinor, Ostrom, *Governing the commons: The evolution of institutions for collective action* (Cambridge University Press Cambridge, 1990).

- Ellinas, Antonis, and Ezra Suleiman, 'Reforming the Commission: between modernization and bureaucratization', *Journal of European Public Policy* 15, no. 5 (2008): pp. 708–725.
- Ellinas, Antonis A., and Ezra Suleiman, *The European Commission and Bureaucratic Autonomy: Europe's Custodians* (Cambridge University Press, 2012).
- Ellinas, Antonis A., and Ezra N. Suleiman, 'Supranationalism in a transnational bureaucracy: The case of the European Commission', *JCMS: Journal of Common Market Studies* 49, no. 5 (2011): pp. 923–947.
- Elliot, D. J., *Key issues on European Banking Union: Trade-offs and some recommendations. Global Economy and Development at Brookings*, Working Paper 52.
- Elsig, Manfred, 'European Union trade policy after enlargement: larger crowds, shifting priorities and informal decision-making', *Journal of European Public Policy* 17, no. 6 (2010): pp. 781–798.
- Elsig, Manfred, 'Principal-agent theory and the World Trade Organization: Complex agency and 'missing delegation'', *European Journal of International Relations* 17, no. 3 (2011): pp. 495–517.
- Epstein, David, and Sharyn O'Halloran, *Delegating powers: A transaction cost politics approach to policy making under separate powers* (Cambridge University Press, 1999).
- Judgment of 2 May 2006, Case C-436/03 *European Parliament v Council of the European Union* ("European Cooperative Society") EU:C:2006:277.
- Everson, Michelle, 'Independent agencies: hierarchy beaters?', *European Law Journal* 1, no. 2 (1995): pp. 180–204.
- Everson, Michelle, 'A technology of expertise: EU financial services agencies', *LEQS Paper*, no. 49 (2012).
- Falkner, Gerda, Miriam Hartlapp, Simone Leiber et al., 'Non-Compliance with EU directives in the Member States: Opposition through the Backdoor?', *West European Politics* 27, no. 3 (2004): pp. 452–473.
- Ferejohn, John, 'Law, legislation, and positive political theory', *Modern political economy: Old topics, new directions* (1995): pp. 191–215.
- Ferguson, R. W., 'Should financial stability be an explicit central bank objective', *Challenges to Central Banking from Globalized Financial Systems*, *International Monetary Fund*, Washington DC (2003): pp. 208–223.
- Ferran, Eilis, 'European Banking Union and the EU Single Financial Market: More Differentiated Integration, or Disintegration?', *University of Cambridge Faculty of Law Research Paper*, no. 29 (2014).
- Ferran, Eilis, 'European Banking Union: imperfect, but it can work', *University of Cambridge Faculty of Law Research Paper*, no. 30 (2014).
- Ferrarini, Guido A., 'Single Supervision and the Governance of Banking Markets', *ECGI-Law Working Paper*, no. 294 (2015).
- Ferrarini, Guido A., and Luigi Chiarella, 'Common banking supervision in the eurozone: strengths and weaknesses', *ECGI-Law Working Paper*, no. 223 (2013).

- Filippov, Mikhail, Peter C. Ordeshook, and Olga Shvetsova, *Designing federalism: A theory of self-sustainable federal institutions* (Cambridge University Press, 2004).
- Fiorina, Morris P., *Congressional control of the bureaucracy: A mismatch of incentives and capabilities*.
- Fisher, Roger, *Improving compliance with international law* (Univ of Virginia Pr, 1981).
- Frankenberg, Günter, *Political technology and the erosion of the rule of law: normalizing the state of exception* (Edward Elgar Publishing, 2014).
- Fratianni, Michele, Jürgen von Hagen, and Christopher Waller, *Central banking as a political principal-agent problem*, CEPR Discussion Papers.
- Frieden, Jeffry, 'The Governance of International Finance', *Annual Review of Political Science* 19 (2016): pp. 33–48.
- Fukuyama, Francis, *Political order and political decay: From the industrial revolution to the globalization of democracy* (Farrar, Straus and Giroux, 2014).
- Gailmard, Sean, and John W. Patty, *Learning while governing: Expertise and accountability in the executive branch* (University of Chicago Press, 2012).
- Garrett, Geoffrey, 'International cooperation and institutional choice: the European Community's internal market', *International Organization* 46, no. 02 (1992): pp. 533–560.
- Garrett, Geoffrey, and R. Barry, 'Weingast, 1993: Ideas, Interests, and Institutions: Constructing the European Community's Internal Market', *Judith Goldstein and Robert o. Keohane (eds) Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*: pp. 173–206.
- Genschel, Philipp, and Markus Jachtenfuchs, *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford University Press, 2014).
- Giandomenico Majone, *Regulating Europe: Problems and Perspectives*, Jahrbuch zur Staats- und Verwaltungswissenschaft (Baden Baden, 1989).
- Gilardi, Fabrizio, *Principal-agent models go to Europe: Independent regulatory agencies as ultimate step of delegation*, ECPR General Conference, Canterbury (UK) (Citeseer, 2001).
- Gilardi, Fabrizio, 'Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis', *Journal of European Public Policy* 9, no. 6 (2002): pp. 873–893.
- Gilardi, Fabrizio, and Martino Maggetti, '14 The independence of regulatory authorities', *Handbook on the Politics of Regulation 201* (2011).
- Glendinning, Simon, and Roch Dunin-Wąsowicz, *Ever Closer Union: Report of the hearing held on 15th April, 2016*, LSE European Institute, <http://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-10---Ever-Closer-Union-REPORT.pdf>, accessed 01 December 2017.
- Goodman, Ryan, 'International law and state socialization: Conceptual, empirical, and normative challenges', *Duke LJ* 54 (2004): p. 983.

- Gortsos, Christos, *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) (ECEFIL, 2013).
- Gortsos, Christos V., *The single supervisory mechanism (SSM): legal aspects of the first pillar of the European Banking Union* (Nomiki Bibliothiki, 2015).
- Goyal, Rishi, Petya Koeva Brooks, Mahmood Pradhan et al., *A Banking Union for the Euro Area*, *IMF Staff Discussion Note*, SDN/13/01.
- Grant, Charles, *Delors: Inside the house that Jacques built* (Nicholas Brealey London, 1994).
- Graziano, Paolo, and Maarten Peter Vink, *Europeanization: New research agendas / edited by Paolo Graziano and Maarten P. Vink* (Basingstoke: Palgrave Macmillan, 2007), <http://www.loc.gov/catdir/enhancements/fy0662/2006049470-b.html>.
- Green Donald, P., and Ian Shapiro, *Pathologies of rational choice theory* (New Haven: Yale University Press, 1994).
- Gren, Jakub, 'The impact of the global financial crisis on central banks independence and mandate : cases of the US Fed, the ECB and the BoE' (LLM thesis, CEU, 2013).
- Grilli, Vittorio, Donato Masciandaro, and Guido Tabellini, 'Political and monetary institutions and public financial policies in the industrial countries', *Economic Policy* 6, no. 13 (1991): pp. 341-392.
- Habermas, Jürgen, *The crisis of the European Union: A response* (Polity, 2012).
- Hall, Peter A., 'Governing the economy: The politics of state intervention in Britain and France' (1986).
- Harding, Cristopher, and Bert Swart, *Enforcing European Community Rules: Criminal Proceedings, Administrative Procedures and Harmonization* (Dartmouth Publishing Company, 1996).
- Hartmann, Moritz, 'Administrative constitutionalism and the political union', *German LJ* 14 (2013): p. 695.
- Hawkins, Darren G., David A. Lake, Daniel L. Nielson et al., *Delegation and agency in international organizations* (Cambridge University Press, 2006).
- Hawkins, Darren G., David A. Lake, Daniel L. Nielson et al., 'Delegation under anarchy: states, international organizations and Principal-agent theory', edited by Darren G. Hawkins, David A. Lake, Daniel L. Nielson et al. In *Delegation and agency in international organizations* (Cambridge University Press, 2006), pp. 3-38.
- Hegel, Georg Wilhelm Friedrich, *Enzyklopädie der philosophischen Wissenschaften im Grundrisse (1830)* (Meiner Verlag, 1991).
- Heidbreder, Eva G., 'Structuring the European administrative space: policy instruments of multilevel administration', *Journal of European Public Policy* 18, no. 5 (2011): pp. 709-727.
- Heidbreder, Eva G., 'Multilevel policy enforcement: innovations in how to administer liberalized global markets', *Public Administration* 93, no. 4 (2015): pp. 940-955.
- Helfer, Laurence R., and Timothy Meyer, 'The evolution of codification: a principal-agent theory of the International Law Commission's influence' (2015).

