

SSM and SRB accountability at European level: What room for improvements?

Banking Union Scrutiny



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Abstract

This paper discusses the accountability mechanisms for the SSM and SRM. Both mechanisms' frameworks have the potential to provide strong political, administrative and legal accountability, but also present shortcomings at the level of practice, coordination, organisation and transparency. The paper identifies those and proposes some ways forward.

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LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
AP	Appeal Panel
BRRD	Bank Recovery and Resolution Directive
CJEU	Court of Justice of the European Union
EBA	European Banking Authority
ECA	European Court of Auditors
ECB	European Central Bank
EIOPA	European Insurance and Occupational Pensions Authority
EP	European Parliament
ESCB	European System of Central Banks
IIA	Interinstitutional Agreement
MiFID	Markets in Financial Instruments Directive
MoU	Memorandum of Understanding
NCA	National Competent (Supervisory) Authority
NRA	National Resolution Authority
OJ	Official Journal
SRB	Single Resolution Board
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

Background

The Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) constitute recent, yet already remarkable, pieces of institutional architecture at the core of the Banking Union, which comprise of both national competent supervisory authorities (NCAs) and national resolution authorities (NRAs) combined with the role of an EU institution, the European Central Bank (ECB) and an EU agency, the Single Resolution Board (SRB). The vast array of powers bestowed upon the two entities, the complexity of coordination, and the fact that decision-making over some of the more sensitive issues in financial policy has been allocated to the EU, make accountability a key requisite for the system's success. Some of the provisions applicable provide a solid foundation for a system of strong accountability. We find however that there may be room for some improvements to effectively counterbalance the powers given to the SSM and the SRB and to increase their accountability at the European level without undermining their independence and within the boundaries of the current legal framework.

In this report we use a relatively accepted taxonomy for accountability that differentiates between “political” accountability, “administrative” (including financial) accountability and “legal” (judicial and quasi-judicial) accountability. The accountability framework for the SSM and SRM is set forth in each mechanism's foundational rules, but these are supplemented by specific Interinstitutional Agreements (IIAs), and need to be put in relation with the general provisions regulating some of the institutions (European Court of Auditors (ECA) or European Ombudsman) or agencies (European Banking Authority (EBA), in particular with its EBA Review Panel, established with the aim to develop the methodological framework for peer reviews and conduct them on a regular basis) that perform, in different ways and with different purviews, an accountability function.

In general terms, the specific SSM/SRM rules (including IIAs) provide ample opportunity for the exercise of political accountability over SSM and SRM tasks and highlight the role of administrative accountability bodies (ECA) or at least do not exclude SSM/SRM from the purview of other institutions (EBA, Ombudsman). Those same rules bolster the judicial review performed by EU courts (the Court of Justice of the European Union (CJEU) and the General Court) by accompanying it with newly created internal review bodies, the Administrative Board of Review (ABoR) for ECB-SSM decisions, and the Appeal Panel (AP) for the SRM. Rules on transparency and access to documents supplement these mechanisms, and help individual citizens get involved in the accountability process. Having said that, the assessment suggests some refinements.

Main findings

The system for political accountability is potentially solid, but whether it is so in reality depends on the proactivity of the European Parliament (EP) and national parliaments in framing the debate, and raising the issues and asking for the information they consider relevant for the European citizens, rather than depending exclusively on the ECB/SRB to make their own selection. Administrative accountability can be performed, in different shades and with a different focus, by several bodies (ECA, EBA, Ombudsman), but there is no clear framework for the coordination between them, nor with political bodies, despite their role could be instrumental to facilitate information production and frame a better informed debate. Judicial review by EU courts is thorough and independent, but the question remains whether a system designed for simpler times can cope with the unprecedented complexity and intensity of the SSM and SRM confronted with new challenges in the interpretation and application of both European and domestic law; a new system in which robust legal accountability (and effective judicial protection for supervised entities and all others directly and individually concerned) is a necessary element of the

overall legitimacy of the system. Such uncertainty on the challenges posed by the SSM and SRM to the European courts is not aided by the (only) optional (and therefore occasional) review role allocated to ABoR and by the limited remit granted to the AP (whose review is possible only with regard to a closed list of SRB decisions), among other design complexities. Finally, the access to documents' framework provides a piecemeal approach, based on specific rules, exceptions, and ad hoc considerations, not a homogeneous system, based on a single unifying principle of transparency, which further complicates matters. In particular, the specific, and restrictive regime of access to documents by the ECB can give rise to problems of implementation, since the ECB sits atop a coordinated system (the SSM) connected to another system (SRM) which involves national authorities and officials that may be bound by their national constitutions to a more exacting duty of transparency (especially in those countries where it is framed as a fundamental right). Convergence of the ECB regime on access to documents with the general principles enshrined in the Regulation No. 1049/2001 should thus be desirable. Moreover, experience shows that, due to the scope of Regulation No. 1049/2001 (as interpreted by settled case-law of the CJEU), some relevant information requested to an authority may result not accessible because this is not included in any document or because the requested document is not available at the authority which is the addressee of the request for access to document under Regulation No. 1049/2001, although it may be well available at other authorities participating to the SSM or SRM.

Policy recommendations

These shortcomings are the basis for our suggestions for improvement, which pivot around the idea of better bridging political, administrative and legal accountability by enhancing:

- proactivity in political accountability, also with a more intrusive and regular political control (albeit fully respectful of the ECB's full independence from any undue political influence as requested by recital 75 and Article 19 of the SSM regulation) by the Chair and Vice-chair of the European Parliament ECON Committee (at a selected subgroup of the Banking Union Working Group (BUWG) under appropriate confidentiality (as a step forward along the lines of the confidential meetings already provided for in the interinstitutional agreements);
- more coordination in the "multi-polar" administrative accountability, with enhanced recourse from the BUWG to technical opinions of the EBA as a source of expert judgment instrumental to political control;
- better coordination with judicial, quasi-judicial and administrative review, to regularly channel and incorporate into the political and administrative accountability framework also the most controversial issues, which give rise to litigation, and the responses offered to them by courts or administrative review bodies;
- and more transparency across the board.

1. KEY FINDINGS

- Accountability is an important factor to ensure the legitimacy of institutions. In case of new institutional frameworks, such as SSM and SRM, it is even more important.
- There is no coordinated accountability framework for SSM and SRM. SSM/SRM accountability provisions focus on political accountability with some mention to ECA (SSM rules).
- Interinstitutional Agreements (IIA) develop political accountability in detail. They provide a framework that offers numerous opportunities for the EU Parliament to control SSM/SRM tasks.
- There is less emphasis on how the information necessary to exercise control can be produced, beyond the annual reports and the answers to questions.
- The role of national parliaments is expressly acknowledged as important for the SRM, much less so in the SSM, and there is no express provision in either frameworks for dialogue or coordination between EP and national parliaments.
- Administrative accountability is regulated in provisions scattered across the TFEU, ESCB/ECB Protocol, SSM/SRM and EBA regulations and Ombudsman rules.
- There is an unfortunate lack of connection between political and administrative accountability frameworks. There is wide room for improvements in the way ECA's and EBA's role can aid a more proactive EU Parliament role of political accountability.
- Legal accountability by CJEU/General Court and domestic courts is based on a system which run the risk of being overburdened by (and therefore of being late in responding to) the amount of complex litigation that SSM and SRM has already generated and promise to further generate in the future. Review by administrative appeal bodies offers some advantages, as a filter and as a first, timely, legality check, but with their optional and occasional role (ABoR) or limited remit (AP) and other design constraints, they cannot entirely bridge the gap. Also, they are cannot engage in dialogue with EU courts.
- Better coordination of the EP with European courts and quasi-judicial and administrative review, in a way fully respectful of their independence, would regularly channel and incorporate into the political and administrative accountability framework also the most controversial issues, which give rise to litigation, and the responses offered to them by courts or administrative review bodies.

2. THE CONTEXT OF ACCOUNTABILITY FOR SSM AND SRM

2.1. Accountability as a democratic, financial and judicial phenomenon

Accountability is used in different areas of social science,¹ such as politics, psychology, sociology, economics and law, as well as in different senses, as a «virtue», or aspirational standard to assess the behaviour of public organisations (mainly in the United States), and as a «device», or institutional arrangements by which an agent is monitored by another agent.² The concept of accountability used in this paper is closer to this second, narrower version, builds on the Basel Committee on Banking Supervision description of accountability arrangements (and their bifurcation into “internal” and “external” accountability)³ and will concentrate on the legal mechanisms of the Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) founding regulations and related norms that have as their main aim the control over the European Central Bank (ECB) Supervisory Board, and the Single Resolution Board, as the main bodies responsible for each mechanism, generally through a dialogue between them and the bodies that exercise the controls.⁴

Such controls may, in turn, be of different nature, and therefore following a relatively accepted classification we differentiate between mechanisms of (2.1.) “political accountability”, where control is vested in bodies with democratic legitimacy, such as the European Parliament and the Council, or national parliaments (2.2.), mechanisms of “administrative accountability”, where control is exercised by the European Court of Auditors (ECA), the European Banking Authority (EBA) and the European Ombudsman (2.3.), and mechanisms of legal accountability, where control is exercised by European courts, such as the Court of Justice of the European Union (CJEU) or the General Court or by national

¹ Robert D. Behn, *Rethinking Democratic Accountability*, (Washington, DC: Brookings Institution Press), 2001; Deirdre Curtin, Peter Mair; Yannis Papadopoulos (eds.), *Accountability and European Governance*, (London: Routledge), 2013.

² Mark Bovens “Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism”, *West European Politics* 33 (2010) 947-948.

³ Basel Committee on Banking Supervision, *Report on the impact and accountability of banking supervision*, Bank for International Settlements, July 2015, 2 and 25-34.

⁴ Gijsbert Ter Kuile; Laura Wissink; Willem Bovenschen “Tailor-Made Accountability within the Single Supervisory Mechanism” *Common Market Law Review* 52 (2015) 155-190. The literature on SSM and SRM accountability is increasingly large; compare at least, Adina Maricut-Akbik, “Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament”, *JCMS*, 2020, 1-16; René Smits, “Accountability of the European Central Bank”, *Ars Aequi*, January 2019; Diane Fromage, Renato Ibrido, “Accountability and democratic oversight in the European Banking Union”, in *The European Banking Union and the Role of Law*, ed. Gianni Lo Schiavo (Cheltenham, UK: Edward Elgar), 2019, 66-86; Paivi Leino-Sandberg, “Public access to ECB documents: are accountability, independence and effectiveness an impossible trinity?”, in *Building bridges: central banking law in an interconnected world*, ECB Legal Conference 2019, (Frankfurt am Main: ECB) 195-219; René Smits, “The ECB and the rule of law”, in *Building bridges: central banking law in an interconnected world*, ECB Legal Conference 2019, 350-383; Diane Fromage, “Guaranteeing the ECB’s democratic accountability in the post-Banking Union era: An ever more difficult task?”, *Maastricht Journal of European and Comparative Law* 26 (2019), p. 48; Fabian Amtenbrink, “The European Central Bank’s intricate independence versus accountability conundrum in the post-crisis governance framework”, *Maastricht Journal of European and Comparative Law* 26 (2019), 165-179; Phedon Nicolaides, “Accountability of the ECB’s Single Supervisory Mechanism: Evolving and Responsive”, *CERIM Online Paper Series*, Paper 10/2018; Nicolò Fraccaroli, Alessandro Giovannini, Jean-Francois Jamet, “The evolution of the ECB’s accountability practices during the crisis”, *ECB Economic Bulletin*, 5/2018, Fabian Amtenbrink, Menelaos Markakis, “Towards a meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central bank in the Single Supervisory Mechanism”, *ADEMU Working Paper Series*, 2017/081, December 2017; Chiara Zilioli, “The independence of the European Central bank and Its new Supervisory Competences, in *Independence and Legitimacy in the Institutional System of the European Union*, ed. Dominique Ritleng, (Oxford: Oxford University Press), 2016, 176. This is part of a wider, and less recent, strand of literature on the accountability of financial supervisors: compare Rosa Lastra and Heba Shams, “Public Accountability in the Financial Sector”, in *Regulating Financial Services and Markets in the XXIst Century*, eds. Rosa Lastra and Charles Goodhart, (Oxford: Hart Publishing), 2001, 165-188; Fabian Amtenbrink, Rosa Lastra, “Securing Democratic Accountability of Financial Regulatory Agencies – A theoretical Framework”, in *Mitigating Risk in the Context of Safety and Security – How Relevant is a Rational Approach?*, ed. Richard V. De Mulder, OMV. 2008 (accessible at www.researchgate.net); Robert J. Dijkstra, “Accountability of financial supervisory agencies: AN incentive approach”, in *Journal of Banking Regulation*, 11, 115-128 (2010). The seminal work in this context is Eva Hüpkens, Marc Quintyn, Michael W. Taylor, “The Accountability of Financial Sector Supervisors: Principles and Practice”, *IMF Working Paper WP/05/51*, 1-34. Accountability of the ECB for SSM-related tasks cannot be determined by simple transposition of the principles and practice of monetary policy: on this compare at least Fabian Amtenbrink, *The democratic Accountability of Central banks. A comparative Study of the European Central Bank*, (Oxford: Hart Publishing, 1999); Jakob de Haan, Sylvester C. W. Eijfinger, “The Democratic Accountability of the European Central Bank: A comment on Two- Fairy Tales” 38 (2000) *Journal of Common Market Studies* 393-407; Chiara Zilioli, Martin Selmayr, “The European Central Bank: An Independent Specialised Organisation of Community Law”, 37 (2000) *Common Market Law Review* 591; Fabian Amtenbrink, Kees van Duin, “The European Central bank before the European Parliament: Theory and Practice after Ten Years of Monetary Dialogue” 34 (2009) *European Law Review* 561-583.

courts (2.4.). Internal boards of review, such as the Administrative Board of Review (ABoR) at the ECB and the Appeal Panel at the SRB (AP) sit, with differences (between themselves), at the cusp between “administrative accountability” and “legal accountability”. As a separate tool instrumental to accountability, we also refer to citizens’ access to documents (2.5.), because transparency is complementary to any form of “informed accountability”, i.e. any expert understanding and informed judgment and control of the SSM and SRM activities and performances based upon relevant, timely and accurate information.⁵

2.2. Political-democratic accountability: SSM and SRM rules and Interinstitutional Arrangements (IIAs).

The framework for democratic accountability is grounded in the provisions in the SSM⁶ and SRM regulations.⁷

2.2.1. SSM Regulation.

Recital 55 of the SSM Regulation provides that any shift of supervisory powers from the Member State to the Union level must be balanced by appropriate transparency and accountability requirements. The ECB is therefore accountable for the exercise of those tasks towards the European Parliament and the Council as democratically legitimised institutions representing the citizens of the Union and the Member States.⁸ That includes regular reporting (subject to the relevant professional secrecy requirements) and responding to questions by the European Parliament in accordance with its Rules of Procedure, and by the euro Group in accordance with its procedures. In turn, recital 56 of the SSM Regulation requires the ECB to forward the reports, which it addresses to the European Parliament and to the Council, to the national parliaments of the participating Member States (and the national parliaments “should be able to address any observations or questions to the ECB on the performance of its supervisory tasks, to which the ECB may reply”). Recital 57 further clarifies that the provisions of the SSM Regulation are “without prejudice to the right of the European Parliament to set up a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of Union law pursuant to Article 226 TFEU or to the exercise of its functions of political control as laid down in the Treaties, including the right for the European Parliament to take a position or adopt a resolution on matters which it considers appropriate”.