- Héritier, Adrienne, 'New Modes of Governance in Europe: Policy Making without Legislating?', edited by Adrienne Heritier and Martin Rhodes. In *New modes of governance in Europe: Governing in the shadow of hierarchy* (Springer, 2010).
- Hix, Simon, 'The study of the European Union II: the 'new governance'agenda and its rival', *Journal of European Public Policy* 5, no. 1 (1998): pp. 38–65.
- Hofmann, Herwig C. H., and Alexander H. Türk, *EU administrative governance* (Edward Elgar Publishing, 2006).
- Hofmann, Herwig C. H., and Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences', *European Law Journal* 13, no. 2 (2007): pp. 253–271.
- Hofmann, Herwig C. H., 'Mapping the European administrative space', *West European Politics* 31, no. 4 (2008): pp. 662–676.
- Hodson, Dermot, 'Reforming EU economic governance: A view from (and on) the principal-agent approach', *Comparative European Politics* 7, no. 4 (2009): pp. 455–475.
- Hodson, Dermot, 'The European Central Bank as a reluctant EU institution: A principal-agent perspective' (2009).
- Hofmann, Herwig C. H., and Alexander Türk, *Legal challenges in EU administrative law: towards an integrated administration* (Edward Elgar Publishing, 2009).
- Hofmann, Herwig C. H., Gerard C. Rowe, and Alexander H. Türk, *Administrative law and policy of the European Union* (Oxford University Press, 2011).
- Hofmann, Herwig C. H., and Katerina Pantazatou, 'The Transformation of the European Economic Constitution', *University of Luxembourg Law Working Paper*, 2015-01 (2015).
- Hofmann, Herwig C. H., 'Agencies in the European Regulatory Union', *TARN WP Series* 5 (2016).
- Högenauer, Anna-Lena, and David Howarth, 'Unconventional Monetary Policies and the European Central Bank's Problematic Democratic Legitimacy', *Zeitschrift für öffentliches Recht* 71, no. 2 (2016): pp. 1–24.
- Hölmstrom, Bengt, 'Moral hazard and observability', *The Bell journal of economics* (1979): pp. 74–91.
- Holzinger, Katharina, and Frank Schimmelfennig, 'Differentiated integration in the European Union: many concepts, sparse theory, few data', *Journal of European Public Policy* 19, no. 2 (2012): pp. 292–305.
- Hooghe, Liesbet, 'Supranational activists or intergovernmental agents? Explaining the orientations of senior Commission officials toward European integration', *Comparative Political Studies* 32, no. 4 (1999): pp. 435–463.
- Howarth, David, and John Savage, *Enforcing the European Semester: The Politics of Asymmetric Information in the Excessive Deficit and Macroeconomic Imbalance Procedures*, SGEU ECPR Conference (June).
- Howarth, David, and Lucia Quaglia, 'Internationalised banking, alternative banks and the Single Supervisory Mechanism', *West European Politics* 39, no. 3 (2016): pp. 438–461.

- Howarth, David, and Lucia Quaglia, 'The comparative political economy of Basel III in Europe', *Policy and Society* 35, no. 3 (2016): pp. 205–214.
- Howarth, David, and Lucia Quaglia, *The Political Economy of European Banking Union* (Oxford University Press, 2016).
- Howarth, David, Lucia Quaglia, and Jakub Gren, 'Supranational banking supervision in Europe: The construction of a credible watchdog', *Journal of Common Market Studies* 53, s1 (2015): pp. 181–199.
- Howarth, David, and Tal Sadeh, 'In the vanguard of globalization: The OECD and international capital liberalization', *Review of International Political Economy* 18, no. 5 (2011): pp. 622–645.
- Hugh, Hecllo, 'A government of strangers', *Washington, DC: Brookings Institution* (1977).
- Ingves, Stefan, 'Central bank governance and financial stability', *BIS Report by a Study Group*, May (2011).
- Issing, Otmar, 'Should we have faith in central banks?', *IEA Occasional Paper*, no. 125 (2002).
- Issing, Otmar, and Jan-Pieter Krahnen, *Transcript of a hearing before Members of the House of Lords (UK) in Frankfurt on Genuine Economic and Monetary Union and its Implications for the UK*, Policy Letter No. 21 (2013), [http://safe-frankfurt.de/uploads/media/House\\_of\\_Lords\\_Hearing\\_Issing\\_Krahnen.pdf](http://safe-frankfurt.de/uploads/media/House_of_Lords_Hearing_Issing_Krahnen.pdf), accessed 01 December 2017.
- James, Harold, *Making the European monetary union* (Harvard University Press, 2012).
- Jensen, Michael C., and William H. Meckling, 'The nature of man' (1994).
- Joosen, Rik, and Gijs Jan Brandsma, 'Transnational executive bodies: EU policy implementation between the EU and member state level', *Public Administration* 95, no. 2 (2017): pp. 423–436.
- Jordan, Andrew, 'The implementation of EU environmental policy; a policy problem without a political solution?', *Environment and Planning C: Government and Policy* 17, no. 1 (1999): pp. 69–90.
- Kane, Edward J., 'The evolving US legislative agenda in banking and finance'. In *Regulation and Supervision of Financial Institutions in the NAFTA Countries and Beyond* (Springer, 1997), pp. 180–193.
- Kassim, Hussein, 'The secretariat general of the European commission', *The European Commission. London: John Harper Publishing* (2006): pp. 75–102.
- Kassim, Hussein, John Peterson, Michael W. Bauer et al., *The European Commission of the twenty-first century* (OUP Oxford, 2013).
- Kaul, I., I. Grunberg, and M. A. Stern, 'Conceicao, P.-le Goulven, K.-Mendoza, RU (Eds)(2003)', *Providing Global Public Goods. Managing Globalization*.
- Kaul, Inge, Isabelle Grunberg, and Marc A. Stern, 'Defining global public goods', *Global public goods: international cooperation in the 21st century* (1999): pp. 2–19.
- Kelemen, R. Daniel, 'The structure and dynamics of EU federalism', *Comparative Political Studies* 36, 1-2 (2003): pp. 184–208.

- Kelemen, R. Daniel, 'Built to last? The durability of EU federalism', *Making History: European Integration and Institutional Change at Fifty* 8 (2007): p. 51.
- Kelemen, R. Daniel, P. Genschel, and M. Jachtenfuchs, 'Building the New European State? Federalism, Core State Powers, and European Integration', *Beyond the Regulatory Polity* (2013): pp. 211–229.
- Kiewiet, D. Roderick, and Mathew D. McCubbins, *The logic of delegation* (University of Chicago Press, 1991).
- Kilroy, Bernadette, *Member state control or judicial independence: The integrative role of the European Court of Justice, 1958-1994*, Annual meeting of the American Political Science Association (Chicago, 1995).
- King, Gary, Robert O. Keohane, and Sidney Verba, *Designing social inquiry: Scientific inference in qualitative research* (Princeton university press, 1994).
- Klein, Peter G., 'New institutional economics' (2000).
- Knight, Jack, *Institutions and social conflict* (Cambridge University Press, 1992).
- Knill, Christoph, 'Implementing European policies: the impact of national administrative traditions' (1997).
- Knill, Christoph, *The Europeanisation of national administrations: Patterns of institutional change and persistence* (Cambridge University Press, 2001).
- Knill, Christoph, Steffen Eckhard, and Stephan Grohs, 'Administrative styles in the European Commission and the OSCE Secretariat: striking similarities despite different organizational settings', *Journal of European Public Policy* 23, no. 7 (2016): pp. 1057–1076.
- Knill, Christoph, and Stephan Grohs, 'Administrative styles of EU institutions'. In *The Palgrave Handbook of the European Administrative System* (Springer, 2015), pp. 93–107.
- Koh, Harold Hongju, Abram Chayes, Antonia Handler Chayes et al., *Why do nations obey international law?* (JSTOR, 1997).
- Kohler-Koch, Beate, and Rainer Eising, *The transformation of governance in the European Union* (Psychology Press, 1999).
- Kreppel, Amie, and George Tsebelis, 'Coalition formation in the European Parliament', *Comparative Political Studies* 32, no. 8 (1999): pp. 933–966.
- Krisch, Nico, 'The pluralism of global administrative law', *European Journal of International Law* 17, no. 1 (2006): pp. 247–278.
- Laffont, Jean-Jacques, and David Martimort, *The theory of incentives: the principal-agent model* (Princeton university press, 2009).
- Lamandini, Marco, David Ramos Muñoz, and Javier Solana, 'Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection', *Quaderni di Ricerca Giuridica*, no. 79 (2015): pp. 1–119.
- Langfield, Sam, and Marco Pagano, 'Bank bias in Europe: Effects on systemic risk and growth', *Economic Policy* 31, no. 85 (2016): pp. 51–106.
- Larosi re, Jacques de, L. Balcerowicz, O. Issing et al., *The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosi re—Report* (Brussels, 2009).



- Lastra, Rosa María, 'Reflections on Banking Union, lender of last resort and supervisory discretion'. In *ECB Legal Conference 2015*, pp. 154–173.
- Lastra, Rosa María, *International financial and monetary law* (Oxford University Press, 2015).
- Lefterov, Asen, *The Single Rulebook: legal issues and relevance in the SSM context*, ECB Legal Working Paper Series No 15 (Frankfurt, 2015), <https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp15.en.pdf>, accessed 01 December 2017.
- Leruth, Benjamin, and Christopher Lord, *Differentiated Integration in the European Union* (Routledge, 2015).
- Leruth, Benjamin, and Christopher Lord, 'Differentiated integration in the European Union: a concept, a process, a system or a theory?', *Journal of European Public Policy* 22, no. 6 (2015): pp. 754–763.
- Leuffen, Dirk, Berthold Rittberger, and Frank Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan, 2012).
- Lombardi, Domenico, and Manuela Moschella, 'Domestic preferences and European banking supervision: Germany, Italy and the Single Supervisory Mechanism', *West European Politics* 39, no. 3 (2016): pp. 462–482.
- Lord, Christopher, 'Utopia or dystopia? Towards a normative analysis of differentiated integration', *Journal of European Public Policy* 22, no. 6 (2015): pp. 783–798.
- Louis, Jean-Victor, *Commentaire Mégret: le droit de la CEE. Banking supervision in the European Community: institutional aspects* (Ed. de l'Univ, 1995).
- Lowi, Theodore J., 'The end of liberalism: The second republic of the United States' (1979).
- Lucia, Luca de, 'Administrative pluralism, horizontal cooperation and transnational administrative acts', *Review of European Administrative Law* 5, no. 2 (2012): pp. 17–45.
- Lupia, Arthur, and Mathew D. McCubbins, *The Democratic Dilemma: Knowledge, Deception, and the Foundations of Choice* (New York: Cambridge University Press, forthcoming, 1997).
- Maher, Imelda, Stijn Billiet, and Dermot Hodson, 'The principal-agent approach to EU studies: Apply liberally but handle with care', *Comparative European Politics* 7, no. 4 (2009): pp. 409–413.
- Majone, Giandomenico, 'The rise of the regulatory state in Europe', *West European Politics* 17, no. 3 (1994): pp. 77–101.
- Majone, Giandomenico, *Regulating Europe* (London: Routledge, 1996).
- Majone, Giandomenico, 'The regulatory state and its legitimacy problems', *West European Politics* 22, no. 1 (1999): pp. 1–24.
- Majone, Giandomenico, 'Two logics of delegation: agency and fiduciary relations in EU governance', *European Union Politics* 2, no. 1 (2001): pp. 103–122.
- Mangenot, Michel, Gérard Druesne, and Claude Wiseler, *Public Administrations and Services of General Interest: What kind of Europeanisation?* (European Institute of Public Administration Maastricht, 2005).