These principles are duly reflected in Articles 19, 20 and 21 of the SSM Regulation.

It is worth noting that also Article 3 of Regulation (EU) No 1093/2010 (EBA Regulation), as amended, sets out that “the European Central Bank shall be accountable to the European Parliament and to the Council with regard to the exercise of the supervisory tasks conferred on it by Regulation (EU) No 1024/2013 in accordance with that Regulation”.

⁵ Recital 2 of Regulation 1049/2001 on access to documents, which applies Article 15(3) TFEU, provides that “openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system”

⁶ 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 (hereafter: SSM Regulation).

⁷ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (hereafter: SRM Regulation).

⁸ Article 10(2) TEU confirms that the Council is a democratically legitimised institution, by stating that “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments or the their citizens”

2.2.2. SRM Regulation

Similar accountability mechanisms are set out in the SRM Regulation, although there are also institutional differences between the SSM and the SRM because the Single Resolution Board, unlike the ECB Supervisory Board, is given the status of an EU agency, is established in accordance with Article 114 TFEU, is accountable also to the European Commission and is part of mechanism which “brings together the Board, the Council, the Commission and the resolution authorities of the participating Member States” (recital 120 of the SRM Regulation).

This is duly reflected in Articles 45, 46 and 47 of the SRM Regulation.

2.2.3. The interinstitutional arrangements.

The framework for democratic accountability also comprises the interinstitutional arrangements that develop some of these provisions.⁹ These include two Interinstitutional Agreements (IIAs) between the European Parliament with the ECB¹⁰ and the SRB,¹¹ as well as one Memorandum of Understanding (MoU) between the EU Council and the ECB.¹² There are two other MoUs, between the European Commission and the SRB, and between the ECB and the SRB,¹³ but they regulate cooperation and information exchange, not accountability in the proper sense, and thus fall outside the present paper.

2.2.4. Instruments of political accountability.

Based upon the foregoing sources, political-democratic accountability is exercised through the appointment of members of the ECB Supervisory Board and the SRB, the control by EU political-democratic bodies and the control by national parliaments.¹⁴

2.2.5. Appointment procedures

First, appointment procedures balance the needs of expertise and democratic accountability. Experience shows that the role of the European Parliament in the process is not marginal and the parliamentary hearings of shortlisted candidates, before appointment, are meaningful and challenging, to ensure that the candidates are truly fit for purpose. In particular, both the Chair and Vice-Chair of the ECB Supervisory Board and the full time members of the SRB are chosen (i) following an open selection procedure, on the basis of merit and experience¹⁵; (ii) including a proposal by the ECB (SSM) or the Commission (SRB), (iii) which is approved by the European Parliament, while (iv) the Council adopts the implementing decision by qualified majority (and both Parliament and Council are kept informed of the selection process¹⁶). One difference is that, for the SRB, in addition to the Chair

⁹ The conclusion of such IIAs is contemplated in Article 20 (9) SSM Regulation, and article 45 (8) SRM Regulation.

¹⁰ Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU) OJ L 320/1 30.11.2013.

¹¹ Interinstitutional agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism OJ L 339/58 24.12.2015.

¹² Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), signed 11 December 2013.

¹³ See <https://srb.europa.eu/en/content/cooperation>.

¹⁴ Ter Kuile, Wissink, Bovenschen “Tailor-Made Accountability”, 170.

¹⁵ Article 26 (3) SSM Regulation, article 56(4) SRM Regulation. The criteria show some differences, though. For the SSM, the Chair and Vice-Chair shall be chosen among “individuals of recognised standing and experience in banking and financial matters and who are not members of the Governing Council” while the Vice-Chair shall be chosen from among the members of the Executive Board of the ECB. For the SRM, “on the basis of merit, skills, knowledge of banking and financial matters, and of experience relevant to financial supervision, regulation as well as bank resolution” [...] and “on the basis of an open selection procedure, which shall respect the principles of gender balance, experience and qualification.”

¹⁶ Article 26 (3) SSM Regulation, article 46 (4) and (6) SRM Regulation.

and Vice-Chair the other four full-time members are also appointed following this procedure, something that does not occur for the ECB.¹⁷ The IIAs and MoU provide more details on the selection process. There are more similarities between the ECB's Agreement (with Parliament) and MoU (with Council), than with the Agreement between Parliament and SRB. The comparison of the appointment for ECB Supervisory Board Chair and Vice-Chair, and SRB full-time members is summarized in the following table:

Table 1: Appointment procedures

Item	MoU Council-ECB	IIA Parliament-ECB	IIA Parliament-SRB
Previous information	ECB to (i) publish selection criteria and provide Council information on (ii) details of selection procedure (2 weeks before vacancy notice), (iii) pool of applicants and (iv) short list (3 weeks before submitting proposal)	ECB to (i) publish selection criteria and provide EP committee information on (ii) details of selection procedure (2 weeks before vacancy notice), (iii) pool of applicants and (iv) short list (3 weeks before submitting proposal)	SRB to keep EP committee informed of vacancy notice, selection criteria, pool of applicants, screening method and shortlist.
Selection	No formal involvement	EP committee may submit questions Procedure: (i) ECB proposal; (ii) Public hearing in EP committee;	Commission provides shortlist, EP committee may consult SRB, and hold <i>in camera</i> hearings and pose written questions
Approval & appointment	Appointment decision under article 26(3) SSM Regulation	Approval with vote in committee and in plenary; No approval: ECB may re-initiate or rely on pool.	Commission proposes, EP committee holds public hearings and consults SRB; committee and plenary vote, informs SRB of decision
Removal	Council or Parliament initiative: communication under article 26(4) SSM Regulation, ECB to provide considerations in writing within 4 weeks.	ECB initiative: proposal to remove providing explanations + vote in committee + vote in plenary. Council or Parliament initiative: communication under article 26(4) SSM Regulation, ECB to provide considerations in writing within 4 weeks.	EP initiative: communication under 56(9) SRM Regulation to Commission and may also inform SRB.

Source: Own elaboration based on information contained in MoU and IIAs.

¹⁷ Articles 43 (1) (b) SRM Regulation, and 55 (4) and (5) SRM Regulation. For the ECB Supervisory Board, the ECB appoints 4 members, and each of the Member States appoints one member. Article 26 (1) and (5) SSM Regulation

The latest SSM appointment process concerned the Vice-Chair of the ECB Supervisory Board included an opening statement and a hearing¹⁸ tabled for 60 minutes,¹⁹ and a vote in committee.²⁰ The latest SRM appointment process for the Vice-Chair and 2 Board members included an exchange of views with the candidates selected. Each candidate was tabled for a meeting of around 40 minutes,²¹ which provided time for a thorough exchange of views; the reports, although favourable, deplored the fact that all the candidates were men;²² and the votes, although clearly favourable, showed some differences in voting patterns, showing more widespread support for some candidates than for others.²³

2.2.6. Dialogues with EU political institutions

In second place, there are the mechanisms by which EU political institutions dialogue with, and exercise control over, ECB and SRB.²⁴ This, in turn, comprises (i) annual reports, (ii) meetings and exchanges²⁵, when necessary also under confidentiality arrangements and behind closed doors with Chair and Vice-Chair of the competent EP Committee and (iii) investigations.

Table 2: Dialogues with EU political institutions (1)

Item	MoU Council-ECB	IIA Parliament-ECB	IIA Parliament-SRB
Report	(i) Addressed at EP, Council, Commission, and Eurogroup, (ii) published in ECB website, (iii) draft confidential version sent earlier to EP, Council and Eurogroup, (iv) Report discussed with Eurogroup and with EP in public		(i) Addressed at EP, national parliaments, Council, Commission, and ECA, (ii) published in SRB website, (iii) draft confidential version sent to Parliament, (iv) report discussed in public to EP and Council

¹⁸ Appointment hearing of Yves Mersch, Member of the Executive Board of the ECB, at the Committee on Economic and Monetary Affairs of the European Parliament, Brussels, 4 September 2019. [Speech available in the ECB website](#). See also Report on the proposal of the European Central Bank for the appointment of the Vice Chair of the Supervisory Board of the European Central Bank (N9-0008/2019 – C9-0028/2019 – 2019/0903(NLE)).

¹⁹ Agenda for the Meeting Wednesday 4 September 2019, 9.00 – 13.00 and 14.30 – 18.30, Thursday 5 September 2019, 9.00 – 12.30. Available [here](#).

²⁰ The vote in committee, although clearly favorable, was not a mere formality (35 votes in favor, 14 against, 4 abstentions). See the Minutes of the Meeting of 4 September 2019, 9.00 – 13.00 and 14.30 – 18.30, and 5 September 2019, 9.00 – 12.30 Brussels. ECON_PV(2019)0904_1. Available [here](#). For the latest available minutes see [here](#).

²¹ [ECON Newsletter 22-23 January 2020](#).

²² “whereas Parliament deplores the fact that all candidates were men despite the obligations under Article 56(4) of Regulation (EU) No 806/2014 and the numerous calls made by Parliament to respect gender balance when presenting lists of candidates.” See, e.g. Report on the proposal for the appointment of a member of the Single Resolution Board (N9-0005/2020 – C9-0009/2020 – 2020/0902(NLE)), letter B (the paragraph is the same in all reports). The reports are available in the Procedure Files [2020/0902\(NLE\)](#) (Mr. Pedro Machado), [2020/0903\(NLE\)](#) (Mr. Jesús Saurina) and [2020/0904\(NLE\)](#) (Mr. Jan Reinder de Carpentier).

²³ See [Minutes of the Meeting of 22 January 2020, 9:00 – 12:30 and 15:00 – 18:30, and 23 January 2020, 9:00 – 12:30, ECON_PV\(2020\)0122_1](#). The votes were (favour-against-abstentions) 41-6-3 (Mr. Pedro Machado), 43-5-4 (Mr. Jesús Saurina) and 37-11-5 (Mr. Jan Reinder de Carpentier). For the latest available minutes see [here](#). On that same day ECON rejected a candidacy for the position of Executive Director of EBA, confirming that the Parliamentary vote is by no means a mere formality.

²⁴ Article 20 SSM Regulation; article 45 SRM Regulation. In addition to being both accountable to the Parliament and Council, the ECB is also accountable to the euro Group (article 20 and recital (55) SSM Regulation), and the SRB to the Commission (article 45 SRM Regulation).

²⁵ For an updated and insightful analysis, compare now Adina Maricut-Akbik, “Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament”, JCMS, 2020, 1-16

Item	MoU Council-ECB	IIA Parliament-ECB	IIA Parliament-SRB
Report contents	Execution of tasks and cooperation ²⁶ Structure and staffing Code of conduct Budgetary issues ²⁷ Breaches by credit institutions, Legal instruments adopted by ECB		Execution of tasks and cooperation ²⁸ Structure and staffing Code of conduct Budgetary issues ²⁹ Use of Fund ³⁰
Hearing and discussions	Two public hearings a year Ad hoc hearings by invitation, confidential	Two public hearings a year Ad hoc hearings by invitation. Special confidential meetings must be justified. MEPs covered by confidentiality duties. No meeting minutes, nor public statement	
Questions	ECB to reply orally or in writing to Eurogroup questions	ECB to reply in writing to EP questions. Specific section of EP-ECB website for Q&A	

The MoU is not concerned with other issues, such as access to information (since Eurogroup meetings are confidential), the Code of Conduct and Investigations (since only the EP can conduct these) which are extensively covered in the respective IIAs. The following table provides a comparison.

Table 3: Dialogues with EU political institutions (2)

Item	IIA Parliament-ECB	IIA Parliament-SRB
Access to information	ECB to provide EP committee with “comprehensive and meaningful record” to enable understanding of discussions. In case of winding-up, <i>ex post</i> disclosure of non-confidential information of credit institution Supervisory fees and explanation published in website Website publication of guide to supervisory practices	SRB to provide EP committee with “comprehensive and meaningful record” to enable understanding of discussions. In case of resolution: information to be disclosed <i>ex post</i> (including balance sheet, losses borne by bail-in creditors, amount/sources of resolution funding, and sale proceeds).

²⁶ This includes the execution of tasks, the sharing of tasks with NCAs, and cooperation with other national or Union authorities.

²⁷ This includes the method of calculation and amount of supervisory fees, and the budget for supervisory tasks.

²⁸ This includes the execution of tasks, the sharing of tasks with NCAs, and cooperation with other national or Union authorities, including the European Financial Stability Facility (EFSF) or European Stability Mechanism (ESM), or third countries, including recognition and assessment of third-country resolution proceedings.

²⁹ This includes the amounts of administrative contributions and the implementation of budget.

³⁰ This includes contributions to the Single Resolution Fund (SRF), alternative funding means, access to financial facilities, investment strategy and use of the SRF.

Item	IIA Parliament-ECB	IIA Parliament-SRB
	EP to apply safeguards and classification procedures depending on level of sensitivity of confidential information and seek ECB consent before disclosing 3 rd parties	Website publication of guide to resolution practices EP to apply safeguards and classification procedures for confidential SRB information. and consult SRB to assess access requests under Regulation 1049/2001 on Access to Documents
Investigations	Principle of sincere cooperation by ECB Same protection as Committees of Inquiry, same confidentiality as confidential meetings If there is a public or private interest recognised in ECB/2004/3 Decision on Access to documents: non-disclosure.	Principle of sincere cooperation by SRB. Same protection as Committees of Inquiry, same confidentiality as confidential meetings Balancing of right of access to documents with public/private interests under Regulation 1049/2001 on Access to Documents
Code of Conduct	Information to EP committee before adoption ECB to inform EP on Code's implementation (upon request) and need for updates Minimum content: conflicts of interest and separation of monetary and supervisory functions	Information to EP committee before adoption SRB to inform EP on Code's implementation (upon request) and need for updates Minimum content: independence of SRB Chair, Vice-Chair and full-time Board members; performance of tasks under principles of public accountability and operational independence and conflicts of interest of NRAs

The above comparison shows that the main differences are in the differentiated treatment of confidentiality and access to information, in line with the broader differences in principles and scope of the main texts applicable to access to documents, namely Decision ECB/2004/3, and Regulation 1049/2001, which will be illustrated below (infra, 2.5.). It is evident that this difference originates from the fact that, unlike the ECB which is an EU institution under the TFEU, whose Decision ECB/2004/3 on access to documents was adopted to serve its monetary policy function, the SRB is a European agency. The SSM is, however, a hybrid, because functionally the Supervisory Board is similar to an agency like the SRB or the ESMA (when the latter performs direct supervisory functions), but legally it is situated within the broader structure of the ECB and its legal basis is Article 127(6) TFEU and not Article 114 TFEU. This hybrid nature, however, may question the conceptual appropriateness of an automatic extension of the specific provisions on access to documents enshrined in Decision/2004/3 beyond the monetary policy context, to embrace also banking supervision. For the latter, the principles and rules set out in Regulation 1049/2001 may prove more suitable, also to avoid undesirable mismatches with the SRM.

2.2.7. Reports and answers to the national parliaments.

In the last place, the rules include accountability provisions involving national parliaments,³¹ where the SSM and SRM frameworks are aligned in spirit, but not in intensity. The mechanisms contemplated by the provisions include (i) the submission of the report to the European Parliament also to national parliaments, with the possibility of these of making observations; (ii) the possibility of national parliaments to ask questions to the ECB or the SRB regarding the performance of their tasks or functions; (iii) the possibility of an invitation to the Chair (together with a representative of the national authority) to participate in an exchange of views; and (iv) the possibility of other accountability mechanisms for national authorities (NCAs and NRAs).

Some differences are subtle, e.g. whereas the SRB submits its report to national parliaments, the ECB forwards them the report it sends to the EU bodies.³² Others are less so. The SRB shall reply to (i) the observations to the report, and (ii) the specific questions being asked, while the ECB has no such duty.³³

Furthermore, the SRB Chair “is obliged to follow” the invitation of the national parliament, while there is no comparable requirement for the Chair of the ECB Supervisory Board.³⁴

The practice of the accountability mechanisms established by the SSM Regulation has been assessed by the European Commission in its review of the SSM Regulation under Article 32. The Report³⁵ finds that ‘the accountability arrangements applicable to the ECB are overall effective’.

2.3. Administrative accountability: ECB, SRB and the European Court of Auditors (ECA), the European Banking Authority (EBA) and the Ombudsman

2.3.1. The scrutiny of the European Court of Auditors: law and practice.

The accountability of the Banking Union system and bodies also involves administrative-financial accountability, a function to be performed by the European Court of Auditors (ECA). Its mandate is based on (i) the ESCB Statute, and the SSM Regulation for the ECB,³⁶ and (ii) the SRM Regulation and the TFEU for the SRB.³⁷ More specifically, Article 27(2) of the ESCB Statute limits the controls of the ECA over the ECB (including its SSM component) to an examination of the “operational efficiency of the management of the ECB”, as opposed to the wider audit mandate usually conferred upon the ECA by Article 287 TFEU (which applies to the SRM). Again, this difference originates from the fact that the ECB is an EU institution whose independence is mandated under the TFEU (to protect its monetary policy function) the SRB is a European agency.

³¹ See article 21 SSM Regulation, article 46 SRM Regulation.

³² Compare article 21 (1) and Recital (56) SSM Regulation with article 45 (2) SRM Regulation.

³³ Compare article 21 (1) SSM Regulation with 46 (2) SRM Regulation, and 21 (2) SSM regulation with 46 (1) SRM Regulation. Also, the SSM article 21 opens with the reference to the annual report in its Section 1, while SRM article 46 opens with the reference to the specific observations, which can be submitted at any time. Recital (56) of the SSM Regulation is very specific as regards the observations to be submitted by national parliaments, as it indicates that “particular attention should be attached to observations or questions related to the withdrawal of authorisations of credit institutions in respect of which actions necessary for resolution or to maintain financial stability have been taken by national authorities in accordance with the procedure set out in this Regulation”, whereas SRM Regulation recitals or provisions are not nearly that specific.

³⁴ Compare article 21 (3) SSM Regulation with 46 (3) SRM Regulation.

³⁵ Report from the Commission on the SSM, SWD(2017) 336 final and Commission Staff Working Document accompanying the Report

³⁶ Article 27.2 of the Statute of the ESCB and of the ECB, and article 20.7 SSM Regulation.

³⁷ Article 287 TFEU.

The exercise of its mandate by the ECA over the SSM and SRM has been a source of friction in the past. In November 2016, the ECA published its first special report (29/2016) on the SSM,³⁸ in December 2017, its first special report (23/2017) on the SRB,³⁹ and in January 2018 its second special report (02/2018) on the ECB's crisis management in relation to its banking supervision tasks.⁴⁰ In all these cases the ECA pointed out the severe difficulties it encountered in terms of access to the relevant information to fulfil its mandate.

The main cause was the ECB's refusal to grant access to relevant documents (the SRB mostly refused access to documents originated by the ECB⁴¹). The ECB relied on the language of the ESCB/ECB protocol, which states that the ECB and ESCB accounts shall be audited by independent external auditors "recommended by the Governing Council and approved by the Council",⁴² and that such audit must be circumscribed "to an examination of the operational efficiency of the management of the ECB",⁴³ and that this must be interpreted to preserve the ECB's independence.⁴⁴ This comes on top of the ECB's adamant defence of its autonomy and independence (Article 19 SSM Regulation mirrors Article 130 TFEU on the ECB independence), which nonetheless has met an equally adamant defence by the CJEU of the need that such independence does not result in an exemption from Union rules of law.⁴⁵

In light of these difficulties, in its October 2017 review of the SSM Regulation the Commission emphasised the ECB's duty to provide access to information by ECA, and the need that both institutions conclude a MoU to structure their cooperation, a cooperation that was also stressed in April 2018 by the European Parliament. The MoU between ECA and ECB was finally signed in October 2019, and it regulates both the general access to documents by the ECA,⁴⁶ and the special treatment of highly confidential documents and information, which must be dealt with on-site, by a limited number of ECA staff, with secure IT systems, and with ECB consultation for their treatment and retention,⁴⁷ all subject to the principle of proportionality.

2.3.2. The European Banking Authority (EBA) administrative review in the context of the promotion of supervisory quality and convergence across the European Union

As set out in the EBA Regulation, the EBA is required to contribute to the establishment of high-quality common regulatory and supervisory standards and practices, ensuring the consistent application of

³⁸ ECA Special Report No. 29/2016. Single Supervisory Mechanism - Good start but further improvements needed.

³⁹ ECA Special report no. 23/2017. Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go.

⁴⁰ ECA Special Report no. 02/2018. The operational efficiency of the ECB's crisis management for banks.

⁴¹ ECA Communication to the European Parliament concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC)).

⁴² Article 27.1 ESCB-ECB Protocol.

⁴³ Article 27.2 ESCB-ECB Protocol.

⁴⁴ See, e.g. Letter from Andrea Enria to Mr. Papadimoulis, MEP, 12 March 2019.

⁴⁵ Judgment of the Court of 10 July 2003, *Commission v European Central Bank*, Case C-11/00, ECLI:EU:2003:395 (OLAF) at 135. The CJEU rejected that the ECB's special status and independence could result in a general exemption from EU Law, including the provisions of the anti-fraud office (OLAF). The CJEU has always been uneasy about the risk of creating spaces exempt from EU Law. Ever since Case C-294/83 *Les Verts* ECR [1986] I-1357, it has emphasized that the Community (now Union) is based on the rule of law, and that this calls for judicial review. The principle of reviewability has been reiterated in relation to administrative agencies and bodies. See, e.g. Case T-411/06, *Sogelma* [2008] ECR II-2771; or Case C-15/00 *Commission v. EIB*, [2003] ECR I-7281. More recently, the CJEU held in the Judgment of 20 September 2016 (Grand Chamber), cases C-8/15 P to C-10/15 P *Ledra Advertising*, the CJEU held that, even when the ECB (and Commission) acted within the framework of the European Stability Mechanism (ESM) which is not subject to EU Law, EU institutions do not cease to be subject to EU Law, including fundamental rights. This case law helps to put the OLAF case in the broader context of EU courts' vision.

⁴⁶ Memorandum of Understanding (MoU) between the ECA and the ECB regarding audits on the ECB's supervisory tasks (ECA-ECB MoU) Section I, nos. 3-6.

⁴⁷ ECA-ECB MoU, Section II no. 7, a-g.

the Single Rulebook, in particular by contributing to a common supervisory culture, and conducting peer-review analyses of the competent authorities.

In this context, the EBA is called to monitor and review the supervisory practice and effectiveness (measured against both high quality standards of supervision and convergence with the practices of the national competent authorities in non-participating Member States within the EU) of the ECB and of the national competent authorities within the SSM. A peer review entails an assessment and comparison of the effectiveness of the supervisory activities and of the implementation of the provisions by all competent authorities, including the ECB, vis-à-vis those of their peers. In this way the EBA, without instituting any hierarchical administrative control over the ECB nor jeopardizing in any way the independence and technical discretion of the ECB as focal point of the SSM, monitors its administrative practice, the existence (or, normally, absence) of breaches of Union law and its organization. The peer reviews include an assessment of the adequacy of resources and governance arrangements of competent authorities, and the ECB is no exception, especially regarding the application of regulatory technical standards and implementing technical standards; the degree of convergence reached in the application of EU legislation and in supervisory practices. The EBA participates also to the process of supervisory convergence, by identifying and promoting the best practices developed by all competent authorities.

In this frame, the EBA's Review Panel was established with the aim to develop the methodological framework for peer reviews and conduct them on a regular basis. In line with Article 30 of the EBA Regulation, the EBA's Review Panel periodically organizes and conducts peer reviews of some or all of the activities of competent authorities, to further strengthen consistency in supervisory outcomes. The EBA regularly publishes its reports on convergence of supervisory practices.⁴⁸ These reports analyse the information collected on supervisory practices also from the ECB, in particular during bilateral convergence visits, first introduced in 2016 and through the organisation of peer reviews and its participation in colleges of supervisors.

This mandate applies also to the supervisory review and evaluation process (SREP) under Article 107 of Directive 2013/36.

Moreover, under Article 29 of the EBA Regulation, as amended, the EBA, for the purpose of establishing a common supervisory culture, shall develop and maintain (i) an up-to-date Union supervisory handbook on the supervision of financial institutions in the Union, which duly takes into account the nature, scale and complexity of risks, business practices, business models and the size of financial institutions and of markets and (ii) an up-to-date Union resolution handbook on the resolution of financial institutions in the Union, which duly takes into account the nature, scale and complexity of risks, business practices, business models and the size of financial institutions and of markets. Both handbooks are adopted after having conducted open public consultations.

In turn, Article 29a of the EBA Regulation, as amended, sets out that at least every three years, by 31 March, the EBA identifies up to two supervisory priorities of Union-wide strategic relevance, in this way contributing also to the definition of the ECB supervisory action plan.

2.3.3. The Ombudsman role

The Commission Report lists the role of the Ombudsman among those of other EU institutions and bodies entrusted with ensuring the ECB's administrative accountability, without further elaborating

⁴⁸ Compare e.g. EBA-OP-2019-02 of 14 March 2019

about its specific role.⁴⁹ This role is grounded on the Ombudsman's general Treaty mandate as an institution primarily concerned with maladministration,⁵⁰ which can receive the direct complaints of citizens,⁵¹ or undertake inquiries on the basis of complaints or on its own initiative, except where the alleged facts are subject to legal proceedings.⁵² So far the Ombudsman has made use of its powers in relation to SSM and SRM, mostly in relation to two aspects: ethics and procedural irregularities, and access to documents. In this capacity, the Ombudsman has engaged with both the ECB and the SRB, although more with the former than the latter, and with tangible results. Some of the Ombudsman cases do not follow a predictable pattern, and depend on the complainants' problem, such as some decisions concerning recruiting procedures,⁵³ delays in handling specific complaints,⁵⁴ or the exercise of tasks.⁵⁵ Other issues seem to have enjoyed more importance, and/or be more recurring. On the ethics side, the Ombudsman played a proactive role⁵⁶ in providing ideas to help the ECB elaborate its Code of Conduct for Supervisory Board Members,⁵⁷ and been an active member in the process⁵⁸ to bolster the Single Code of Conduct that now regulates the ethical standards of all ECB high officials.⁵⁹

The Ombudsman more recurring involvement concerns, however, transparency and access to documents. The Ombudsman opened cases on transparency and communication by the ECB,⁶⁰ and on access to documents in relation to the SRB in 2018.⁶¹ It closed the SRB case, as the issue was being dealt by courts,⁶² but it has advised the ECB to enhance its communication policy to make it more transparent,⁶³ something on which the ECB reportedly followed,⁶⁴ and repeatedly engaged to make its processes more transparent.⁶⁵

⁴⁹ "As to administrative accountability, the ECB is subject to extensive complementary reviews by various administrative bodies in the EU, namely the Commission, the European Court of Auditors (ECA), the European Banking Authority (EBA) and the European Ombudsman." Commission 2017 SSM Report p. 5.

⁵⁰ Article 228 TFEU, article 2 (1) European Ombudsman Statute.

⁵¹ Article 228 (1) TFEU, article 2 European Ombudsman Statute.

⁵² Article 228 (2) TFEU, article 3 European Ombudsman Statute.

⁵³ See, e.g. Decision in case 449/2017/AMF on the European Central Bank's recruitment procedure for two positions in the Single Supervisory Mechanism; or Decision in case 2126/2017/KT on how the Single Resolution Board explained its assessment of the complainant's performance in a staff selection procedure. The Ombudsman found no evidence of maladministration.

⁵⁴ Decision in case 604/2018/JAP on the European Central Bank's failure to provide information about the processing of a complaint concerning alleged irregularities by a Spanish bank; or Decision in cases 1141/2019/SRS, 1417/2019/SRS and 1015/2019/SRS on the Single Resolution Board's alleged failure to take a timely decision on whether to compensate creditors and shareholders of a Spanish bank. The Ombudsman found no evidence of maladministration.

⁵⁵ Decision in case 1836/2016/PL on the European Central Bank's alleged failure to supervise the Eurozone banking system before 2014. No evidence of maladministration.

⁵⁶ European Ombudsman Staff Working Paper on the revision of the ECB's Ethics Framework, Letter of 20 August 2014.

⁵⁷ 2014 ECB Code of Conduct for members of the Supervisory Board.

⁵⁸ See, for example, the Recommendations of the European Ombudsman on the involvement of the President of the European Central Bank and members of its decision-making bodies in the 'Group of Thirty' (1697/2016/ANA) 15 January 2018. Some concerns were raised that the ECB's membership of the "Group of Thirty" could compromise its independence.

⁵⁹ ECB Code of Conduct for High Level Officials, 2019. The Code responded to requests from the European Parliament and recommendations from the European Ombudsman. See

<https://www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190116.en.html>

⁶⁰ Case 1339/2012/FOR: Improving transparency and communication at the European Central Bank. For a more recent example, see Decision in case 18/2016/ZA on the European Central Bank's failure to reply adequately to request for information, 27 September 2016.

⁶¹ Case OI/1/2018/AMF The Single Resolution Board's handling of requests for access to documents from shareholders of the Spanish bank Banco Popular considering themselves to be interested parties under the Single Resolution Mechanism Regulation 806/2014 (dealt by Courts).

⁶² See Decision of 16 July 2018, on Case OI/1/2018/AMF.

⁶³ Case 1339/2012/FOR originated in a complaint by an NGO, which alleged that the ECB membership of the Group of Thirty could compromise its independence. The problem for the Ombudsman was the lack of transparency by the ECB in handling the complaint.

⁶⁴ In its Report on the follow-up by EU institutions on its recommendations Putting it Right? - How the EU institutions responded to the Ombudsman in 2013, 25 November 2014, the Ombudsman stated that: "In its follow-up reply in case 1339/2012/FOR, the European Central Bank (ECB) announced that its Executive Board and Governing Council decided to make improved communication one of the key priorities of the ECB's medium-term strategic planning for 2013-15. The ECB initiated a review of its communication policy, which also included communication issues arising from the establishment of the single supervisory mechanism (SSM)". Part of this effort

⁶⁵ For example, the Recommendations of the European Ombudsman on the involvement of the President of the European Central Bank and members of its decision-making bodies in the 'Group of Thirty' (1697/2016/ANA) 15 January 2018, which were important input for the

2.4. Legal accountability: ECB, SRB and European courts, national competent and resolution authorities and national and European courts, and quasi-courts

2.4.1. Legal accountability and effective judicial protection under Article 47 of the Charter of Fundamental Rights.

Both the actions of the ECB and the SRB are subject to the review by the General Court and the Court of Justice of the European Union and at least some of the actions of the national competent authorities acting within the SSM and SRM are subject to the review by the relevant national courts. As to the former, in principle, neither institution presents peculiarities. Both are subject to annulment procedures, to be decided by the General Court, under article 263 TFEU, actions for failure to act, under article 265 TFEU, and actions in damages, under article 340 TFEU. In actions before national courts that involve issues of EU law (often under the clothes of domestic law provisions implementing EU directives which are relevant for supervision or resolution) those courts can make use of the preliminary reference procedure under article 267 TFEU to establish a dialogue with the TFEU.