- March, James, and Johan P. Olsen, *Rediscovering Institutions. The Organizational Basis of Politics* (New York: Free Press, 1989).
- March, James G., and Johan P. Olsen, *Democratic governance* (Free Press, 1995).
- Masaaki Shirakawa, *International financial stability as a public good*, Keynote address at a High-Level Seminar co-hosted by the Bank of Japan and the International Monetary Fund, 2012 (Tokyo, Japan, 2012).
- Masciandaro, Donato, 'Unification in financial sector supervision: The trade-off between central bank and single authority', *Journal of Financial Regulation and Compliance* 12, no. 2 (2004): pp. 151-169.
- Masciandaro, Donato, Maria J. Nieto, and Henriette Prast, 'Who pays for banking supervision? Principles and trends', *Journal of Financial Regulation and Compliance* 15, no. 3 (2007): pp. 303-326.
- Mastenbroek, Ellen, 'EU compliance: Still a 'black hole'?', *Journal of European Public Policy* 12, no. 6 (2005): pp. 1103-1120.
- Mastenbroek, Ellen, and Michael Kaeding, 'Europeanization Beyond the Goodness of Fit: Domestic Politics in the Forefront', *Comparative European Politics* 4, no. 4 (2006): pp. 331-354.
- Matthews, Felicity, 'Governance and state capacity', edited by David Levi-Faur. In *The Oxford handbook of governance* (Oxford University Press, 2012), pp. 281-293.
- McCallum, Bennett T., *Two fallacies concerning central bank independence*, National Bureau of Economic Research.
- McCallum, Bennett T., 'Crucial issues concerning central bank independence', *Journal of Monetary Economics* 39, no. 1 (1997): pp. 99-112.
- McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast, 'Administrative procedures as instruments of political control', *Journal of Law, Economics, & Organization* 3, no. 2 (1987): pp. 243-277.
- McCubbins, Mathew D., and Talbot Page, 'A theory of congressional delegation', *Congress: Structure and policy Vol. 409* (1987).
- McCubbins, Mathew D., and Thomas Schwartz, 'Congressional oversight overlooked: Police patrols versus fire alarms', *American journal of political science* (1984): pp. 165-179.
- McCubbins, Matthew D., Roger G. Noll, and Barry R. Weingast, 'Structure and process, politics and policy: Administrative arrangements and the political control of agencies', *Virginia Law Review* (1989): pp. 431-482.
- Mendrinou, Maria, 'Non-compliance and the European commission's role in integration', *Journal of European Public Policy* 3, no. 1 (1996): pp. 1-22.
- Miller, Gary J., 'The political evolution of principal-agent models', *Annu. Rev. Polit. Sci.* 8 (2005): pp. 203-225.
- Mises, Ludwig von, *Human action: A treatise on economics* (Fox&Wilkes, 1966).
- Mitchell, Ronald B., 'Regime design matters: intentional oil pollution and treaty compliance', *International Organization* 48, no. 3 (1994): pp. 425-458.

- Mitchell, Ronald B., *Compliance theory: an overview* (Earthscan London, 1996).
- Mitchell, Ronald B., 'Situation Structure and Regime Implementation Strategies', *Unpublished manuscript, Stanford University, Stanford, Calif* (1999).
- Moe, Terry M., 'The new economics of organization', *American journal of political science* (1984): pp. 739-777.
- Moe, Terry M., 'An assessment of the positive theory of congressional dominance', *Legislative Studies Quarterly* (1987): pp. 475-520.
- Moe, Terry M., 'Political institutions: The neglected side of the story', *Journal of Law, Economics, & Organization* 6 (1990): pp. 213-253.
- Moe, Terry M., 'Politics and the Theory of Organization', *Journal of Law, Economics, and Organization* 7, special issue (1991): pp. 106-129.
- Monti, Giorgio, and Ann Petit Christy, *The Single Supervisory Mechanism: legal fragilities and possible solutions*, Ademu Working Paper Series WP 2016/016 (2016).
- Moravcsik, Andrew, 'Preferences and power in the European Community: a liberal intergovernmentalist approach', *JCMS: Journal of Common Market Studies* 31, no. 4 (1993): pp. 473-524.
- Moravcsik, Andrew, 'Liberal intergovernmentalism and integration: a rejoinder', *JCMS: Journal of Common Market Studies* 33, no. 4 (1995): pp. 611-628.
- Moschella, Manuela, 'Designing the Financial Stability Board: a theoretical investigation of mandate, discretion, and membership', *Journal of International Relations and Development* 16, no. 3 (2013): pp. 380-405.
- Nicolaidis, Phedon, and Nadir Prezios, 'Discretion and Accountability: The ESMA Judgment and the Meroni Doctrine. Bruges European Economic Research (BEER) Papers 30/2014' (2014).
- Nicolaidis, Kalypso, and Robert Howse, *The Federal Vision* (Oxford University Press, 2001).
- Nieto, María, and Garry J. Schinasi, 'EU framework for safeguarding financial stability: towards an analytical benchmark for assessing its effectiveness', *IMF Working Papers* (2007): pp. 1-23.
- Niskanen, William A., *Bureaucracy and representative government* (Transaction Publishers, 1971).
- North, Douglass C., *Institutions, institutional change and economic performance* (Cambridge University Press, 1990).
- North, Douglass C., 'Institutions and credible commitment', *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft* (1993): pp. 11-23.
- Olson, Mancur, 'The logic of collective action Cambridge', Mass.: Harvard 1971 (1965).
- Ostrom, Elinor, 'An agenda for the study of institutions', *Public choice* 48, no. 1 (1986): pp. 3-25.

- Padoa-Schioppa, Tommaso, *EMU and banking supervision*, Lecture by Tommaso Padoa-Schioppa Member of the Executive Board of the European Central Bank at the London School of Economics, Financial Markets Group on 24 February 1999 .
- Padoa-Schioppa, Tommaso, 'Central banks and financial stability: exploring the land in between', *The Transformation of the European Financial System* (2003): pp. 269–310.
- Pagano, Ugo, 'Bounded rationality and institutionalism', *The Evolution of Economic Institutions: A Critical Reader*, Edward Elgar (2007): pp. 19–33.
- Pelkmans, Jacques, and Marta Simoncini, 'Mellowing Meroni: Hows ESMA can help build the Single Market. CEPS Commentaries, 18 February 2014' (2014).
- Persson, Torsten, and Guido Tabellini, *Designing institutions for monetary stability* (Elsevier, 1993).
- Pescatore, Pierre, *Droit de L'intégration* (Kluwer Law International, 1974).
- Peters, B. Guy, 'Institutional theory: Problems and prospects' (2000).
- Pfeffer, Jeffrey, *Organizations and organization theory* (Pitman Boston, MA, 1982).
- Pollack, Mark A., 'Delegation, agency, and agenda setting in the European Community', *International Organization* 51, no. 01 (1997): pp. 99–134.
- Pollack, Mark A., 'The Commission as an agent'. In *At the Heart of the Union* (Springer, 1997), pp. 109–128.
- Pollack, Mark A., 'The Engines of Integration? Supranational Autonomy and Influence in the European', edited by Wayne Sandholtz and Alec Stone Sweet. In *European integration and supranational governance* (OUP Oxford, 1998), p. 217.
- Pollack, Mark A., 'Delegation, agency and agenda setting in the Treaty of Amsterdam' (1999).
- Pollack, Mark A., *The engines of European integration: delegation, agency, and agenda setting in the EU* (OUP Oxford, 2003).
- Puetter, Uwe, 'Informal circles of ministers: a way out of the EU's institutional dilemmas?', *European Law Journal* 9, no. 1 (2003): pp. 109–124.
- Pülzl, Helga, and Oliver Treib, 'Implementing public policy', edited by Frank Fischer and Gerald J. Miller. In *Handbook of public policy analysis: theory, politics, and methods* (crc Press, 2006), pp. 89–107.
- Putnam, Robert D., 'Diplomacy and domestic politics: the logic of two-level games', *International Organization* 42, no. 03 (1988): pp. 427–460.
- Rasmussen, Anne, 'EU conciliation delegates: Responsible or runaway agents?', *West European Politics* 28, no. 5 (2005): pp. 1015–1034.
- Raustiala, Kal, 'Compliance & (and) Effectiveness in International Regulatory Cooperation', *Case W. Res. j. Int'l L.* 32 (2000): p. 387.
- Raustiala, Kal, and Anne-Marie Slaughter, 'International law, international relations and compliance' (2002).
- Judgment of 20 February 1979, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 (1979).