In a matter of few years after the establishment of the SSM and SRM quite a number of litigation proceedings have been brought against the ECB and the SRB⁶⁶, and their number and overall significance have probably exceeded policymakers' original expectations when the system was set up. Some of these cases pose fundamental questions of constitutional legitimacy (beyond the foundational questions addressed by the German Constitutional Court with its landmark judgment of 30 July 2019)⁶⁷, respect of fundamental rights, accountability and transparency.

One recurring issue, which is revealing of the accountability challenges outlined here, concerns the difficulties of structuring a system of judicial review that can cope with the complexities of the composite system of decision-making in the SSM and SRM. Both mechanisms involve the composite decision-making by EU authorities (ECB and SRB) and national authorities (NCAs, in the SSM, and NRAs in the SRM). The specific context of bank crisis-management also involves a sequential decision-making by the ECB, which determines that a bank is failing or is likely to fail (FOLTF), the SRB, which decides on the occurrence of a public interest in resolution and then, if such occurrence of a public interest is established, on the application of resolution measures, a decision that is endorsed by Commission and, in particular cases, by the Council, and then possibly a decision by the ECB to withdraw the bank's license (subject to the SRB opinion).⁶⁸ This gives rise to a jigsaw puzzle, where the technical question of determining what is "the" relevant decision subject to challenge is instrumental to the more general question of ensuring effective legal accountability. Recent case law by EU courts has clarified some of these aspects, while leaving others unresolved.

Among the issues that have been settled is that where a decision is adopted by the ECB upon proposal of the NCA. The CJEU with a judgment of 18 December 2018 in *Silvio Berlusconi/Fininvest v Banca d'Italia*,⁶⁹ drew a general distinction regarding judicial competence over the administrative acts

Single Code of Conduct were a follow-up on its earlier decision on the Group of 30 in Case 1339/2012/FOR. See also the Letter from the European Ombudsman to the ECB on the Supervisory Review and Evaluation Process, case SI/10/2016/EA. See <https://www.ombudsman.europa.eu/es/case/en/48792> for the letter and the ECB reply.

⁶⁶ For the list and a description prepared by René Smits and Federico Della Negra compare <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence>.

⁶⁷ Ulrich Häde1, Das Urteil des Bundesverfassungsgerichts zur Bankenunion – Strategiewechsel in Karlsruhe? 37. Frankfurter Newsletter zum Recht der Europäischen Union (12.8.2019).

⁶⁸ SRM Regulation article 18 (1) (FOLTF determination), (6) (adoption of resolution scheme by the SRB), and (7) (Commission and Council intervention), and SSM Regulation article 14 (5) SSM Regulation (withdrawal of license).

⁶⁹ Judgment of 19 December 2018, in case C-219/17, *Silvio Berlusconi/Fininvest v Banca d'Italia*, EU:C:2018:1023.

adopted in such supervisory proceedings, between preparatory acts which are binding upon the ECB and others which are not. In particular, the CJEU concluded that a decision (in the case at hand, on the approval of the acquisition of qualifying holdings under Article 15 SSM Regulation) adopted by the ECB following preparatory acts and a *non-binding proposal* of decision prepared by the national competent authority can be appealed only before the General Court, and such Court has also:

“jurisdiction to determine, as an incidental matter, whether the legality of the ECB’s decision (...) is affected by any defects rendering unlawful the acts preparatory to that decision that were adopted by [national competent authority]”.

This very principle has been confirmed by the CJEU also in the context of the SRM with judgment of 3 December 2019, in case C-414/18, *Iccrea Banca*.⁷⁰

Yet, other complex issues concern the sequence of acts in the context of bank resolution. There, the determination by the ECB that a bank is FOLTF is a fundamental step that enables the SRB to determine that the bank must be subject to resolution measures, but formally speaking it is a preparatory act. Thus, the General Court found in case T-283/18 *Ernest Bernis et al.*⁷¹ that the FOLTF determination is not challengeable as such, leaving thus, to our mind, a gap in effective judicial protection. Still, this leaves open the doubts about the resolution decision itself, which is entirely prepared by the SRB, but is then adopted, by endorsement, by the European Commission and Council.⁷² Therefore, the proper identification of the appealable decision (and of the ensuing liability or joint liability, if any) is less straightforward.⁷³ In second place, if the SRB determines that there is no public interest in the resolution, and insolvency action is then taken at the national level, it is still unclear what avenues are open, if any, to challenge the SRB determination. In third place, when, in a resolution context, the ECB decides not to withdraw immediately the license because the SRB/NRA considers, under Article 15, paragraph 6, of the SSM Regulation that “the withdrawal of the authorisation would prejudice the adequate implementation of or actions necessary for resolution or to maintain financial stability”, it is still unclear (i) if such decision can be contested before the General Court and (ii) if the ECB decision is bound by the factual determination of the SRB/NRA.

A related source of complexity is that both the SSM and SRM rely on the application of EU law and domestic law.⁷⁴ In cases where European courts are asked to review the application of national law by the ECB or the SRB, those courts may likely encounter doubts that relate to the interpretation of national law (including the constitutionality of the applicable national law or its legality) and, whilst the European courts relied so far extensively on the judicial interpretation of such domestic provisions according to national case law, where such case law was settled⁷⁵, it remains to be seen how the European courts will handle questions of law, under domestic law, where there is no settled case law on their constitutional legality, or validity. Moreover, it is still unsettled how European courts will handle

⁷⁰ ECLI:EU:C:2019:1036

⁷¹ Order of 6 May 2019, case T-283/18 *Ernest Bernis v. ECB* EU:T:2019:295.

⁷² In some of the very many pending cases concerning the resolution of the Banco Popular, the GCEU is also called to determine if, in the event that such decision could be considered grossly negligent (as some private applicants claim), the ensuing liability pertains to the SRB or the European Commission.

⁷³ As it happened again in the Banco Popular case, where the Spanish NRA (FROB) implemented the resolution decision and whose implementing acts have been challenged by private applicants before the Spanish courts.

⁷⁴ Filippo Annunziata, Raffaele D'Ambrosio, “L’applicazione del diritto degli Stati membri da parte della Banca Centrale Europea”, in *Giur. Comm.*, 2019, II, 1; Vittorio Di Bucci, “Quelques questions concernant le contrôle juridictionnel sur le mécanisme de surveillance unique”, *Liber Amicorum Antonio Tizzano, De la Cour CECA à la Cour de l’Union: le long parcours de la justice européenne*, Giappichelli, Torino, 2018, 316-331; Miro Prek, Lefevre, « The EU Courts as “national” courts: National law in the EU judicial process » (2017) CMLR 54, p. 369-402.

⁷⁵ Joined cases T-133/16 to T-136/16, *Caisse régionale de crédit agricole mutuel Alpes Provence* ECLI:EU:T:2018:219; T-52/16, *Crédit mutuel Arkéa v ECB*, ECLI :EU :T :2017 :902

cases where the ECB or the SRB must apply directly national legislation transposing EU directives, but such national legislation either (i) adds requirements to those set by EU rules of minimum harmonization or is a non-harmonized component of a set of transposing rules (e.g. domestic procedural rules on the application of the EU fit and proper testing) or (ii) domestic law is wrongly transposing EU provisions or (iii) has not timely transposed a directive (it being doubtful that the court could uphold a decision of the ECB or SRB giving so called inverse direct application to unconditional and sufficiently precise provisions of the directive, although this may well be meant to be necessary to perform the tasks conferred on the SSM or SRB by the relevant Regulations⁷⁶). In turn, in cases where domestic courts are asked to review the application of domestic law implementing EU directives 2013/36 and 2014/59 by the national competent authorities (for instance as regards less significant institutions), those domestic courts may likely encounter doubts that concern the interpretation of EU Law, which should be resolved by making a preliminary reference to the Court of Justice of the European Union (CJEU) under Article 267 TFEU, in this way further incentivising the increase in size of the workload for the European courts on SSM and SRM matters and putting additional pressure on the time-responsiveness of the European courts in such relevant matters.

Also, the area of guidelines, recommendations, supervisory manuals and other non-binding acts or of other binding supervisory instruments like instructions or requests is, still, a breeding ground of complexity and it remains to be seen how an effective judicial protection will be made available before European and national courts.

The analysis of legal accountability helps us draw some lessons applicable to accountability mechanisms in general. The SSM and SRM consist in a complex architecture with sequential decision-making, which makes it hard to cope with for a court system that was designed for simpler structures. Yet, courts at least have both a framework and an extensive practice of dialogue and coordination, which means they can accommodate the new system to provide effective review. *Political and administrative accountability bodies would need to be capable of a similar coordination to ensure the effectiveness of political and administrative accountability.*

2.4.2. ECB, SRB and administrative review bodies: similarities, differences, and practice.

Finally, both the SSM and the SRM contemplate the review of acts by the ECB and the SRB by an Administrative Board of Review (ABoR⁷⁷) and an Appeal Panel (AP⁷⁸). Both bodies have been established in line with recent EU practice to subject some of the decisions by each administrative authority to the benefits of independent review. However, the two review bodies are different.

The ABoR provides an “internal” review for all decisions taken by the ECB in the exercise of the powers conferred on it by the SSM Regulation after a request for review submitted by the addressee of such decision or by a person who is directly or individually concerned, and provides an “opinion”, while the AP makes “decisions” over “appeals” but only on a handful of matters, expressly mentioned in Article 85 SRM Regulation (which sets out that “any natural or legal person, including resolution authorities, may appeal against a decision of the Board referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) which is addressed to that person, or which is of direct and individual concern to that person”).⁷⁹

⁷⁶ R. Smits, “Competences and Alignment in an Emerging Future. After L-Bank: How the Eurosystem and the Single Supervisory Mechanism May Develop”, 2017 ADEMU Working Paper 77, 17.

⁷⁷ Article 24 SSM Regulation.

⁷⁸ Article 85 SRM Regulation.

⁷⁹ Article 24.7 SSM Regulation, article 85.8 SRM Regulation.

As a consequence, if the ABoR issues an opinion contrary to the Supervisory Board's act, the Board shall propose to the Governing Council to adopt a new draft decision which may abrogate the initial decision, replace it with an amended decision, but also with a decision of identical content,⁸⁰ i.e. the ECB may decide not to follow the ABoR opinion, which is not binding. Thus, despite the importance of ABoR role, ABoR is closer to a fully internal mechanism than a quasi-judicial body. This was confirmed by the General Court and then the CJEU in the *Landeskreditbank* case, where the courts considered the arguments presented by the ABoR as justification to the ECB's follow-up decision, as part of the ECB's compliance with the duty to state reasons, i.e. the courts found the ABoR to be a fully internal feature.⁸¹

In contrast, the Appeal Panel provides quasi-judicial review and "may confirm the decision taken by the Board, or remit the case to the latter", and, as it happens with a judgment of the European courts, "the Board shall be bound by the decision of Appeal Panel and it shall adopt an amended decision".⁸² It offers, therefore, a quasi-judicial scrutiny.

This difference is based, first, on the relevance of ECB independence, outlined in Article 130 TFEU, and SSMR Article 19 and, second, on Article 263(5) TFEU, which allows the possibility to establish specific arrangements for the review of acts of Union agencies (e.g. the SRB), but not of EU institutions, such as the ECB.⁸³

The practice of the two review mechanisms has been different too (and this is also reflected in different rules of procedure, with only the proceedings before the AP being organised mirroring a judicial proceeding).

- a) As to ABoR practice, so far the ABoR has issued (until 31 December 2019) twenty three opinions, and this indicates that ABoR has been considered as a suitable venue for administrative reconsideration of the Supervisory Board's decisions only in an handful of cases; anecdotal evidence further suggests that supervised entities seem to be reluctant to make full use of this procedural avenue, due to an industry perception of a limited independence of ABoR from the ECB and thus of a very low likelihood of reversal by ABoR of any ECB decision (in the supervised entity's perspective, administrative review by the ABoR may even prove counterproductive, because it could be used by the ECB to confirm the same decision, strengthening however the original, possibly weaker, statement of reasons, thereby making then less promising, for the potential appellant, the judicial challenge before the European courts). For this reason, it appears that supervised entities rather challenge the ECB decision before the General Court straight away. Moreover, as noted by Professor René Smits, "even the fact that the opinion has been adopted is not known beyond the affected parties: the applicant and the ECB. It is only through any subsequent judicial proceedings that the opinion may become known. (...) The lack of transparency for third parties about administrative review is an element that the ABoR proceedings share with many national administrative review proceedings but which is regrettable from a transparency perspective, nevertheless. ABoR proceedings are confidential, unless so authorised by the Governing Council, the ECB President makes the outcome of the ABoR proceedings public".

⁸⁰ Article 24.7 SSM Regulation.

⁸¹ Judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg v. BCE*, T-122/15, EU:T:2017:337; Judgment of 8 May 2019, *Landeskreditbank Baden-Württemberg v. BCE*, C-450/17 P, EU:C:2019:372.

⁸² Article 85.8 SRM Regulation

⁸³ The fifth paragraph of Article 263 TFEU reads as follows: "Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them".

- b) The AP, in contrast, has received roughly 120 appeals in less than four years and decided these appeals respecting all requirements for “a fair trial” within the pressing timelines set by its Rules of Procedure (in order to do so, the average duration of an AP proceedings is a few months longer than the accelerated proceeding before the ABoR, where there is no exchange of written submissions after the notice of appeal and the parties have the opportunity to discuss the case only orally at one hearing before the ABoR): a majority of these cases were, however, manifestly inadmissible because beyond the AP’s remit (appeals against ex ante contributions to the Single Resolution Fund or appeals against a resolution decision) and were handled with shortly motivated inadmissibility orders. Roughly 30 decisions were motivated at length in the merits and were: (i) 5 decisions on contributions for the administrative costs of the Single Resolution Board; (ii) one decision on MREL determination; (iii) and several decisions on access to documents in the context of the Banco Popular resolution.⁸⁴

2.5. Transparency and accountability towards citizens, access to documents

A fourth source of accountability for the ECB and SRB when they perform their SSM and SRM tasks are the rules on transparency, where the two bodies differ.

2.5.1. Transparency: Regulation 1049/2001 v. Decision ECB/2004/3

For the SRB, article 15 TFEU general principle on transparency applies, and access to documents is subject to Regulation 1049/2001 (Access Regulation).⁸⁵ The ECB, on the other hand, although recital 59 of the SSM Regulation provides that the Access Regulation under Article 15(3) TFEU should apply also to documents held by the ECB resulting from the carrying out of supervisory tasks, in accordance with

⁸⁴ All decisions can be accessed at www.srb.europa.eu. The problems of administrative contributions cases were full of minute details, but their underpinning issue was the identification of the exact scope of application of the contribution obligation under the SRM Regulation. The first decision adopted in November 2016 concerned an SRB letter requesting payment of 2015-2016 provisional administrative contributions sent to all banks included in a list of credit institutions published by the ECB on its website on 4 September 2014, which was contested by one bank, which had been subject to resolution measures (in a Member State) and ceased to be a bank in July 2015. The AP partially sided with the appellant and remitted the case to the SRB. If an entity originally included in the ECB list of credit institutions under its direct supervision had ceased to be a licensed bank during the relevant period, it could not be required to contribute to the SRB administrative costs. The scope of the rules had to be determined in light of their purpose, also because a literal reading which would impose contributions to the SRB to entities which are not a credit institution could make Commission Delegated Regulation 1310/2014 incompatible with the SRMR (and its clear scope of application). The AP held that, while only the CJEU and not an appeal body has the power to declare a regulation invalid, when two alternative interpretations of a given provision of Union law are possible, but one of such interpretation would make such provision unlawful because the delegated provision would clash with the delegating act, the AP should prefer the interpretation that preserves the lawfulness of the delegated provision. Similarly, in case 4/2018 The AP held that, although following an ECB declaration that the bank was failing or likely to fail, the appellant entity was subject to liquidation under national law, the bank had to pay administrative contributions until the date when its bank license was finally withdrawn. The appellant argued that it ceased to be subject to the SRMR and should not pay administrative contributions to the SRB from the prior date when the SRB decided that resolution was not in the public interest. The AP noted, instead, that the appellant was still a credit institution when the SRB determined the 2018 contributions, which followed strict pre-defined criteria, in a list meant to be exhaustive, and non-discretionary. The facts alleged by the entity fell outside these criteria and were not relevant to exempt from the administrative contributions. On the issue of the determination of Minimum Requirements for Capital and Eligible Liabilities (MREL) the AP issued a decision on 16 October 2018. MREL rules ensure that a bank has sufficient instruments that may be written-down or converted (bailed-in) in order to ensure an orderly resolution. Thus, among all instruments which can be potentially subject to bail-in, the MREL rules identify a narrower sub-set whose characteristics make such bail-in easier. In this case the SRB made an MREL determination that was below 8% of total liabilities including own funds (TLOF). Since resolution rules provide that the SRF resources can be tapped only after capital/liabilities reaching 8% TLOF are bailed-in, the appellant alleged that with a target below that level authorities might have to implement the resolution strategy without relying on SRF resources. The AP held that the SRB’s decision was justified. The MREL requirement was calibrated to ensure that the target of the relevant credit institution was proportionate, considering also that the bail-in of instruments equivalent to 8% TLOF can be reached using not only MREL instruments but also liabilities that do not qualify as MREL but are not excluded from bail-in, e.g. those with a less than 1-year maturity. The largest AP caseload has focused on access to documents under Regulation 1049/2001 (Public Access Regulation) connected to the Banco Popular resolution. In summary: (i) the overall question was whether the SRB had granted adequate access to Banco Popular’s shareholders and subordinated bondholders to the documents supporting the SRB’s resolution decision; (ii) the AP’s first answer was “not nearly enough”; and (iii) the answer became more refined and nuanced as successive rounds of appeals resulted in additional SRB disclosures.

⁸⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

the TFEU, treats all access to documents requests under its Decision ECB/2004/3.⁸⁶ The legal soundness of this practice seems to us doubtful, in the face of the clear wording of such recital 59. It has, however, helped the ECB to frame the issue of access to documents in its own terms. Conversely, the SRM framework provides no exception or specificities to the general rules on document disclosure, which means that the Access Regulation applies in full.

The ECB Decision is inspired by the Access Regulation, but also offers some clear differences.⁸⁷ This results in a regime where the convergence or divergence is very much left to the interpretation to the specific rules, as indicated in the following table.

Table 4: Transparency: Regulation 1049/2001 v. Decision ECB/2004/3

Item	Access Regulation	Decision ECB/2004/3
General provision	Article 1. Regulation's goal to define <u>principles, conditions and limits</u> of access to information, and has the goal of establishing rules ensuring the <u>easiest possible exercise</u> of this right, and to promote good administrative practice on access to documents.	Article 1. Decision's goal to define <u>conditions and limits</u> for access to documents and to promote good administrative practice on public access to such documents.
Absolute exceptions	Article 4.1 Short list of "public interest" exceptions No reference to "confidential information".	Article 4.1. Long list of "public interest" exceptions "Confidential information" expressly protected
Relative exceptions	Analogous treatment in articles 4.2 Access Regulation and 4.2 ECB/2004/3 Decision	
Internal documents and deliberations	Article 4.3. Conditional exception	Article 4.3. Unconditional exception for documents part of internal deliberations

Source: Own elaboration with the information of relevant legal texts.

The main differences are threefold: (i) on framing, (ii) on absolute exceptions to disclosure, and (iii) on the treatment of internal documents. First, the Access Regulation frames itself as a norm regulating the "principles" of access, as well as the "conditions and limits", whereas the ECB Decision frames itself as a norm regulating only "conditions and limits". Thus, what may be seen as the general rule and main goal in one case (open, easy, access) can, in the other case, be seen as the exception, or at least as subject to many qualifications. This is confirmed by the fact that the Access Regulation makes express reference

⁸⁶ European Central Bank Decision of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) as modified by ECB Decisions ECB/2011/6 and ECB/2015/1.

⁸⁷ For a general (critical) approach towards the ECB/2004/3 see e.g. Päivi Leino-Sandberg "Public access to ECB documents: are accountability, independence and effectiveness an impossible trinity?" ECB Legal Conference Proceedings 2019 p. 195.

to the Charter of Fundamental Rights,⁸⁸ while the ECB makes reference to the rules concerning its specific statute,⁸⁹ which means that access to documents is characterised as an individual right in one case, whereas its status is unclear in the other, and seems to be more a matter of good administrative practice (with implications that will be briefly considered below).

2.5.2. Access to documents and the exceptions under Regulation 1049/2001 and Decision ECB/2004/3

In the second place, access to documents is subject to absolute exceptions, where institutions “shall refuse” access, with no exceptions, and “relative exceptions” where institutions shall refuse access “unless there is an overriding interest in disclosure”, which means that the decision to disclose or not may be subject to a balancing exercise (e.g. by courts). While both texts are aligned in what regards relative exceptions, which protect commercial interests, court proceedings and inspections, investigations and audits, they widely differ on the absolute exceptions. The Access Regulation has limited exceptions, including — public security, — defence and military matters, — international relations, and — the financial, monetary or economic policy of the Community or a Member State, whereas the ECB Decision contemplates a much longer list, which also includes — protecting the integrity of euro banknotes, — public security, — international financial, monetary or economic relations— the stability of the financial system in the Union or in a Member State,— the Union's or a Member State's policy relating to the prudential supervision of credit institutions and other financial institutions, — the purpose of supervisory inspections, — the soundness and security of financial market infrastructures, payment schemes or payment service providers, as well as the confidentiality of information protected as such under EU Law.⁹⁰ This longer list, together with the open textured nature of some of its items (e.g. “stability”, “prudential supervision policy” etc) has the potential to transform the ECB rules from a regime on “access” into a regime on “confidentiality”.

In a way, these differences in the granular content of the access to documents translate, with ECB practise, into a somehow different, more nuanced, scope for access. This also relates to the point made above about the different framing of both regimes on access to documents. For the ECB, access to documents is a matter of good administrative (supervisory) practice, framed within the institution's organizational provisions. Thus, it applies *unless* trumped over by one of the numerous (and open-ended) exceptions, which are also considerations relevant for the ECB supervisory practice. For the SRB, access to documents is framed as an individual right, i.e. it is established for the benefit of citizens, and can be directly exercised by them, and subject to a more limited list of exceptions, which must thus be subject to restrictive interpretation. Thus, even bearing in mind the many similarities in mind, the approach to each text is likely to be different, unless shaped by a corrective interpretation by courts.

2.5.3. Internal documents and the protection of the institution's decision-making process.

Finally, in what regards internal documents, the Access Regulation provides that disclosure can be refused only if it would seriously undermine the institution's decision-making process,⁹¹ while the ECB Decision does not include such requirement for ECB documents drafted for internal use as part of deliberations, and it only includes a similar such requirement for documents reflecting exchanges of

⁸⁸ Recital (2) Access Regulation.

⁸⁹ Recital (3) ECB/2004/3.

⁹⁰ Article 4.2. ECB/2004/3 Decision.

⁹¹ Article 4.3 Access Regulation.

views between the ECB and other relevant authorities and bodies (where access can be refused if disclosure can seriously undermine the ECB's effectiveness in performing its tasks⁹²).

Finally, the specific, and restrictive regime of access to documents by the ECB can give rise to problems of implementation, since the ECB sits atop a coordinated system (the SSM) connected to another system (SRM) which involves national authorities and officials that may be bound by their national constitutions to a more exacting duty of transparency (especially in those countries where it is framed as a fundamental right).⁹³ Convergence of the ECB regime on access to documents pertaining to the SSM, and thus to its banking supervisory functions, with the general principles enshrined in the Access Regulation should thus be desirable and would not affect, in our view, the unfettered independence of the ECB, as (rightly) mandated under the TFEU

2.5.4. The case-law on access to documents in the SSM and SRM.

The CJEU was recently called to determine on questions of access to documents with regard to the context of banking supervision in the successive cases of *Espirito Santo*⁹⁴, *BaFin v Ewald Baumeister*⁹⁵, *UBS Europe*⁹⁶, *Enzo Buccioni*⁹⁷, *Espirito Santo II*⁹⁸ and *Di Masi and Varoufakis v ECB*.⁹⁹

These cases are part of the process to gradually codify an interpretative practice that somehow reconciles the different regimes on access to documents, and different rules on the confidentiality of information,¹⁰⁰ including SSM Rules,¹⁰¹ ESCB rules,¹⁰² ESAs rules,¹⁰³ MiFID rules,¹⁰⁴ CRD rules,¹⁰⁵ or Solvency II rules. This patchwork quilt creates uncertainty about what the standard applicable to each public institution and can create the impression that transparency and disclosure are based on context and specific rules, instead of a general principle.

Fortunately, the CJEU has not followed this compartmentalised approach, but only time and experience will tell whether its approach suffices. In line with our comments above, despite all the meritorious interpretative clarifications given by the CJEU, full-fledged consistency could only be achieved by reforming the framework to ensure full consistency. In *Banco Espirito Santo* the General Court, deciding in the context of the ECB Access Decision, considered the petition to access the Governing Council decision to suspend access by *Banco Espirito Santo* to credit instruments, and to set the ceiling for the provision of emergency liquidity that could be provided by Banco de Portugal to *Banco Espirito Santo*. The Court rejected the ECB's contention that this would undermine the confidentiality of the Governing Council proceedings,¹⁰⁶ but accepted its argument that such disclosure could undermine financial or monetary policy.¹⁰⁷ In *Baumeister*, it considered the meaning

⁹² Article 4.3. ECB/2004/3 Decision.

⁹³ This can give rise to conflicts between the duties of national officials under their domestic laws, and under EU Law. See Päivi Leino-Sandberg "Public access to ECB documents: are accountability, independence and effectiveness an impossible trinity?" cit. p. 210.

⁹⁴ Judgment of 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234.

⁹⁵ Judgment of 19 June 2018, *BaFin v Ewald Baumeister*, C-15/16, EU:C:2018:464.

⁹⁶ Judgment of 13 September 2018, *UBS Europe and Alain Hondequin and Others v. DV and Others*, C-358/16, EU:C:2018:715.

⁹⁷ Judgment of 13 September 2018, *Enzo Buccioni*, C-594/16, EU:C:2018:717.

⁹⁸ Judgment of 13 March 2019, *Espirito Santo Financial Group v European Central Bank*, T-730/16, EU:T:2019:161.

⁹⁹ Judgment of March 2019, *Fabio De Masi and Yanis Varoufakis v. ECB*, T-798/17, EU:T:2019:154.

¹⁰⁰ See René Smits; Nikolai Badenkoop "Towards a single standard of professional secrecy for supervisory authorities – A reform proposal" *European Law Journal* no. 3 (2019) pp. 295-318.

¹⁰¹ Article 27 (1) SSM Regulation

¹⁰² Article 37 ESCB Statute.

¹⁰³ Article 70 (2) Regulations 1093/2010, 1094/2010, and 1095/2010.

¹⁰⁴ Article 76 (2) Directive 2014/65/EU.

¹⁰⁵ Article 53 (1) Directive 2013/36/EU.

¹⁰⁶ *Banco Espirito Santo* 77-83.

¹⁰⁷ *Banco Espirito Santo* 88-108.

of MiFID confidentiality provisions in light of the Access Regulation, holding that the exchange of information between supervisory authorities is necessary for the effective supervision, and that this requires confidentiality, but that this cannot operate as a general presumption that all information relating to a supervised entity be deemed to be confidential.¹⁰⁸ In *Buccioni*, although the problem was based on CRD IV provisions, the Court used a general approach, which interpreted together the provisions of CRD IV and MiFID on confidentiality, and referred to *Baumeister* (based on MiFID) as a precedent that could be applied by analogy. Nevertheless, despite it framed the problem in the context of the right to an effective remedy/judicial protection (Charter article 47) it was relatively cautious, and allowed supervisory authorities and national courts much leeway to balance an applicant's right to access and the public interests involved in the confidentiality of information.¹⁰⁹ In *UBS Europe*, the Court held that two persons who had been deemed no longer 'fit and proper' to perform functions in the financial market could not have copies of the correspondence from the national supervisory authority, because this was, according to the Court, not a case "covered by criminal law"¹¹⁰ (which provides an exception to the non-disclosure of documents). The Court, as in *Buccioni*, read the provisions in the context of the right to judicial protection, which includes the right of access to the file, but held that this right was not unfettered, and has to be balanced by other interests, and that national courts are the ones that can do such balancing.¹¹¹ In *Di Masi and Varoufakis* the General Court considered the ECB's refusal to grant access to the documents of the legal advice for its decision of the supply of emergency liquidity by the Greek central bank to Greek banks, within the framework of the ECB Access Decision, accepting the ECB's characterisation that these were documents "for internal use", and thus confidential,¹¹² which the ECB had duly motivated in its decision,¹¹³ and rejecting the petitioners' arguments about the existence of an overriding public interest.¹¹⁴

In the SRM context, also the Appeal Panel developed in 2017-2019 a large caseload focussing on access to documents under Regulation 1049/2001 connected to the Banco Popular resolution. In brief, the overall question was whether the SRB had granted adequate access to Banco Popular's shareholders and subordinated bondholders to the documents supporting the SRB's resolution decision; the AP's first answer was "not nearly enough" and the answer became more refined and nuanced as successive rounds of appeals resulted in additional SRB disclosures. The AP had to examine the SRB's refusal to disclose key resolution documents (e.g. the resolution decision, the valuation report, and the resolution plan) in light of the right that "any citizen" has under the Public Access Regulation to access documents. A key to the AP decisions were the arguments that: (i) the conferral of powers to Union agencies is conditional upon respecting fundamental rights and judicial review; and (ii) administrative safeguards, including access to documents are instrumental to both. On these grounds, the AP held that the SRB erred in law when refusing to access the valuation report in its entirety. The report was a critical part of the resolution decision, and thus had to be at least partially disclosed. In turn, the SRB was only partly entitled to refuse access to other documents: the resolution decision, some parts of the resolution plan and other relevant documents could be disclosed in a redacted, non-confidential form, without endangering financial stability, especially since disclosure would take place months after the resolution decision was taken¹¹⁵. In successive rounds of appeals the AP develop a stable framework of analysis to

¹⁰⁸ Baumeister 33-35.

¹⁰⁹ Buccioni 27-33.

¹¹⁰ UBS Europe 46-48.

¹¹¹ UBS Europe 68-70.

¹¹² Di Masi and Varoufakis 45-52.

¹¹³ Di Masi and Varoufakis 53-58.

¹¹⁴ Di Masi and Varoufakis 67-72.