- Reykers, Yf, and Niels Smeets, 'Losing control: A principal-agent analysis of Russia in the United Nations Security Council's decision-making towards the Libya crisis', *East European Politics* 31, no. 4 (2015): pp. 369–387.
- Ricardo, David, *On the principles of political economy, and taxation* (John Murray, 1821).
- Ross, George, *Jacques Delors and European Integration* (Cambridge Univ Press, 1995).
- Ross, Stephen A., 'The economic theory of agency: The principal's problem', *The American Economic Review* 63, no. 2 (1973): pp. 134–139.
- Rynck, Stefaan de, 'Banking on a union: the politics of changing eurozone banking supervision', *Journal of European Public Policy* 23, no. 1 (2016): pp. 119–135.
- Sappington, David E. M., 'Incentives in principal-agent relationships', *The Journal of Economic Perspectives* (1991): pp. 45–66.
- Sarcinelli, Mario, 'La Banca Centrale Europea: istituzione concettualmente evoluta o all'inizio della sua "evoluzione"?', *Moneta e Credito* 45, no. 178 (1992).
- Sawer, Geoffrey, *Modern federalism* (Carlton, Vic.: Pitman, 1976).
- Scelle, Georges, *Précis de droit des gens principes et systématique: Droit constitutionnel international: les libertés individuelles et collectives, l'élaboration du droit des gens positif. Deuxième partie* (Recueil Sirey, 1934).
- Scelle, Georges, *Théorie et pratique de la fonction exécutive en droit international* (Martinus Nijhoff, 1936).
- Scelle, Georges, *Quelques réflexions sur l'abolition de la compétence de guerre* (A. Pédone, 1954).
- Scelle, Georges, 'Le phénomène juridique du dédoublement fonctionnel', *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70* (1956): p. 324.
- Scelle, Georges, 'Quelques réflexions hétérodoxes sur la technique de l'ordre juridique interétatique', *Hommage d'une génération de juristes au Président BASDEVANT*, Pedone (1960): p. 477.
- Scelle, Georges, and Carlo Santulli, *Précis de droit des gens: principes et systématique. Introduction, le milieu intersocial. Première partie* (Daloz, 1932).
- Schammo, Pierre, 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision?', *Oxford Journal of Legal Studies* 32, no. 4 (2012): pp. 771–797.
- Schammo, Pierre, 'Differentiated integration and the single supervisory mechanism: which way forward for the European Banking Authority?', *Britain Alone* (2014).
- Schelkle, Waltraud, 'The Political Economy of Fiscal Policy Co-ordination in EMU: From Disciplinary Device to Insurance Arrangement', *JCMS: Journal of Common Market Studies* 43, no. 2 (2005): pp. 371–391.
- Schimmelfennig, Frank, Dirk Leuffen, and Berthold Rittberger, 'The European Union as a system of differentiated integration: interdependence, politicization and differentiation', *Journal of European Public Policy* 22, no. 6 (2015): pp. 764–782.

- Schmidt, Vivien A., George Tsebelis, Thomas Risse et al., 'Approaches to the study of European politics', *ECSA review* 12, no. 2 (1999): p. 15.
- Schoenmaker, Dirk, and Christiaan van Laecke, 'Current state of cross-border banking', *International Financial Instability: Global Banking & National Regulation*, World Scientific, Singapore (2007): pp. 39–63.
- Schoenmaker, Dirk, and Pia Hüttel, 'Should 'outs' join the Banking Union?'. In *Single Supervision and cross-border banking 2015.3*, pp. 89–112, <http://european-economy.eu/book/single-supervision-and-cross-border-banking/>, accessed 01 December 2017.
- Scholten, Miroslava, 'Mind the trend! Enforcement of EU law has been moving to 'Brussels'', *Journal of European Public Policy* (2017): pp. 1–19.
- Scholten, Miroslava, and Annetje Ottow, 'Institutional Design of Enforcement in the EU: The Case of Financial Markets', *Utrecht Law Review* 10, no. 5 (2014): pp. 80–91.
- Schuknecht, Ludger, 'EU fiscal rules: issues and lessons from political economy' (2004).
- Schüler, Martin, 'Incentive Problems in Banking Supervision-The European Case', *ZEW Discussion Papers* No.03-62 (2003). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=467840](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=467840).
- Sean Gailmard, 'Accountability and Principal-Agent Theory', edited by Mark Bovens, Robert E. Goodin, and Thomas Schillemans. In *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014).
- Shore, Cris, *Building Europe: The cultural politics of European integration* (Routledge, 2013).
- Siekmann, Helmut, *The Legal Framework for the European System of Central Banks*, White Paper No. 26 (2015).
- Simon, Herbert A., *Administrative behavior* (Simon and Schuster, 2013).
- Slaughter, Anne-Marie, 'Sovereignty and power in a networked world order', *Stan. J. Int'l L.* 40 (2004): p. 283.
- Smismans, Stijn, *Law, legitimacy and European governance: functional participation in social regulation* (Oxford University Press, 2004).
- Smismans, Stijn, 'Reflexive law in support of directly deliberative polyarchy: reflexive-deliberative polyarchy as a normative frame for the OMC', edited by Olivier de Schutter and Simon F. Deakin. In *Social rights and market forces: is the open coordination of employment and social policies the future of social Europe?* (Emile Bruylant, 2005), pp. 99–144.
- Smith, Adam, 'An Inquiry into the Nature and Causes of the Wealth of Nations vol. 2' (1786).
- Smith, Vera Constance, *The rationale of central banking* (PS King London, 1936).
- Smits, René, *The European Central Bank: Institutional aspects*, International banking and finance law series v.5 (The Hague, London: Kluwer Law International, 1997).
- Soederberg, Susanne, Georg Menz, and Philip Cerny, *Internalizing globalization: the rise of neoliberalism and the decline of national varieties of capitalism* (Springer, 2005).

- Spendzharova, Aneta B., and Ismail Emre Bayram, 'Banking union through the back door? How European banking union affects Sweden and the Baltic States', *West European Politics* 39, no. 3 (2016): pp. 565–584.
- Steinmo, Sven, and Kathleen Thelen, *Structuring politics: historical institutionalism in comparative analysis* (Cambridge University Press, 1992).
- Stiglitz, Joseph E., *The theory of international public goods and the architecture of international organizations* (Department for Economic and Social Information and Policy Analysis, United Nations, 1995).
- Stone, Diane, and Stella Ladi, 'Global public policy and transnational administration', *Public Administration* 93, no. 4 (2015): pp. 839–855.
- Stubb, Alexander C-G, 'A categorization of differentiated integration', *JCMS: Journal of Common Market Studies* 34, no. 2 (1996): pp. 283–295.
- Sverdrup, Ulf, and John Erik Fossum, *Compliance and styles of conflict management in Europe*, ARENA.
- Sweet, Alec Stone, and James A. Caporaso, 'From free trade to supranational polity: The European Court and integration', *European integration and supranational governance* (1998): pp. 92–133.
- Tallberg, Jonas, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (Jonas Tallberg, Department of Political Science, Lund University, Sweden, 1999).
- Tallberg, Jonas, *Making states comply: the European Commission, the European Court of Justice, and the enforcement of the internal market* (Jonas Tallberg, Department of Political Science, Lund University, Sweden, 1999).
- Tallberg, Jonas, 'Paths to compliance: Enforcement, management, and the European Union', *International Organization* 56, no. 03 (2002): pp. 609–643.
- Tallberg, Jonas, *European governance and supranational institutions: making states comply* (Routledge, 2004).
- Teixeira, Pedro Gustavo, '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): pp. 527–583.
- Thatcher, Mark, 'Delegation to independent regulatory agencies: Pressures, functions and contextual mediation', *West European Politics* 25, no. 1 (2002): pp. 125–147.
- Thatcher, Mark, 'The third force? Independent regulatory agencies and elected politicians in Europe', *Governance* 18, no. 3 (2005): pp. 347–373.
- Thatcher, Mark, and Alec Stone Sweet, 'Theory and practice of delegation to non-majoritarian institutions', *West European Politics* 25, no. 1 (2002): pp. 1–22.
- Thatcher, Mark, and Alec Stone Sweet, *The politics of delegation* (Routledge, 2003).
- Theissen, Roeland Johannes, *EU banking supervision* (Eleven international publishing, 2013).
- Thelen, Kathleen, 'Historical institutionalism in comparative politics', *Annual Review of Political Science* 2, no. 1 (1999): pp. 369–404.

- Tömmel, Ingeborg, and Amy Verdun, *Innovative governance in the European Union: the politics of multilevel policymaking* (Lynne Rienner Publishers, 2009).
- Touray, M. C.A., 'EU Regulatory Response After the Credit Crisis: Was Article 114 TFEU the right legal basis and does the Meroni Doctrine hinder the effectiveness of the European Banking Authority?'.
- Treib, Oliver, 'Implementing and complying with EU governance outputs', *Living reviews in European governance* 3, no. 5 (2008): pp. 1–30.
- Treib, Oliver, Holger Bähr, and Gerda Falkner, 'Modes of governance: towards a conceptual clarification', *Journal of European Public Policy* 14, no. 1 (2007): pp. 1–20.
- Tröger, Tobias H., '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. 04 (2014): pp. 449–497.
- Trondal, Jarle, *An emergent European executive order* (Oxford University Press, 2010).
- Trondal, Jarle, *Unpacking international organisations: The dynamics of compound bureaucracies* (Oxford University Press, 2010).
- Trondal, Jarle, 'Domestic agencies in an emergent European executive order', *European Integration* 33, no. 1 (2011): pp. 55–74.
- Trondal, Jarle, 'Public Administration of the European Union', edited by William R. Thompson. In *The Oxford Research Encyclopedia of Politics* (Oxford University Press, 2017), pp. 1–25.
- Trondal, Jarle, and Michael W. Bauer, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system', *European Political Science Review* (2015): pp. 1–22.
- Tsebelis, George, 'The power of the European Parliament as a conditional agenda setter', *American Political Science Review* 88, no. 01 (1994): pp. 128–142.
- Tsebelis, George, and Geoffrey Garrett, 'Agenda setting power, power indices, and decision making in the European Union', *International Review of Law and Economics* 16, no. 3 (1996): pp. 345–361.
- Tsingou, Eleni, 'Transnational governance networks in the regulation of finance', *Business and Global Governance* (2010): pp. 138–156.
- Tullock, Gordon, *The politics of bureaucracy* (Public Affairs Pr, 1965).
- Tuori, Kaarlo, and Klaus Tuori, *The Eurozone crisis: a constitutional analysis* (Cambridge University Press, 2014).
- Underdal, Arild, 'Explaining compliance and defection: three models', *European Journal of International Relations* 4, no. 1 (1998): pp. 5–30.
- van Cleynenbreugel, Pieter, *Market supervision in the European Union: integrated administration in constitutional context* (Martinus Nijhoff Publishers, 2014).
- van Waarden, Frans, 'Persistence of national policy styles: A study of their institutional foundations', *Convergence or diversity* (1995): pp. 333–372.