¹¹⁵ The AP agreed with the SRB that documents exchanged with the ECB or the European Commission were protected as part of the deliberation process, under article 4 (3) of the Public Access Regulation.

balance the competing interests at stake and adhered to the following principles: (a) The right of access is a transparency tool of democratic control available to all Union citizens irrespective of their interests in subsequent legal actions¹¹⁶; (b) The principle is that all documents of the institutions should be accessible to the public, since the Public Access Regulation implements Article 15 of the TFEU, and a fundamental right under Article 42 of the Charter of Fundamental Rights of the European Union, although certain public and private interests are also protected by way of exceptions and the agencies must be able to protect internal deliberations to safeguard their ability to carry out their tasks; (c) Exceptions to public access to documents must be applied and interpreted narrowly¹¹⁷; (d) For certain categories of documents the Union institutions, bodies and agencies can rely on a general presumption that their disclosure would undermine one of the interests protected by the Public Access Regulation¹¹⁸.

¹¹⁶ Judgment of 13 July 2017, *Saint-Gobain Glass Deutschland*, C-60/15, EU:C:2017:540, paragraphs 60-61 and judgment of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 20.

¹¹⁷ Judgment of 17 October 2013, *Council v. Access Info Europe*, C-280/11, EU:C:2013:671, paragraph 30.

¹¹⁸ Judgment of 28 June 2012, *Commission v. Edition Odile Jacob*, C-404/10, EU:C:2012:393; judgment of 21 September 2010, *Sweden and Others v. API and Commission*, C-514/07 P, EU:C:2010:541; judgment of 27 February 2014, *Commission v. EnBW*, C-365/12 P, UE:C:2014:112; judgment of 14 November 2013, *LPN and Finland v. Commission*, C-514/11 P and C-605/11 P EU:C:2013:738; judgment of 11 May 2017, *Sweden v. Commission*, C-562/14 P, EU:C:2017:356.

3. TENSIONS, DEFICITS AND A POSSIBLE WAY FORWARD.

As already noted, the European Commission considers that the existing, quite composite, accountability framework for the SSM and SRM is “overall effective”.

In the literature this view finds some consensus, also because accountability is perceived as having evolved over time with both the SSM and SRM being now more responsive in practice¹¹⁹; moreover, some authors find that “the information requirements under the SSM Regulation and the Interinstitutional Agreement paired with the (internal organisation of the) regular hearings and ad hoc exchanges do provide for a robust beginning for the European Parliament to understand and evaluate policy decisions and their rationale and, more generally, to remove information asymmetries also with regard to the public at large”.¹²⁰ Yet, these authors also find that this positive picture is somehow mitigated by existing shortcomings, including the “lack of performance benchmarks against which the actions of the SSM/ECB can be evaluated”, the “lack of expert review” through “a policy or regulatory audit by external experts who can assess [also confidential] information on a confidential basis”¹²¹, “the absence of meaningful instruments that would allow the European Parliament to assign consequences to its judgment of the performance of the ECB” – this occurs because the SSM Regulation was adopted pursuant to Article 127(6) TFEU and the relevant special legislative procedure puts the Council alone at the helm of the process with the European Parliament only having a right to be consulted - and the “relative vagueness of the SSM’s objectives”.¹²²

In our view, there could be room for some improvements, and such improvements could be engineered in practice without revolutionising the existing institutional framework (and thus within the boundaries of the current legal framework) balancing the need for a more intrusive and informed accountability with the need to refrain from “excessive accountability” and which “may in fact result in de facto constrained independence”¹²³, opening the door to “undue political influence” over European financial supervisors in a way which, abusing of political power and going beyond the forms of political control which are needed to ensure democratic checks and balances and democratic accountability of the administration, would intrude into, or constrain the margins of technical appreciation which need to be given to supervisors or which may in the end jeopardise the necessary confidentiality of relevant information pertaining to supervision and internal decision-making.

We identify three main and complementary, actions which, taken together, would better bridge between political, administrative and legal accountability and, both individually and as a whole, could contribute, in our view, to the strengthening of the existing framework without disrupting the acquis and without jeopardizing the effectiveness of the SSM and SRM. In other words, would effectively counterbalance the powers given to the SSM and the SRB and would increase their accountability at the European level without undermining their independence and within the boundaries of the current legal framework. These three actions are described here below and they specifically refer to strengthened political accountability (3.1.), coupled with strengthened administrative accountability (3.2.) and with strengthened legal accountability at least in the SRM through a reconsideration of the remit of the Appeal Panel and of some of its institutional features (3.3.).

¹¹⁹ Phedon Nicolaides, “Accountability of the ECB’s Single Supervisory Mechanism: Evolving and Responsive”, 3

¹²⁰ Fabian Amtenbrink Menelaos Markakis, *Towards a Meaningful Prudential Supervision Dialogue in the Euro Area?*, 24.

¹²¹ Phedon Nicolaides, “Accountability of the ECB’s Single Supervisory Mechanism: Evolving and Responsive”, 3, 25-27.

¹²² Fabian Amtenbrink Menelaos Markakis, *Towards a Meaningful Prudential Supervision Dialogue in the Euro Area?*, 24

¹²³ Phedon Nicolaides, “Accountability of the ECB’s Single Supervisory Mechanism”, 11

3.1. Strengthened political accountability: the need for coordination and proactivity in the European Parliament's role to ensure more in-depth discussion.

One of the main challenges of the SSM/SRM framework is to understand what accountability mechanisms can achieve. SSM and SRM provisions develop in detail the reporting and accountability obligations of ECB and SRB vis-à-vis the European Parliament, and even (for the SRB) national parliaments. However, to make proper use of accountability mechanisms, political bodies need to make more active and less episodic their role and to collect quite granular “inside” information, for only then will they be able to ask the right questions, debate the right issues and provide conscious, political legitimisation to the technical output of the two administrative mechanisms as a result of their control as democratically elected bodies.

Yet, the substance and contents of the information to be shared between the SSM/SRM and the European and national parliaments is only regulated in detail for the annual report.¹²⁴ No reference is made to what happens if a specific request for information (as the questions for written answer concerning the SSM and SRM under Rule 141 of the Rules of Procedure of the European Parliament) is turned down by the ECB or the SRB (something that, formally, we do not expect to have happen nor to happen, but may nonetheless occur at least in substance when the answer given is totally elusive).

Moving to the specific mechanisms of control for which there is available information, these include the Annual Reports, EP Parliament hearings, and MEPs questions.¹²⁵

Judging from the Annual Reports published so far and by the minutes of the hearings of the Chair of the SSM Supervisory Board and of the SRB this public information fairly offers an helicopter view of the main issues encountered in the annual activity by both mechanisms, the development of their work programs, their results and their main short-to-midterm targets but there is little in granular information concerning the wide array of specific complexities encountered by the SSM and SRM in the day-to-day administration of the Single Rule Book and the proper performance of their activities. Moreover, aggregate high-level results have, in general, limited informational value for outside observers, including the MEPs called to exercise political accountability. More importantly, the Annual Report is based on the issues that the ECB Supervisory Board or the SRB consider of general importance for the work of the SSM or SRM, which means that, in the hearings where the Annual Report is presented, the ECB and SRB have great influence in setting terms of the discussion, and there is no procedure in place to make the Report (and the hearing associated to it) more responsive to the concerns of the EP (and MEPs).

On the EP ECON hearings, the evidence belies the facile prejudice of a disengaged political body, but it also raises other challenges that are more difficult to fix. The information publicly available on the ECON hearings for the SSM,¹²⁶ and the SRM,¹²⁷ shows a careful preparation, including, for each hearing, (i) several briefing papers drafted by experts, (ii) a briefing note drafted by EP staff, summarising the experts' conclusions, and adding other relevant topics; as well as, for the hearings with available

¹²⁴ Supra 2.2.

¹²⁵ For an insightful and comprehensive review (concerning the SSM) Adina Maricut-Akbik, “Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament”, 1-16

¹²⁶ <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union>

¹²⁷ <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union?tabCode=bank-resolution>.

transcript,¹²⁸ (iii) a lively debate where the MEPs showed in their questions and remarks an acquaintance with the relevant issues.

Thus, if any issue is subject to improvement it is not the preparation, or knowledgeability (although improving this is always positive), but the EP's focus and coordination to improve the depth of control, make it more active and less episodal. Although there are important differences between the approach in the SSM and SRM and conclusions can only be drawn from the limited information available, preliminary evidence suggests a lack of continuity on the issues subject to control, which hinders their in-depth treatment. Consider, for example, the EP hearing of 12 December 2019: (i) the experts' briefing papers concerned the issue of "subdued profitability" of significant Banking Union banks;¹²⁹ (ii) the EP staff briefing note covered this, but also the SSM 2020 supervisory priorities (including balance sheet repair and strengthening future resilience) and stress testing developments, updates on individual bank cases (NordLB and Banca Carige) and supervisory issues and policies (e.g. money laundering or Brexit).¹³⁰ The variety and complexity of the issues presented would already make it difficult to exercise in-depth control in a long hearing, while the transcript shows that the hearing lasted from 9:11 AM to 10:37 AM, i.e. less than 90 minutes. Furthermore, in that hearing, the MEPs questions and remarks included not only the issues outlined above in (i) and (ii), but also other individual cases (Novo Banco or Banca Popolare di Bari), supervisory consistency, competition and state aid, the exercise of the power to withdraw banking licenses, fit-and-proper assessments, the treatment of sovereign exposures, contingencies on the approval of ESM, banks' mergers and balance sheet structure, SIs supervision, small banks and proportionality, FinTech banks and regulatory arbitrage or sustainable finance and "green" and "brown" factors.¹³¹ The succession of remarks and questions did not follow any identifiable pattern; even if we restrict our analysis to the more repeated issues (EDIS and sustainable finance) each MEPs questions and remarks did not fully build on previous MEPs questions and remarks. To an external observer the result looks frankly disjointed, where a significant amount of time was spent on asking each question. The SSM Chair showed remarkable agility in changing from one topic to another (this is no surprise, due to his well-known, in depth command of all minute details of bank supervision and policy), but one wonders if this effort could be put to better use in deepening on each specific issue.

This impression is confirmed by the information available on the 4 September 2019 hearing: (i) it was predated by two internal briefing papers, with an in-depth analysis of money laundering and third-party equivalence;¹³² (ii) the briefing note covered individual cases (AS PNB Banka, NordLB, Banca Carige and Deutsche Bank) institutional and organisational issues (enlargement to Croatia and Bulgaria, and ECA-ECB MoU), risk assessment and analysis (NPLs, sovereign exposures or leveraged loans) and supervisory issues and policies (Basel III and future capital needs); (iii) the hearing lasted 73 minutes; and (iv) Mr. Enria speech covered these and other issues (NPEs, Basel III, Brexit, reforms - Banking Union and money laundering -, but also banks' profitability, internal models) while MEPs

¹²⁸ Unfortunately, these comprise only the hearings of 12 December 2019, and 4 September 2019, for the SSM, and the 22 July 2019 for the SRM (see the two previous notes).

¹²⁹ See papers by Can Bertray and Huizinga, Resti, Bruno and Carletti and Farina, Krahnen, Pelizzon and Wahrenburg at <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union>.

¹³⁰ C. Dias, K. Grigaite, M. Magnus Briefing Note Public hearing with Andrea Enria, Chair of the ECB Supervisory Board ECON on 12 December 2019. PE 624.437- 10 December 2019.

¹³¹ [Committee on Economic and Monetary Affairs. Public Hearing with Andrea Enria Chair of the Supervisory Board of the ECB. Brussels Thursday, 12 December 2019.](https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union)

¹³² J. Deslandes, C. Dias and M. Magnus "Anti-money laundering - reinforcing the supervisory and regulatory framework" PE 614.496 - August 2019; and, from the same authors, "Third country equivalence in EU banking and financial regulation" PE 614.495 - August 2019. It is unclear, however, whether these were preparatory briefing papers for the 4 September 2019 hearing, since they are not listed below the briefing note, as it is customary for SSM hearings, but below the heading "Briefings". See <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union>.

questions and remarks covered issues that included Basel III, risk concentrations, national options and discretions, financial stability in light of accommodative monetary policy, the “doom-loop” of sovereign exposures, the need for coordinated fiscal and economic policies, transparency, bank concentration v. diversity, cryptocurrencies etc.¹³³ On two issues (sovereign exposures and NPLs) there were cross-references, or the answers built on answers to previous questions,¹³⁴ but to an outside perspective, although questions and remarks were relevant and knowledgeable, the approach followed did not permit to gain any “traction” on any of the relevant issues.

Finally, to close on EP hearings, if one examines the transcripts, there are not enough follow-ups from one meeting to another. There is a reference, in the December 2019 meeting, to a “commitment” by Mr Enria on a previous March 2019 meeting, on the treatment of sovereign exposures (Jurzyca MEP), and in the September meeting to previous assertions by Mr Enria’s predecessor, Mrs. Daniele Nouy (Hübner MEP) but there is no discernible pattern, or continuity in the control of issues.

The picture with questions to and replies is also not totally encouraging. With the exception of the hot debate ignited in 2018 by the ECB proposal for the Addendum on NPL Guidance which was understandably centred on the proper divide between regulatory and supervisory competences, the information available on the EP site suggests that the ECON Chair or an MEP formally addressed a question to the SSM Chair quite rarely (for an example, see question on 30 November 2017 and response in 7 December 2017).¹³⁵ Thus, the conclusion in light of existing evidence¹³⁶ would be that the Q&A is possibly – qualitatively if not quantitatively – the more underutilized of all control mechanisms. This is no surprise, if one considers further that most of the answers to the questions are polite but quite general (if not vague) in their factual content, with little added value for the EP effective political control.¹³⁷

As said above, the information on SRB/SRM¹³⁸ offers many similarities, but also some differences. Again, there are (i) briefing papers and (ii) a briefing note to prepare the hearing; (iii) a hearing including a presentation by the SRB Chair and (iv) a time for questions and remarks by MEPs. The July 2019 hearing (i) was predated by two internal briefing notes by EP staff on SRM features, oversight and accountability, and liquidity provision in resolution;¹³⁹ and (ii) one specific briefing note preparatory for the hearing, which covered SRB role and tasks, the Annual Report, MREL implementation, an update on the Banco Popular case, and the steps to complete the Banking Union (including EDIS and liquidity facility to finance banks post-resolution) as well as the need for harmonisation of bank insolvency law, or the EP’s role as co-legislator for certain modifications to the resolution framework (involving ESM);¹⁴⁰ (iii) in the hearing the SRB Chair presented the SRB Annual Report, and her speech stressed in a quite comprehensive way resolution’s exceptional role, the work on resolution plans, including impediments

¹³³ [Committee on Economic and Monetary Affairs. Public Hearing with Andrea Enria, Chair of the Supervisory Board of the ECB. Brussels, Wednesday 4 September 2019.](#)

¹³⁴ See *supra* previous note.

¹³⁵ See <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union>. Questions to and replies from SSM/ECB.

¹³⁶ Compare also the 776 questions and 337 letters over a period of 4 years documented, as to the SSM, by Adina Maricut-Akbik, “Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament”, 16

¹³⁷ For a similar finding, that accountability in practise depends on the reliance of question asked and on the responsiveness of the ECB, Adina Maricut-Akbik, “Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament”, 16

¹³⁸ See <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union?tabCode=bank-resolution>

¹³⁹ M.Magnus, C.Dias, J. Deslandes “Single Resolution Mechanism: Main features, Oversight and Accountability” PE 528.749 - July 2019; and J. Deslandes and M. Magnus “Banking Union: Towards new arrangements for the provision of liquidity in resolution?” PE 624.402 - July 2019. Again, as in the case of the SSM hearing of 4 September 2019, it is unclear whether these were preparatory briefing notes for the 22 July 2019 hearing, since they are not listed below the briefing note, as it is customary for SRM hearings, but below the heading “Briefings”. See <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union?tabCode=bank-resolution>.

¹⁴⁰ J. Deslandes, C. Dias, M. Magnus, R. Segall Briefing Note. Public hearing with Elke König, Chair of the Single Resolution Board, 22 July 2019, PE 634.376- July 2019.

to resolvability and MREL, and further steps (including the document on expectations for banks) and the need for further reforms, including the need for deeper capital markets to place MREL, the harmonisation of domestic insolvency laws to make them closer to the US model, liquidity in resolution or resolution of CCPs;¹⁴¹ and, finally, (iv) the MEPs questions and remarks focused on aspects of operational (in)efficiency pointed in the ECA report (e.g. staffing or data), gaps in resolution planning, SRF resources, ESM reform, software expenditures deductibility from capital, the tools to manage liquidity in a resolution, the asymmetrical treatment of banks (and ensuing unpredictability), the state of resolution planning, the risks of Brexit, early warnings, shadow banking, TLAC/MREL, or proportionality. The issues were, again, varied, and there were more interventions, the conversation drifted less off-topic, and questions came back to resolution planning, liquidity in resolution, and the SRB's inadequacy of resources, remarks were more succinct and inquisitive, and to an external observer the tone seemed less deferential and more challenging.

The above offers three possible readings. A first reading would be that the mechanisms of accountability are used optimally, and the seeming dispersion of issues (greater in the SSM case) simply reflect the fact that there are no salient matters to complain about (or, that those salient matters are duly covered in the discussion). This reading is the least convincing, in our view. Two, the combination of annual reports, public hearings and questions and answers is far from optimal, and control is less meaningful than it could be, not because the ECON Committee or its members try to do too little, but perhaps because they try to do too much, all at once, and without sufficient order and continuity. If this were the case, the problem could be addressed without a change of framework, by simply using the existing tools with a more coordinated strategy. This implies also, of course, a change in psychological behaviour: MEPs, and particularly ECON members, should accept that, in the interest of an effective political control over the SSM and SRM, as necessary to properly deliver on their mandate towards all European citizens, they must join forces, cooperate and act in a more coordinated way, irrespective of their political inclinations (political inclinations matter when a political decision has to be taken, much less so when MEPs must first collect granular "inside" information, ask the right questions, debate the right issues). For example, one approach could be (i) to use questions more assiduously to prepare the terrain prior to a hearing, (ii) use briefing notes or reports to expand on the answers to the questions and identify blind spots or controversial points, and focus the debate on 3-4 issues, (iii) divide each hearing in blocks, around those main issues (leaving a final one for other matters) and make sure that, within each block, MEPs questions build on each other, and deepen on the issue, (iv) for each block, trying to obtain commitments by the SSM and SRB Chairs (on matters such as more transparency or information), or draw clear conclusions on the status quo; and (v) use subsequent meetings to follow-up on previous commitments and conclusions.

A third reading of the available evidence, however, suggests that public hearings and questions have less a function of control, and more a function of communicating to the public the relevant issues. In that context, it makes sense to be as broad and comprehensive as possible, while depth and continuity may be less important. Still, it would suggest that the current framework gives the European Parliament a rather "passive" role, that of an addressee of public information, leaving to the ECB and SRB to develop on their own the content of their annual reports and of their answers to specific requests for information, selecting the type and granularity of the information on their actions they deem appropriate for public disclosure via their reporting to the political institutions. Since these reports and answers are in principle public, this is a strong deterrent for both the ECB and SRB to be truly specific and fully transparent, since this may put at risk other competing public and private interests (e.g.

¹⁴¹ [Committee on Economic and Monetary Affairs Public Hearing with Elke König, Chair of the Single Resolution Board. Brussels, Monday, 22 July 2019.](#)

financial stability, internal decision-making, inspections and supervision; regular formation of the price for the securities listed on regulated markets or negotiated on multilateral trading facilities issued by supervised entities, commercial interests of supervised entities) which also need to be protected.

It is true that this inconvenience is partly counterbalanced by (i) the fact that the public report is preceded by the transmission to the Parliament of a draft confidential report (however, it is doubtful that, also considering the little time lag between the transmission under embargo and the transmission of the public version, there may be room for amendments) and, more importantly, (ii) by the possibility of holding, upon request, special, ad hoc confidential parliamentary meetings with Chair and Vice Chair of the Committee according to Article 20(8) of the SSM Regulation and Article 45(7) of the SRM Regulation.

We submit, however, that, in order to foster the exercise of more an active role of effective political accountability by the European Parliament, ECON could organize and implement a own initiative program of *ex post* regular and (also thematically) well-structured *confidential* checks and controls over the activities performed by the ECB and SRB, through (i) periodic confidential exchanges of documents and information (on selected issues, to be examined in-depth) (ii) closed doors (follow-up) meetings and (iii) (where necessary to complete the in-depth analysis) on site fact finding visits. We consider that, to the extent that these checks and controls are truly *ex post*, and thus limited to activities already performed without transcending into any *ex ante* attempt to give instructions for, or somehow influence the outcome of, decisions still to be taken, this would be fully consistent with the requirement of independence of both the Supervisory Board of the SSM and the full-time members of the SRB as set out in Articles 19(1) and (2) of the SSM Regulation and Article 47(2) of the SRM Regulation. In a sense, and in line with a principle embedded also in the IIAs (e.g. Article 2 of the EP/SSM IIA), this *confidential* access to all relevant information by the competent members of the European Parliament would ensure the practical implementation of the principle of openness which must inform the SSM and SRM. In this confidential context also internal documents should, in our view, be made available by the ECB or SRB upon request (this is particularly so for documents which are not classified because they deal with the current situation of a specific bank, and rather consist of internal guidelines, policy options of a general nature, for example regarding different NPL resolution strategies).

This would better institutionalise a two-tiered system, one based on public information and one based on confidential information, of political accountability for the activities of the SSM and the SRM.

More specifically, we consider that, in compliance with the existing legal framework as set out in Article 20 of the SSM Regulation and in Article 45 of the SRM Regulation as well as in the applicable IIAs, the competent members of the European Parliament and their relevant staff, with the authorisation of the Chair of the SSM and of the SRB could (i) regularly search for, and exchange with, the ECB and SRB, under the appropriate arrangements of strict confidentiality already applied for closed doors meetings, all relevant information for a granular, more continuous, possibly thematic and periodic control of their performance and (ii) to conduct, also under appropriate arrangements of strict confidentiality, regular on site fact-finding visits at the ECB or SRB. To ensure water-tight protection of confidentiality, the same safeguards now institutionalised in the MoU between the ECA and the ECB for the special treatment of highly confidential documents and information could be replicated here, providing that access to these documents or information be dealt with on-site, by a limited number of competent MEPs and relevant staff, with secure IT systems, and with ECB/SRB consultation for their treatment and retention,¹⁴² all subject to the principle of proportionality. It could be added, in this respect, that a similar selective and highly confidential access to supervisory and resolution information has been used by both the

¹⁴² ECA-ECB MoU, Section II no. 7, a-g.

European courts under Article 104 of the Rules of Procedure and by the AP in several cases and proved effective in balancing the need for legal accountability and SSM/SRM confidentiality.¹⁴³

It is doubtful, under the existing legal framework, whether the competent MEPs entitled to directly exercise this active role are only the Chair and Vice-Chair of the ECON Committee, or this could also be extended to a selected (but politically more representative) subgroup of (5 to 7 members, including Chair and Vice-Chair of) the Banking Union Working Group of the ECON Committee. A literal reading of Article 20(8) of the SSM Regulation and of Article 45(7) of the SRM Regulation, and of the relevant IIAs' provisions implementing them, may suggest that all confidential exchanges should be necessarily mediated (solely) by the Chair and Vice-Chair of the ECON Committee in a direct relationship with the Chair of the Supervisory Board or the Chair of the SRB. Even assuming that one should give a restrictive literal interpretation of these provisions as to the persons entitled to govern the process of confidential exchange between the European Parliament and the SSM and SRM, we consider however that the overarching principle of effective political accountability, on one hand, and the purpose and finality of these confidential exchanges militate for an extensive reading of the modalities according to which such confidential exchanges can be organised, and this means, to our minds, that what is truly relevant, under these provisions, is that confidential exchanges occur under the control of the Chair and Vice Chair of the ECON Committee and with the authorisation of the Chair of the SSM and of the SRB and these exchanges may embrace, in addition to episodic meetings upon request, also a structured program of confidential checks upon request, subject to the safeguards indicated above.

If this holds true, it is evident, in our view, that Chair and Vice-Chair of the ECON Committee cannot be expected to perform these in-depth checks, through exchanges, meetings and on-site visits on their own, in a "solitary" dialogue with the Chair of the Supervisory Board or the Chair of the SRB, and can rely at a minimum on their staff. Extending the participation to such confidential exchanges, meetings and on-site visits to *all* members of the ECON Committee would perhaps pose a threat to the effectiveness of the confidentiality arrangements, due to the high number of the members of the Committee; however the same inconvenience does not hold, in our view, for a selected subgroup (of 5 to 7 members, including Chair and Vice-Chair) of the Banking Union Working Group of the ECON Committee which would be more politically representative than just the Chair and the Vice-Chair and would add credibility to these confidential exercises of political accountability.

In organising and implementing under the control of the Chair and Vice Chair of the ECON Committee such an own initiative program of *ex post* regular and (also thematically) well-structured *confidential* checks and controls over the activities performed by the ECB and SRB as indicated above the European Parliament would certainly show a more "active" role and would leverage its potential in information search and joint production, building on procedural rights to some extent already reflected (albeit in general terms and in other contexts) in the EP Rules of Procedure, like Rule 221 which sets out a procedure for the competent EP Committee for the consultation of confidential information in a committee meeting in camera and Rule 228, which sets out a procedure for fact-finding visits. This would then translate into a more effective, public and confidential, political dialogue, capable of identifying blind spots or controversial points.

However, as already noted, in order to safeguard the independence of the ECB Supervisory Board and the independence of the full-time members of the SRB the results of such regular and structured confidential exchanges, meeting and on-site visits should never translate into instructions (or any other form of "undue political influence") on how supervisory or resolution policies or specific supervisory or

¹⁴³ For more information, compare M. Lamandini, D. Ramos Munoz, "Law and Practise of Financial Appeal Bodies (ESA's Board of Appeal and SRB Appeal Panel): A View from the Inside", in *Common Market Law Review* 57 (2020), 119-160.

resolution measures should be designed or taken by the ECB or the SRB nor constrain ex ante the margin of technical appreciation conferred upon the SSM and the SRB. These results, in our view, could also be formalized in an annual confidential report from the Banking Union Working Group to the SSM and SRB, which could frame the context for, and feed a useful and confidential dialogue on how to better coalesce regulatory action and supervisory action and, in turn, inform a better common understanding on the real progresses made by both mechanisms in their implementation of the Banking Union Rule Book.

One possible concern may be that, by discussing the substance of ECB/SRB decisions, the EP could, in the name of accountability, end up nonetheless by impinging upon both authorities' independence. There are three replies to this. One, both authorities are still sufficiently protected from political pressures via their budgetary independence, and composite appointment and removal procedures, not to mention the fact that, unlike courts, political bodies cannot simply set aside agency decisions they disagree with. Two, independence is not only a matter of institutional safeguards, but of institutional practice, its Chair and staff. They currently offer, to our mind, the best reassurances on effective independence. Three, pointing to the risk of jeopardizing the authority's independence would seem to frame the issue backwards: it is the existence of mechanisms of political accountability that justifies carving out certain technical decisions from the remit of political bodies, and giving them to technical bodies. The relationship of the ECB Supervisory Board and the SRB with the EP is not the same as with the courts: courts may annul ECB/SRB decisions; the EP cannot. Therefore, the issue of the "goals", or what political accountability is supposed to achieve is less pressing in the case of political accountability than in the case of legal accountability, where courts can annul agency decisions, and whether they do so in the name of "legality" review, or "full" review is an issue with obvious consequences. In the case of political bodies, especially democratically elected ones, like the EP, whose remit is broader, and whose control does not have the same drastic consequences of judicial review, there should be greater leeway to contest not only procedure, legality and operational efficiency, but also the actual substance of decisions, to ensure that democratic legitimacy is respected by means of the authority's explanations, and the EP's conveyance of objections.

Whether the EP could streamline this process to make it clearer and devise a better strategy is another matter. Above we have indicated that evidence may suggest that the different tools could be combined better to ensure ongoing control, and the follow-up of relevant issues. This idea could be taken one step further, by trying to distinguish questions by their nature. One example would be to differentiate between "policy" questions (e.g. was to improve liquidity in resolution, potential for harmonization of insolvency laws), "application" questions (e.g. situations pertaining to different banks), and "operational" questions (e.g. resolution plans and impediments to resolution, adequate staffing, organization of Joint Supervisory Teams, etc). This does not need to be used as a rigid distinction, but as a flexible tool to organize hearings (public or in camera, depending on the sensitivity of the relevant issues and the related need of confidentiality). If, following the above example, an SSM hearing begins with the issue of "sustainable finance", there could be questions on the policy rationale for including this as part of the prudential exercise, questions on whether there is progress on banks' internal models (IM) to account for "green" and "brown" factors, and questions about the operational challenges this entails for the supervisor.

In selecting the topics and setting the agenda for public or confidential debate, ECON could also (a) leverage on the interparliamentary cooperation fostered by the Lisbon Treaty, by actively requesting issues that play out before national parliaments, or their dedicated committees, ahead of dialogue sessions between the European Parliament and the SSM Chair or the SRB Chair, and feeding back to national parliaments what the European Parliament has learned on these issues (an example is what

happened in Spain in the wake of the Banco Popular resolution, where the Spanish Congress was deeply engaged with the issue, but with little coordination with the EP) and (b) collect findings, also through in camera hearings, from supervised entities to ensure stakeholders' and banks' experiences and suggestions are heard by the ECB and the SRB.¹⁴⁴ On this latter aspect, it may be worth acknowledging, on a practical note, that in the authors' experience the SRB AP derived in the past considerable benefits in understanding in-depth key regulatory issues and their practical implications from confidential, separate meetings with SRB officials, on one hand, and the chief risk officers of a selected sample of significant credit institutions. The same may prove quite beneficial for the members of the ECON Banking Union Working Group.

In our view, all the above would enhance the credibility of the political accountability of both the SSM and the SRM and would be beneficial for the overall democratic legitimacy of the two mechanisms.

This, in some circumstances, could also help the ECB and the SRB to reassure the public opinion, for instance in the wake of the adoption of an "unpopular" decisions (like for instance a determination of the failing or likely to fail or the adoption of a resolution decision), when most or some of the confidential information which could better explain why such measures were necessary cannot be disclosed to the public, if highly regarded political representatives like the Chair and Vice-Chair of the competent Committee (or a representative subgroup of the BUWG, if an extensive reading of the relevant, enabling provisions is accepted), having checked such information under appropriate confidentiality, could nonetheless reassure with public statements the European citizen that they closely monitored these decisions and found these actions appropriate and proportionate to the circumstances (we consider indeed that the provisions in the relevant IIAs that prevent MEPs from making any statement on the content or results of confidential meetings with the Chair of the SSM or the Chair of the SRB can be derogated if such statements are previously agreed with them; we read indeed the prohibition of such statement as governed by the implied premise that this prohibition applies "unless otherwise agreed"). In this way more political accountability would translate, to our eyes, into reinforced credibility of the overall institutional setting for supervision and resolution and, in turn, into its full democratic legitimacy.