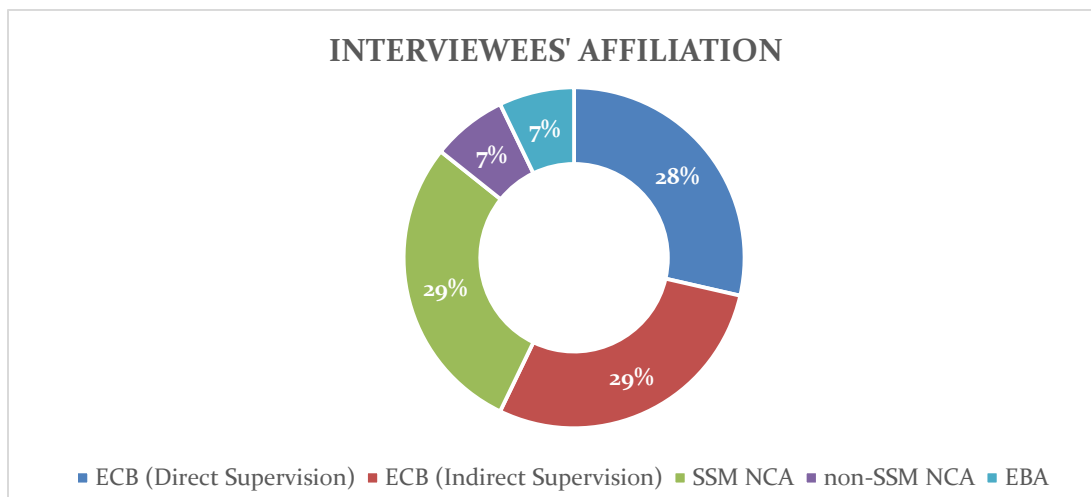
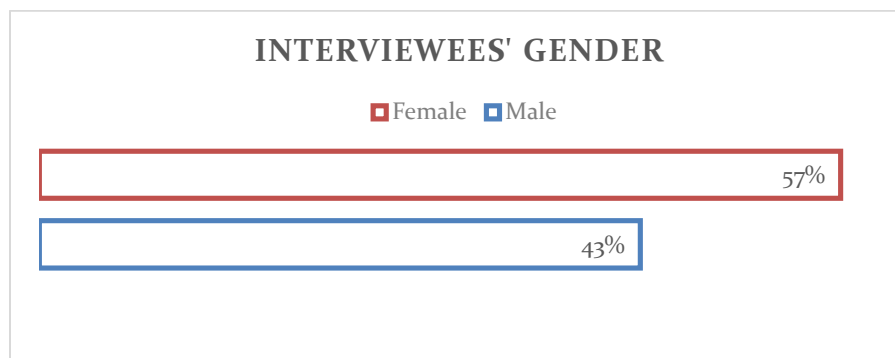
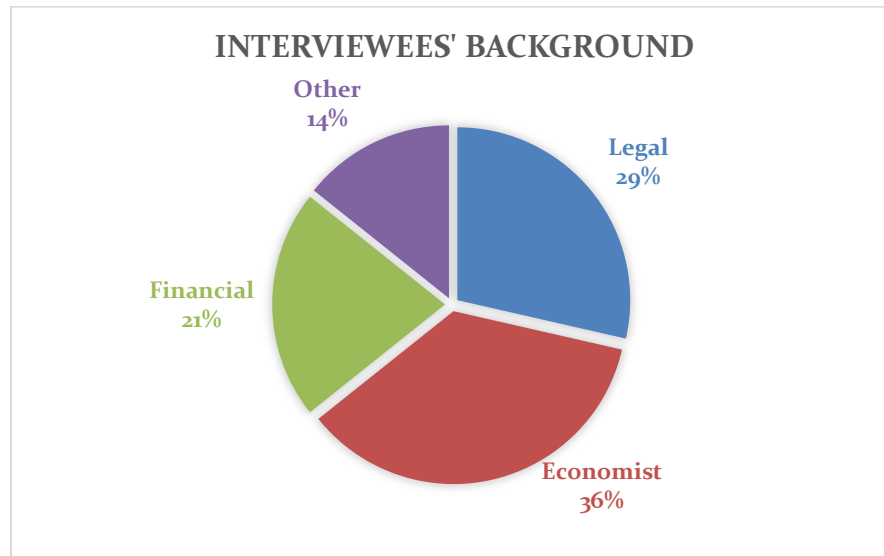
- Vaubel, Roland, 'Principal-agent problems in international organizations', *The Review of International Organizations* 1, no. 2 (2006): pp. 125–138.
- Verhelst, Stijn, 'Renewed financial supervision in Europe—final or transitory?', *Egmont Paper* 44 (2011).
- Verhoest, Koen, Sandra van Thiel, Geert Bouckaert et al., *Government agencies: practices and lessons from 30 countries* (Springer, 2016).
- Véron, Nicolas, 'Europe's Banking Union', *The New International Financial System: Analyzing the Cumulative Impact of Regulatory Reform* 48 (2015): p. 131.
- Versluis, Esther, 'Compliance Problems in the EU What potential role for agencies in securing compliance?' (2005).
- Versluis, Esther, 'Even rules, uneven practices: Opening the 'black box' of EU law in action', *West European Politics* 30, no. 1 (2007): pp. 50–67.
- Vestlund, Nina M., 'Pooling administrative resources through EU regulatory networks', *Journal of European Public Policy* (2015): pp. 1–20.
- Vibert, Frank, *The rise of the unelected: democracy and the new separation of powers* (Cambridge University Press, 2007).
- Wallace, Helen, and William Wallace, 'Flying together in a larger and more diverse European Union' (1995).
- Walsh, Carl E., 'Optimal contracts for central bankers', *The American Economic Review* (1995): pp. 150–167.
- Waterman, Richard W., and Kenneth J. Meier, 'Principal-agent models: an expansion?', *Journal of public administration research and theory* 8, no. 2 (1998): pp. 173–202.
- Weber, Max, 'Law in Economy and Society, ed. Max Rheinstein', *Trans, by, Edward Shils and Max Rhinestein, New York, Simon and Schuster* (1954).
- Weber, Max, *Wirtschaft und gesellschaft: Grundriss der verstehenden Soziologie* (Mohr Siebeck, 2002).
- Weingast, Barry R., 'The congressional-bureaucratic system: a principal agent perspective (with applications to the SEC)', *Public choice* 44, no. 1 (1984): pp. 147–191.
- Weingast, Barry R., and William J. Marshall, 'The industrial organization of Congress; or, why legislatures, like firms, are not organized as markets', *Journal of Political Economy* 96, no. 1 (1988): pp. 132–163.
- Wessels, Wolfgang, 'Beamtengremien im EU-Mehrebenensystem—Fusion von Administrationen?'. In *Europäische Integration* (Springer, 2003), pp. 353–383.
- Wille, Anchrit, *The normalization of the European Commission: Politics and bureaucracy in the EU executive* (OUP Oxford, 2013).
- Williamson, Oliver E., *Markets and Hierarchies: A study in the Economics of Internal Organization* (New York: Free Press, 1975).
- Williamson, Oliver E., *The economic institutions of capitalism* (Simon and Schuster, 1985).

- Williamson, Oliver E., 'A comparison of alternative approaches to economic organization', *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft* (1990): pp. 61–71.
- Williamson, Oliver E., 'Opportunism and its critics', *Managerial and decision economics* 14, no. 2 (1993): pp. 97–107.
- Wilson, Woodrow, 'The study of administration', *Political science quarterly* 2, no. 2 (1887): pp. 197–222.
- Windhoff-Héritier, Adrienne, *Common goods: reinventing European and international governance* (Rowman & Littlefield, 2002).
- Wissink, Laura, Ton Duijkersloot, and Rob Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', *ULR* 10, no. 5 (2014): pp. 92–115.
- Witte, Andreas, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?', *Maastricht Journal of European and Comparative Law* 21 (2014): pp. 89–109.
- Wymeersch, Eddy, 'The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union', *National Bank of Belgium Working Paper*, no. 255 (2014).
- Young, Oran R., *International cooperation: Building regimes for natural resources and the environment* (Cornell University Press, 1989).
- Young, Oran R., *Governance in world affairs* (Cornell University Press, 1999).
- Zeckhauser, Richard J., and John W. Pratt, *Principals and agents: The structure of business* (Harvard Business School Press Boston, 1985).
- Zedillo, Ernesto, Tidjane Thiam, K. Y. Amoako et al., *Meeting global challenges: international cooperation in the national interest* (International Task Force on Global Public Goods, 2006).
- Zilioli, Chiara, and Martin Selmayr, *The Law of the European Central Bank* (Hart Pub Limited, 2001).
- Zürn, Michael, and Christian Joerges, *Law and governance in postnational Europe: compliance beyond the nation-state* (Cambridge University Press, 2005).
- Zürn, Michael, and Jürgen Neyer, 'Compliance in comparative perspective: The EU and other international institutions' (2001).
- Zysman, John, 'How institutions create historically rooted trajectories of growth', *Industrial and corporate change* 3, no. 1 (1994): pp. 243–283.



# ANNEX

## Interviewees' sample



## Executive summaries of informal interviews conducted

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	A
<b>Interviewee profile</b>	legal
<b>Date(s):</b>	13 November 2015, 12 January 2016, 15 July 2016
<b>Duration (total)</b>	ca. 45 minutes
<b>Subject:</b>	<b>SSM set-up and the recent developments</b>

---

### Informal interview with A (executive summary)

- A is an ECB-based supervisory expert responsible for development of policies for LSI supervision. He was involved in the SSM preparatory work (intergovernmental negotiations, ECB SSM internal group, SSM Task Force). A was engaged in drafting of the SSM Regulation and the SSM Framework Regulation. A has good memories from the period of SSM negotiations in Brussels. From A's perspective negotiations went smoothly, however there was also a number of politically salient issues including the scope of ECB instructions vis-à-vis NCAs on LSIs, significance threshold and governance of the SSM.
- A considers ECB-NCA relations concerning LSIs generally good. A does not see any imminent challenges to them and is of the opinion that the SSM institutional design is well-structured. According to A's view, common SSM supervisory culture is on the right track to be developed. Training and exchange schemes are in the opinion of A important channels to build common supervisory culture and understanding of supervisory approaches.
- A finds supervisory networks between DGMS<sub>3</sub> and NCAs (Senior Management Network and Working Group on High Supervisory Standards) important tools to 'take NCAs on board' and engage them in the development of supervisory policies. A welcomed the recent redistribution of tasks related to common procedures between "supervisory" DGs of the ECB and the assignment of common procedures (licensing, qualifying holdings and license withdrawals) to DG-MS<sub>3</sub>. He does not see risks to the intra DG cooperation in this new environment.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	B
<b>Interviewee profile</b>	Financial
<b>Date:</b>	09 November 2015, 28 June 2016
<b>Subject:</b>	ECB-NCA relations

---

### Informal interview with B (executive summary)

- **B** is an ECB-based supervisory expert responsible for common procedures desk, LSI reporting. **B** was also involved in number of drafting teams on specific joint supervisory standards. Before, **B** worked in private sector.
- From **B** experience, development of common supervisory policies is a complicated process. NCAs usually want to formulate common standards in such way which does not impose additional burden on their work or the position of supervised entities. Not all NCA are interested in participating in working groups, as it is not obligatory. Usually a call of interest for participation precedes the creation of a working group.
- **B** distinguishes between “sensitive” and “technical” policy topics. In order to foster good relations with NCAs, the ECB usually does not intend to push for policy work in controversial areas (for example takeover procedures). Importantly, in cases in which NCA have already well-developed policies, they intend to ‘upload’ their national approaches during the drafting stage. Three NCAs can be considered as active and “challenging”: DE, AT and IT. They are also the biggest DG-MS<sub>3</sub> “clients” given the size of their respective LSI sectors. The development of joint standards is the easiest in new areas (resulting from enhanced supervisory legislation) like for example the area of supervisory planning. In **B**’s opinion, in this area it was relatively easy to develop common policy stance because the NCA did not formulate strong supervisory approaches in this regard. Therefore, “carte blanche” on NCA side facilitates reaching the agreement and also enhances the leading role of the ECB in working groups.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	C
<b>Interviewee profile</b>	Economist
<b>Date:</b>	29 January 2016, 21 October 2016
<b>Subject:</b>	<b>Development of common supervisory policies/standards</b>

---

[Informal interview with C \(executive summary\)](#)

- C is an ECB-based supervisory expert and an ECB member of JST of a significant Spanish institution. C is involved in daily tasks of JST, including the conduct of the Supervisory Review and Examination Process (SREP) which is its core supervisory activity. C considers the role of ECB-based part of her JST crucial for the proper functioning of ECB direct supervision. In C's opinion, ECB-based supervisors are doing the supervisory legwork and are in the lead of the process. In the C's JST, NCA-based supervisors have limited influence and their work is steered from the ECB. For instance, SREP is carried out centrally and its different components (Risk Assessment System, governance, ICAAP, ILAAP) are examined by the ECB supervisors.
- As such, C did not observe any conflicts regarding such distribution of tasks within its JST. NCA-based supervisors do not seem to have objections as for their limited influence. There have been no issues between JST coordinator (ECB based) and national sub coordinator (NCA based) concerning their competence and position in the JST. However, C heard that not all JSTs work in the same way as her. In some of them, especially responsible for global significant institutions, the role of NCAs is more prominent given international and multi-jurisdictional scope of their activities. Also, conflicts between JST coordinator and NCA sub coordinators occur more frequently. Based on C's experience, the ECB could be able to supervise significant institutions without NCA assistance.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	D
<b>Interviewee profile</b>	Financial
<b>Date(s):</b>	31 August 2016
<b>Duration (total)</b>	ca. 45 minutes
<b>Subject:</b>	<b>DGMSIV supervisory networks</b>

---

### Informal interview with D (executive summary)

- D is an ECB-based supervisory expert working on policy issues. D perceives the SSM as a supervisory system governed by multiple networks consisting of the ECB and NCA-based supervisors. Network governance forms as a very important part of the SSM since all SSM policies are prepared and discussed by networks. It allows integrating NCAs into the functioning of the SSM and engaging them into common projects. These channels allow NCAs to provide important contribution to the SSM.
- Two types of supervisory networks can be distinguished within the SSM: Joint Supervisory Teams (JSTs) responsible for ECB direct supervision and horizontal policy networks in DGMS<sub>4</sub>. As such each horizontal division has at least one network, for example SSM Risk Analysis has two. In total, there are 13 networks. Furthermore, DG-MSIII has two networks for LSI supervision but D is not involved in their operations. As such, these networks are not formalized. There is no mandate, or legal basis for their functioning. Therefore, they wield no formal supervisory powers. Such an arrangement is necessary to avoid treating them as ESCB-committees of ECB monetary policy arm, which decisions must be accepted by the Governing Council.
- The scope of activities of supervisory networks depends on the specificities of individual horizontal divisions and personalities of their heads. There exist vibrant networks which meet regularly in plenary sessions (like Authorisation Network or Methodology and Standards Development Network). On the other hand, there are some networks which function more as means to endorse head of division's priorities and NCA are not necessarily consulted in this regard. Some national representatives participate in more than one supervisory network. This applies especially to smaller and less staffed NCAs which have to economize their resources. D is generally satisfied with the functioning of supervisory networks and finds them as an important channel to forge common supervisory culture over time.



<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	E
<b>Interviewee profile</b>	Legal
<b>Date(s):</b>	19 October 2016
<b>Duration (total)</b>	ca. 45 minutes
<b>Subject:</b>	<b>AUT network and national divergences in fit and proper</b>

---

### Informal interview with E (executive summary)

- E is an ECB-based supervisor working on matters related to authorizations and approvals. Regarding the F&P policies, although the ECB formulated various policy stances of different aspects of F&P assessments for significant institutions, significant divergences at national level remain. There are mainly caused by applicable legal frameworks.
- There exist jurisdictions, in which ex-ante F&P (BE, FR) assessment is necessary (that is before a person assumes its function, conditionality). Other jurisdictions follow ex post assessment (F&P can be carried out after the appointment according to applicable deadlines). These two different ways of F&P significantly complicate F&P supervision for significant institutions. Furthermore, there exist jurisdictions (LT, BE, IE, MT), in which key function holders in addition to board members (head of compliance, risk departments) also have to be assessed against F&P requirements. As far as F&P assessment techniques are concerned, in some jurisdictions interviews are used (NL, BE, IE, ES) whereas some jurisdictions do not require this step.
- With regard to ECB-NCA relations, the cooperation according to E is well structured. In this supervisory field, mutual trust and informal communication are crucial given tight deadlines for common procedures set in the SSMFR. Therefore, it is of utmost importance that NCA notify and work together with ECB experts already at the very stage of dossier and do not wait with submission until the very last moment.
- National supervisors are also very important to the ECB from the other reason. NCA authorisation experts provide their experience and know-how of F&P. Example: through Authorisation network NCA experts took active participation in development of common policy stances for SIs. To sum up, according to E there are three key values which should always guide ECB-NCA relation with regard to F&P: transparency of decision-making, communication and information sharing.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	F
<b>Interviewee profile</b>	Statistics
<b>Date(s):</b>	25 October 2016
<b>Duration (total)</b>	ca. 30 minutes
<b>Subject:</b>	<b>JST functioning</b>

---

### Informal interview with F (executive summary)

- F is an ECB-based supervisor working in a JST responsible for the supervision of a medium-sized SI. Before joining the SSM, F worked in other ECB business line (statistics). F perceives the SSM as a great step forward in building an impartial supervisory approach. In JSTs (at least the one of F), there is no distinction between EU and national officials – all work hand in hand while supervising banks. For instance, he covers one on risks in SREP assessment. Another of F's colleagues, based in BaFin, covers other risk. Later on, their assessment was compiled and feed into the final SREP decision. There is no double checking of work done by NCA colleagues.
- However, smooth ECB-NCA cooperation is not always the case. In other JSTs problems sometimes occur. Much of this is connected to the stance of senior national officials who are not willing to change their supervisory/managerial approaches. It is hard for some of them to accept authority of JST coordinator, especially when he is younger and spent fewer years in banking supervision industry.
- In this context, JST institutional design is somewhat suboptimal. JST coordinators can appraise neither national sub coordinators nor national supervisors forming JSTs. Although they form significant part of a JST, their reporting lines are national. This complicates the work in case differences of opinion occur. The JST coordinator has weak formal instruments to enforce its supervisory stance on sub-coordinators. Although there is recourse to instructions, they are not a preferred solution given institutional and personal sensitivities. Instead, informal ways of persuasion are used more often; however they may involve escalation of an issue and involving more actors so that the matter in the end becomes political.
- Therefore, F sees a great potential in network interaction and is of the opinion that the SSM needs more time to development common supervisory culture. For this reason, younger generation of supervisors should be hired which is not affected by national particularities. This however does not always happen in the SSM and national key in appointments/promotions continues to play significant role.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	G
<b>Interviewee profile</b>	Economist
<b>Date(s):</b>	10 March 2017
<b>Duration (total)</b>	ca. 45 minutes
<b>Subject:</b>	<b>ECB-DNB relations</b>

---

### Informal interview with G (executive summary)

#### *Supervision of significant institutions*

- G is a high-level supervisor at DNB. G is of the opinion that it may take years to ensure efficiency of JSTs' functioning. At the moment, there is still a room for improvement to make them truly multinational teams. First of all the decision-making in the JSTs is too remote and centralized. The coordinator always resides in Frankfurt, when if the JST team is small and originating from one NCA only. The second issue concerns the loyalty in the JSTs. There is a problem with adequate incentives for both national and supranational supervisors. This is related to promotion opportunities, which are either purely national or supranational. Above all, being a supervisor pertaining to a JST means that you will work at least 5 years in the same place. More staff exchanges and intra SSM mobility could address the issue, but in fact there is a number of obstacles including legal constraints related to taxation of seconded staff. In G's opinion, the ECB is already doing much in this regard, but still there is a need for more opportunities and mobility.

#### *Split between SI and LSI supervision*

- Essentially, it does not constitute a problem however there is a problem with the use of the proportionality concepts (i.a. proportional application of SSM supervisory standards to LSIs) which sometimes is used in order to shield national particularities. One of such field in the conduct of SREP on smaller banks. There has been reluctance from some NCAs to require a fully-fledged SREP for small banks. In this regard, the need for a proportional approach was highly advocated due to possible costs which this incurs. In fact, application of full SREP (4 pillars) could indeed reveal that some domestic LSI banking sectors are not as healthy as it is claimed. So far, the fully fledged SREP is required only vis-à-vis high priority LSI. DNB, on the contrary, conducts SREP on all LSIs.

#### *Supervision of less significant institutions*

- When answering to the question whether there is more enforcement or managerialism with regard to ECB's oversight regime, G considers that the compliance is promoted by managerialism done under shadow of hierarchy. G mentions the possibility of taking over the LSI supervision as the main 'stick' mechanism (nuclear option) which motivates the NCAs to comply with the ECB's preferences. When discussing whether the SMN and WG-HSS are fora, on which G would directly share his day-to-day supervisory issues, G said that we are not there yet. He also notes however that these fora have considerably evolved, and now there is much more active participation and exchange of views among the NCAs. The main obstacle for SMN/WG-HSS to becoming a truly active communication platform are language issues however political salience of banking supervision also plays role. G considers the development of JSS by DG-MSIII as a step towards a good direction, however agreeing only on 'common denominator' is not enough. G thinks that the ECB should develop its policies in a bigger isolation from NCAs so they are not allowed the possibility to water the product down already in the preparatory stage. Another issue is demanding ECB's reporting requirements. For instance, DNB has to dedicate 2 FTEs to meet the ECB's requests in this regard. Also discrepancies in definitional issues across the NCAs, and between the ECB and NCAs make reporting more complicated. The main DNB contribution to SSM is: pragmatism and supervisory practices related to RAS/ICAAP and Pillar 2 Capital requirements.

#### *Other/general issues*

- G sees creation of on-site inspection function, reporting and Supervisory Manual as the main lessons learnt from DNB participation in the SSM. Interestingly, DNB applies Supervisory Manual also (directly) to the LSI supervision. Furthermore, the Manual constitutes a helpful educational tool especially for DNB newcomers. In particular, it gives to DNB know-how of methodologies and procedures. G describes the SSM supervisory approach as legalistic and still judgment-based. Indeed, there is a lot of room for maneuver regarding individual decisions on SIs which shall follow "holistic perspective". This gives to JSTs a lot of possibilities for adjustment. On policy work, G notes that there should be less drafting teams consisting of NCA experts and more ECB direct involvement. Ideally, if there is also an equivalent of SMN for SIs. G says that all supervisory issues shall not be escalated to the SB. Also DG-MSIV could work better and the ECB's intra-DG cooperation and information flows.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	H
<b>Interviewee profile</b>	Legal
<b>Date(s):</b>	10 October 2016
<b>Duration (total)</b>	ca. 30 minutes
<b>Subject:</b>	<b>SSM functioning</b>

---

### Informal interview with H (executive summary)

- H is an ECB-based supervisor who worked closely with ECB representatives in the Supervisory Board. From H observations, the SB operations represent tensions between achieving common supervisory objectives and dealing with national supervisory bias. Yet, the SB is on the good way to harmonize supervisory practices and reduce national divergence. The example of this can be found in the recent work on options and national discretions (ONDs). At the time of SSM creation, ONDs were highly politically salient issues and initially there was reluctance among the MS to formulate common supervisory policy on these aspects.
- However over time (January 2015), national reps of the BU SM have increasingly seen a need to have a common supervisory approach on ONDs to banks directly supervised by the ECB. As a consequence, high-level group was established and a set of policy proposals covering the vast majority of O&Ds available in Union law was formulated. H notes that trust has played a very significant role, and that the approach and personality of Mr Ignazio Angeloni who coordinated the project helped to get NCAs on board.
- As for the functioning of the SB, H is aware of current legal and institutional limitations. The SB receives a huge number of different requests coming from supervisory DGs and it is very important that it is able to prioritize them. Here, the role of SB Secretariat is very helpful which shall serve as a filter.
- However, another aspect which could also improve the smooth functioning of the SB would be to divide different supervisory portfolios among the ECB representatives. At the moment, the SB seems to be indeed very centralized around the Chair whose management style is more of centralizing rather than sharing supervisory dossier. H explains this approach by the fact that Ms Nouy is the first chair of the SB and most likely is willing to leave her impact on early functioning of the SB. It might be that over time there will be more distribution of portfolios among four ECB representatives so that their role is more managerial than advisory.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	I
<b>Interviewee profile</b>	Financial
<b>Duration</b>	30 minutes
<b>Date:</b>	13 August, 21 October 2016
<b>Subject:</b>	<b>Development of O&amp;D policies for SIs and LSIs</b>

---

### Informal interview with I (executive summary)

- I is an ECB-based supervisory expert who worked on the harmonisation of CRR/CRDIV options and national discretions. I participated in many policy-related work of the ECB, including development of common policy stances on different options and national discretions available in Union law. Regarding OND harmonisation project for SIs, I observed active participation of national representatives in a specifically created high level group. The creation of the HLG was endorsed by the Supervisory Board in May 2015. All NCAs delegated their representatives to this group. The NCA representatives were supervisory experts specialized in CRR/CRDIV topics. That is why, according to I, a common technical language was found easily between them and there has been a productive and fruitful discussion. Yet, according to I, not every NCA took actively part in the drafting: some of the NCAs were more vocal (DE, IT, ES) in presenting their stances whereas the other (MT, LU, CY, LT, LV, EE) less.
- I noted that there were many planetary meetings of the HLG. The main concern of NCA representatives was not the issue of reducing individual national discretion, but to make sure that everybody will follow a common stance (no free-riding).
- The outcome of the HLG was however not endorsed by the Supervisory Board in its entirety due to sensitiveness of some OND. Therefore, the final outcome differed from the original proposal and that is why HLG was created. It was also decided that the policy work on OND would be proportionally extended to LSIs in the future.
- Regarding OND harmonisation project for LSI, I noted that it was an ongoing project and public consultation regarding LSI policy package were about to be launched. In this case, no HLG was created and the policy work was conducted by Senior Management Network consisting of NCA representatives not necessarily specialized in the OND topics. This is due to the fact that the majority of technical issues were addressed at the HLG dedicated to SIs. However, as I stated, still some NCAs sent their comments also regarding OND policies on LSIs (DE, IT).

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	J
<b>Interviewee profile</b>	Economist
<b>Date(s):</b>	09 November 2016
<b>Duration (total)</b>	ca. 90 minutes
<b>Subject:</b>	<b>EBA policy work</b>

---

### Informal interview with J (executive summary)

- J is an EBA-based policy expert. Prior to 2011 J worked for CEBS. J noted that the EBA is only supervisory authority in the EU which was assigned EU-wide supervisory convergence mandate. EBA's primary tools to drive supervisory convergence rely on peer reviews, trainings and comply-or-explain mechanism. Recently, an additional instrument has been developed – that is bilateral EBA staff visits to CAs.
- As noted by J, **EBA Review Panel** is the main internal body responsible for EBA convergence related activities. Under Review Panel's coordination, EBA experts have developed various benchmarks and indicators to assess progress in implementation and compliance of CAs with EBA policy products, notably Guidelines. As regards the process of policies drafting, two ways can be distinguished: 'Push-model' and 'Pull-model'
- The Push model resembles top-down approach. In this model, the EBA is in the lead whereas competent authorities are more like 'clients' of EBA's products. Notably, policies on supervisory colleges, Pillar 2, Stress Tests were developed in this way. On the opposite, there is also 'pull-model', in which these are CAs provide more expertise and resources to common work. In this model, policies related to investment firms are developed.
- As such, there is no standard way how the drafting teams for development of supervisory policies are set-up, also in terms of composition. It is rather done on case-by-case basis. However, for the reasons of efficiency J highlighted that it is better to have smaller groups consisting of reps from a subset CAs rather than from all of them. On the other hand, there is an issue whether non-participating CAs have capacities to implement the policy products developed. That is why J sees the EBA's role also in capacity-building at national level. Regarding the organization of policy work at the EBA, there exist permanent Standing Committee on Oversight and Practices (SCOP) which advises the Board of Supervisors (BSR) on convergence agenda. For the development of specific policies, usually ad-hoc drafting teams or task forces are created under auspices of SCOP.
- For the policy work on Stress Test GLs, there is a drafting team consisting of 15 national reps and the ECB. It is currently working on the amendment of ST GLs and is expected to deliver them in

Q22017. Within the team, there are more and less active national reps (big CAs, like DE, IT, FR, NL however active participation also depends on size, personality and expertise in field). The majority of them have economic background. The work has been divided in clusters and each national rep (group of national reps) are working on specific aspect of GLs. However, the key work takes place during plenary meeting, either at the EBA HQs or CAs.

- Regarding the policy work on supervisory colleges, there was a special work stream established called 'Home-Host working group'. It was responsible for developing RTS concerning the functioning of colleges as well as for specific policy stances. It was also taking care of Colleges Action Plans. It consisted of national reps originating from 24 CAs. To assess the implementation of College Action Plans and national compliance, the EBA experts developed internal criteria for the assessment of college functioning.
- J was not able to comment on Fit and Proper policies since was not involved in their drafting. However, J forwarded the names of EBA experts involved and recommended to get in touch with them.



<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	K
<b>Interviewee profile</b>	Supervision
<b>Date(s):</b>	17 January 2016
<b>Duration (total)</b>	ca. 30 minutes
<b>Subject:</b>	<b>SSM functioning from an NCA perspective</b>

---

### Informal interview with K (executive summary)

- K is a supervisor responsible for less significant banks based at Banca d'Italia. From K perspective, the creation of the SSM was a huge game-changer for Banca d'Italia, also in terms of workload.
- The First Comprehensive Assessment exercise was very resource-consuming since the requests coming from the ECB were very demanding. Also, the issue was new methodologies used by the ECB, for instance for NPL classification. Sometimes there differed a lot from the ones used formerly by Banca D'Italia according to its *Bolletino di Vigilanza* (national supervisory manual). Therefore, the specificities of NPEs could not also be properly captured given tighter ECB requirement. That is why IT banks were not among top ones in Comprehensive Assessment results.
- Another issue coming from the SSM creation is unequal split of supervisory work at Bdl. Notably, supervisors working in JSTs have noticed that their workload has increased whereas for supervisors who working in LSI supervision it remained the same. The increase in work for NCA supervisors working in JSTs comes from the ECB's more intrusive approach and various data requests, not always necessary.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee – encrypted</b>	L
<b>Interviewee profile</b>	Economist
<b>Date(s):</b>	14 November 2016
<b>Duration (total)</b>	ca. 30 minutes
<b>Subject:</b>	<b>SSM functioning from an NCA perspective</b>

---

#### Informal interview with L (executive summary)

- L is a supervisor working in the SSM Coordination of ACPR. Before joining ACPR's banking branch, he worked for ACPR's insurance supervision unit. From L early experience, the SSM has positive impact on ACPR and the ECB contributes a lot to the quality of banking supervision in the Euro Area. ACPR does not treat the ECB as a competitor. L notes that on my occasions the ECB decisions on French banks have been adjusted to include ACPR comments (but it is not always the case).
- The L's division works closely with the SB Secretariat from which it gets all supervisory dossiers which are subsequently forwarded to competent business lines. Also L's division interacts with SSM coordination divisions from other NCAs. For this purpose, a network of experts has been created and is informally chaired by high-level reps of the SB Secretariat.
- L is content with the current information-sharing arrangements in the SSM, however L would also welcome more transitional interactions and staff exchanges. L considers supervisory knowledge transfer and learning as crucial to build a common supervisory culture.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee – encrypted</b>	M
<b>Interviewee profile</b>	Economist
<b>Date(s):</b>	8 November 2016
<b>Duration (total)</b>	ca. 20 minutes
<b>Subject:</b>	<b>Single Market from a non-participating NCA perspective</b>

---

### Informal interview with M (executive summary)

- M is a policy expert based at the Bank of England (BoE). Before M worked for the EBA. According to M, the EBA does not have much to offer to BoE since it has well-developed supervisory policy-making capacities and well-defined supervisory by the PRA. Some of EBA products were however welcome by BoE which includes EBA guidelines on Supervisory Evaluation and Review Process (SREP). M participated in drafting team. From M's observations, the first stage of GLs drafting went slow due to weak chairmanship of one of NCA resp. However, they EBA high level officials took after the lead, the works on SREP GLs accelerated. The drafting was coordinated by SCOP (EBA Standing Committee on Oversight and Policies) Notably, DE and AT were very much involved in ICAAP rules.
- Another field of EBA's work which was of interest to BoE was standards on recovery planning (BRRD). This product was heavily based on BoE approach. All in all, M notes some convergence pressured coming to the EBA but in a rather informal way. Since British banking sectors is not very exposed to continental Europe, neither is the BoE the primary recipient of EBA's work on the functioning of supervisory colleges in the EU. As for BoE-SSM relations, M notes that national interest of EA MS now play lesser role than before. However, for M, the overall SSM structure is too legal and bureaucratic.

<b>Interviewer</b>	Jakub Gren, PhD student, University of Luxembourg
<b>Interviewee - encrypted</b>	N
<b>Interviewee profile</b>	Legal
<b>Date(s):</b>	03 March 2017
<b>Duration (total)</b>	ca. 90 minutes
<b>Subject:</b>	<b>ECB-NBB relations</b>

---

### Informal interview with N (executive summary)

- N is a policy expert working in NBB. N is of the opinion that my perspective on the SSM distinguishing enforcement (legally binding) and management (non-binding) is indeed an interesting one. However he wonders why I did not cover the Supervisory Board as a platform of Principal-Agent cooperation. I explained that it is a formal rather than informal body, and thus does not likely to fit well into managerialism and N understood.
- On the enforcement argument, N highlights the importance of the Framework Regulation which fills-in the agency contract. In particular, N lists the concept of Joint Supervisory Teams which was not foreseen by the Council's SSM Regulation, but was a choice of the ECB and NCAs picked from other (less integrative) alternatives. N also recommends distinguishing between the less intrusive (operational) powers of instruction assigned to JST Coordinator, and formal ECB instructions to NCAs.
- As for JSTs, N agrees that they may be treated as national actors because of their predominantly NCA-based composition. However, N also notes that in the case of larger banks (ex. BNP Paribas Fortis) national supervisors are more likely to embrace a supranational perspective since NCA sub-coordinators are often assigned responsibilities thematically, and not according to national jurisdictions (i.a. a sub coordinator from one NCAs may be in charge of assessing a specific risk for the whole banking group). N notes that there were (and sometimes still) are some conflicts between the JST coordinator and sub coordinators. N was aware of one ECB instruction to NBB in this regard. However, the conflicts in general tend to appear more between the ECB and NCA senior management to whom the coordinator and sub-coordinator respectively report.
- N mentions SSM-wide assessment of JST performance. JST staff feedback on their coordinators did not deviate much from the coordinators' self-assessment and was positive on aggregated SSM wide basis. Interestingly, JST coordinators scores lower notes

in the assessment conducted by their respective ECB managers (heads of divisions/DGs). As N also notes, there exists many challenges in ensuring the consistency across JSTs on the ECB side. Often even JST coordinators are confused as to the benchmarking carried out by the DG-MSIV which has a lot of flexibility in this regard. For instance, there will be a new updated SREP methodology.

- Later on this year, the ECB will issue an act further delegating operational tasks to JSTs. This means that the decision-making will be less centralized and not each supervisory issues will be escalated to the Supervisory Board. In this context, JSTs will (and indirectly NCAs) become even more powerful with regard to day-to-day supervision. In particular, when it comes to preparatory work. However, there will be mechanisms established to carry out random checks. In this context, ECB specialized horizontal services will play more prominent roles, particular Supervisory Quality Assurance Division. There is also a need to better use NCA horizontal functions, informal networks is too little. Importantly, networks do not report to the Supervisory Board but only to the head of respective horizontal division.
- N considers templates provided in the annex to the Supervisory Manual an important ex ante mechanisms. However he also notes that the ECB reluctantly shares the templates with non-JST business lines. As a non-JST supervisor, N would prefer to have access to them but understands that the ECB prefers to maintain flexibility in this regard and avoid that the NCAs use these templates “against the ECB in the future”.
- While discussing the benefits of the SSM, N points out the reduction of the possibility of supervisory capture and more necessary playing field. However in the end, there is a trade-off between one-size-fits-all approach and flexibility.
- Another benefit: increasing staff at NCA level. The SSM gives to NCAs argument to request more funding. In this context, N notes that for the ECB Banking Supervision costs do not matter (there is no limit) – see the contacts the consultancies get as subcontractors (comprehensive assessment or upcoming internal models review). NBB was always more cautious with the costs.
- For N, the capital requirements to banks should be governed by a harmonized approach. He notes that BE traditionally imposed high capital requirements on its banks and as the result of the SSM the requirement has been decreased. Also, the new ECB’s Pillar 2 add-ons approach, consisting of Pillar 2 Requirements (binding) and Pillar 2 Guidance (non-

binding) is considered as further relaxation of capital requirements to SSM banks. N considers NBB tough approach to capital requirements being the main NBB's contribution to the SSM.

- Other areas of one-size-fits all: O&Ds, however there is a problem with O&S assigned to legislator. The NBB could not follow the ECB requirements to go further in this regard, since it is also accountable to the parliament and it is its competent to exercise 'regulatory O&Ds'.
- More flexibility: macro-prudential tools. In many respects the ECB micro powers overlaps with the NCA macro competences. NBB active participation in networks: cannot equally actively participate in all work streams. Focus: SREP, O&Ds, Fit and Proper policies (strong involvement in various drafting teams). Well-functioning networks: SMN, COI. Room for improvement: MSD, especially when it comes to cooperation on the Supervisory Manual amendments.
- N also notes that from time to time the policy products developed by networks were not endorsed further due to different opinion of DG-MSIV top management and also the Chair/Vice chair. Thus, they are not always final. Necessary requirements to foster SSM supervisory culture: more information exchange, transparency and streamlining of processes.
- The EBA –NBB relations were not covered since they are out of N's assigned tasks. However, he was of the opinion that it is a good choice not to cover the EBA in my study due to its uncertain future and the fact that it is not a direct supervisor.