3.2. Bridging political accountability with strengthened administrative accountability: a better partnership between parliaments, EBA and ECA.

Searching for information on own initiative, even in a structured two-tiered system, and thus also better leveraging on regular and confidential exchanges, meetings and on-site fact finding visits, would likely not be enough for the European Parliament to overcome all existing information asymmetries with the ECB and SRB. Moreover, European policymakers, albeit knowledgeable in financial and economic matters, may lack the expert judgment necessary to fully appreciate the minute details of all relevant confidential information concerning the performance of supervisory and resolution tasks by the two mechanisms. To this aim, additional, regular independent expert advice may prove very beneficial.

3.2.1. The role of the EBA as independent expert with full knowledge of supervisory and resolution practices in the Union and its involvement to support the informed judgment of the European Parliament

We submit that expert advice could (and should) be *regularly* sought for by the European Parliament (and notably its ECON Committee and more specifically its Banking Union Working Group), in the first

¹⁴⁴ We gratefully acknowledge that we owe this remark to private discussions with Professor René Smits.

place, from the EBA in accordance with recital 45 and Article 34 of EBA Regulation, which sets out that the EBA “may, upon a request from the European Parliament, the Council or the Commission, or on its own initiative, provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence”. In turn, Article 16a, as recently introduced in the EBA Regulation, provides that “the Authority may, upon a request from the European Parliament, from the Council or from the Commission, or on its own initiative, provide opinions to the European Parliament, to the Council and to the Commission on all issues related to its area of competence” and that the request may “include a technical analysis”. In this way, we submit that checks over the SSM and SRM activities would more likely leave the practice of a political discussion in general and diffuse terms to enter the realm of an effective control of measurable outcomes, of performances measured against appropriate metrics and benchmarks.

With regard to the SSM, this expert role is part of the mandate given by Regulation 1093/2010 to the EBA, which must (i) contribute to the establishment of high-quality common regulatory and supervisory standards and practices also by developing “other measures, including opinions” to the Union institutions” (Article 8, paragraph 1, letter a) as amended by Regulation (EU) 2019/2175), (ii) develop and maintain an up-to-date Union supervisory handbook setting out “supervisory best practices and high-quality methodologies and processes” (Article 8, paragraph 1, point aa) as amended) and (iii) conduct regularly “peer review analyses of competent authorities”

With regard to the SRM, this expert role is part of EBA’s mandate given by Directive 2014/59/EU Article 3, which requires, at paragraph 8, that Member States shall ensure that each resolution authority has the expertise, resources and operational capacity to apply resolution actions, and is able to exercise their powers with the speed and flexibility that are necessary to achieve the resolution objectives and, at paragraph 9, that “EBA, in cooperation with competent authorities and resolution authorities, shall develop the required expertise, resources and operational capacity and shall monitor the implementation of paragraph 8, including through periodical peer review. In turn, Article 8 of the EBA regulation, at paragraph 1, point (ab) (as amended by Regulation 2019/2175) requires the EBA “to develop and maintain an up-to-date Union resolution handbook on the resolution of financial institutions in the Union which is to set out best practices and high-quality methodologies and processes for resolution, taking into account the work of the Single Resolution Board.

This, in our view, could respond to the concerns, voiced in the literature, that, the current accountability framework “lacks of performance benchmarks against which the actions of the SSM/ECB can be evaluated” and “lacks of expert review” through “a policy or regulatory audit by external experts who can assess [also confidential] information on a confidential basis”. It also responds to the concern that without a public version of the Supervisory Dashboard Pilot – the management toolkit used by the Supervisory Board to govern the supervisory tasks conferred upon the ECB -, it would be difficult, if not impossible, to assess whether the ECB banking supervision is achieving its objectives¹⁴⁵ and that external expert of the European Parliament have not access to the relevant information and cannot therefore “replicate the tests or a sample of tests carried out by the SSM”.¹⁴⁶ In our view, the information collected and processed by the EBA, duly conveyed through an opinion to the ECON Committee, can be used, for accountability purposes, as an “external” performance framework for the SSM to some extent equivalent to the “internal” tool – the SSM Supervisory Dashboard Pilot – “which allows to track and assess the most important aspects of the ECB supervisory activities and to monitor the

¹⁴⁵ Phedon Nicolaides, *Accountability of the ECB’s Single Supervisory Mechanism*, 37, quoting Transparency International, “Two Side of the Same Coin? Independence and Accountability of the European Central Bank” (Brussels, 2017) 7

¹⁴⁶ Phedon Nicolaides, *Accountability of the ECB’s Single Supervisory Mechanism*, 37

effectiveness with which supervisory priorities are translated into practice”, which is however “available only to the Supervisory Board and to senior management”.¹⁴⁷

This would nicely bridge the tasks of administrative accountability already conferred upon the EBA in respect to the SSM and the SRM with the political accountability vested with the European Parliament because the EBA would also play a role in aid of the accountability process before the EP, making it technically more informed and more robust.

We do not consider this auxiliary role of the EBA in aid of the political accountability of the SSM and SRM as a threat to the independence of the ECB as a Treaty-based institution or an institutional conundrum, with Treaty implications, because an agency would “oversee” and exercise control over an institution. These concerns were already voiced by the ECB at the time of adoption of the recent reform of the EBA Regulation to oppose the attribution to the EBA of the power to set supervisory priorities. However, these legal concerns have been dispelled and, as noted above, Article 29a of the EBA Regulation, as amended, sets out the at least every three years, by 31 March, the EBA identifies up to two supervisory priorities of Union-wide strategic relevance. In turn, this auxiliary role is part of the mandate expressly given to the EBA to give opinions to the European Parliament, including “technical analysis”. In so doing the EBA would not intrude into the supervisory tasks conferred upon the SSM or the resolution tasks conferred upon the SRM but would rather technically assess their performance in general or on specific issues relevant for political and administrative accountability and provide the European Parliament with a precious double-check of the information reported to it by both mechanisms as an additional, practical toolkit to transform political accountability from passive to active without undermining the institution’s independence and within the boundaries of the current composite legal framework.

3.2.2. The role of the ECA as an independent mechanism of control, and in aid of the accountability process before the European Parliament

Furthermore, there is neither clarity nor detail about what role the ECA as well as national auditing courts can play as an independent mechanism of control, but also in aid of the accountability process before the EP.

The provisions concerning the ECA in the SSM Regulation seem to place the review in the context of parliamentary accountability,¹⁴⁸ but it does not clearly articulate the relationship between the two. The ECA’s mandate of review over the ECB is limited to the “operational efficiency” of the “management” of the ECB.¹⁴⁹ This can give rise to problems of interpretation of what “operational efficiency” or “management” mean, which provide the ECB with important bargaining power to set the terms on which an audit can develop.¹⁵⁰ Furthermore, although the ECB is responsible for the functioning of the SSM, the direct supervision of many entities is undertaken by NCAs; meanwhile, the ECA’s competence is circumscribed to the ECB. This means that the ECB and NCAs are organised within a “single”, coordinated, system, whereas the ECA and national auditors are not. This also can affect audits over the SRM-SRB, to the extent that the information was originated by the ECB.

So far, the relationship between ECA, on one side, and SSM and SRM, on the other side, has gone through its initial stage, where ECA’s access to ECB information constituted the main obstacle, and influenced the whole process. During this stage the attention given by the ECA to SSM and SRM has

¹⁴⁷ Phedon Nicolaidis, “Accountability of the ECB’s Single Supervisory Mechanism: Evolving and Responsive”, 25.

¹⁴⁸ Article 20 (7) SSM Regulation.

¹⁴⁹ Article 27 (2) ESCB-ECB Statute.

¹⁵⁰ Some have interpreted this as focusing on “performance audits”, thereby leaving out “financial compliance” audits. See, e.g. Frédéric Allemand “Accountability and audit requirements in relation to the SSM” ECB Legal Conference Proceedings 2017 p. 71.

been relatively limited (one report on SSM, one on SRM, one on operational efficiency of ECB crisis management, and the annual report mandated by article 92(4) SRM Regulation, on contingent liabilities arising from SRM). The attention by the EP to the information has also been limited, also due to the fact that this is a competence of the Budget Committee and not of the ECON Committee, which was however adamant with both the ECB and the SRB regarding ECA's past complaint of not having sufficient information to perform its mandate. For the SSM, either the transcripts of the hearings or the preparatory briefing notes only mentioned the ECA to stress the need that the ECB facilitated access to information through the adequate IIA,¹⁵¹ but not to the substance of ECA reports. The SRB shows some differences, and the substance of the ECA report on SRM was mentioned in the hearing for which there is an available transcript to illustrate some of the SRB's operational shortcomings.¹⁵² Yet, it is surprising that the ECA report on the operational efficiency of the ECB crisis management is not cited in any briefing or available hearing transcript for either agency (especially the ECB) despite being the more recent report.

In a sense, the current rules provide a sufficiently robust framework to facilitate exchange, but the framework to produce and search for the information, which is needed to turn the framework of exchange into a robust framework for accountability, leaves much to be desired. Reformed rules, new IIAs (e.g. between the EP and ECA) or a more assiduous communication between EP and ECA could help bolster a new environment, characterised by the greater granularity of information, and thus an accountability that, on top of being democratic, is also better informed. If MEPs begin using evidence in ECA, they may use their evidence to control not only operational efficiency, but to better frame the policy questions. For example, some evidence of the 2018 ECA report on ECB crisis management could have been used to frame questions concerning the crisis management of specific banks,¹⁵³ or resolution plans.¹⁵⁴

¹⁵¹ See, e.g. [Committee on Economic and Monetary Affairs. Public Hearing with Andrea Enria, Chair of the Supervisory Board of the ECB. Brussels, Wednesday 4 September 2019](#), or J. Deslandes, C. Dias, M. Magnus, M. Peraki Briefing note. Public hearing with Danièle Nouy, Chair of the Supervisory Board PE 624.410- November 2018.

¹⁵² [Committee on Economic and Monetary Affairs Public Hearing with Elke König, Chair of the Single Resolution Board. Brussels, Monday, 22 July 2019](#) (Markus Ferber and Sven Giegold). This also contributes to the impression of a less deferential tone in the SRB hearing, since there were less open hints at possible operational inefficiencies in the SSM hearings.

¹⁵³ See, e.g. the points "The setting-up of coordination and cooperation with other authorities is still not complete", "Interaction with the SRB and other stakeholders needs improvement", "there is no common set of indicators with clear thresholds to determine deterioration and the key identifier has several drawbacks" in ECA Special Report 02/2018 *The operational efficiency of the ECB's crisis management for banks* paras. 33-43, or 75-79.

¹⁵⁴ For example, in the SRB hearing mention was made of the ECA report on the absence of resolution plans, but no mention of the fact that, on the ECB recovery planning, "the results of recovery planning are not systematically used for crisis identification or management", or that "Due to the limitation of the sample provided by the ECB, conclusions could not be drawn on the recovery plan assessments" (ECA Special Report 02/2018 *The operational efficiency of the ECB's crisis management for banks* paras. 60-66) to press the point home that there is an unnecessary level of uncertainty and lack of clarity about how to deal with entities in a situation of crisis (both for recovery and resolution) which hinders the effectiveness of the whole process.

3.3. Bridging political accountability with judicial and quasi-judicial review: independence and legitimacy are buttressed, not hindered, by judicial and quasi-judicial review and by a better partnership between the EU Parliament and the European courts and administrative review bodies.

3.3.1. Establishing a periodic dialogue with the President of the Court of Justice and the Chairs of ABoR and AP on the major findings emerging from judicial, quasi judicial and administrative review in the SSM and SRM.

Although it is certainly true that, as noted by Professor René Smits in several of his academic writings, which also draw from his experience at ABoR,¹⁵⁵ in the SSM context only a tiny minority of the decisions adopted by the ECB has been contested before the General Court (roughly 0,003%, giving rise to roughly 50 cases), their significance cannot be neglected. As the CJEU noted in *Gauweiler*,¹⁵⁶ legal accountability is an essential component of the ECB legitimacy and the less the political accountability, the more the legal accountability required.

The same holds true for the decisions of the SRB contested before the General Court: so far there are more than 100 cases (and 4 appeals to the CJEU) on the resolution decision and the decision regarding the expert valuation and 6 cases on access to documents concerning the Banco Popular Español; 2 pending cases against the decision not to initiate resolution action in respect of ABLV and 1 case concerning a decision not to initiate resolution action in respect of PNB Banka. On top of that, there are more than 30 cases (and 2 appeals to the CJEU) on the calculation of ex ante contributions to the SRF.

The fundamental problem lies here with the timeline of the proceedings. In the Banco Popular cases although the Court selected a few pilot cases, after almost 3 years from the date of the resolution decision no judgement has been rendered on the merits; after more than two years, the Court adopted the first inadmissibility judgments in a few cases.

It is in this context that quasi-courts can prove highly complementary to the European courts and strengthen legal accountability by ensuring that appellants have their affairs handled impartially, fairly and within a very reasonable time.¹⁵⁷ This explains why administrative review bodies have tried to carve-out a place of their own in financial markets' increasingly complex architecture and governance. This requires a delicate balancing act vis-à-vis the three established players in the review system. Towards the agencies quasi-courts need to combine the independence to decide each case based on its merits (and not the downsides for the agency) with the institutional loyalty to offer precise reasons on why a decision was wrong, which help to put it right. Towards appellants, they need to be perceived as an impartial and useful device, but also send a clear message as to what they can, and cannot, review. The third relationship is with courts. While the legislature may have established quasi-courts, only the courts' interpretation of their role can grant them a stable ground to operate. Quasi-courts thus need to persuade courts that they have a relevant role to play without interfering with courts' own, that they can help 'de-clutter' the courts' table and offer a very timely first legality answer to those in need of such accountability (and this without becoming 'institutional clutter' themselves). So far, they have tried to do so by combining expediency, prudence, and willingness to penetrate the minute, often abstruse details, to dig out the real issues, which can then be re-examined by the courts. Their

¹⁵⁵ Compare e.g. René Smits, "The ECB and the rule of law", 350-383.

¹⁵⁶ Judgment of the Court (Grand Chamber) of 16 June 2015, Peter Gauweiler and Others v Deutscher Bundestag, Case C-62/14, ECLI:EU:C:2015:400.

¹⁵⁷ To use the words of the CJEU, judgment of 11 July 2011, C-439/11 P, Ziegler SA v Commission, EU:C:2013:513 at paragraph 154.

contribution, in this relationship with courts, is that of providing a first, quick, solution for the benefit of courts and parties alike.

But the experience with the ABoR is shrouded in darkness, since, ABoR proceedings are confidential unless the ECB's Governing Council authorises the ECB President to make the outcome of the ABoR proceedings public.¹⁵⁸ As indicated by René Smits, this is regrettable, and sits in contrast with the work of other appeal bodies, such as the AP of the SRB, or the ESAs Board of Appeal.¹⁵⁹ The consequence is that "only if the parties contesting a decision include a reference to the ABoR in their pleadings, will the outsider know that their case is a follow-on case".¹⁶⁰

The experience accrued so far by the AP of the SRB is much more transparent. All decisions are published on the SRB website, with only minor redactions (mostly on the identity of the appellants). This makes them (almost) fully accessible and, within the limits of the closed list of remits conferred upon the AP, it offers a timely idea to an outside observer of the issues which have been litigated. Unlike the curia website, which offers a description of the main pleas also in pending cases, however, pending cases before the AP are not reported in the SRB website.

We consider that also a dialogue of the Banking Union Working Group of the ECON Committee with the European courts and with the administrative review bodies of the SSM and SRM, would help in identifying blind spots or controversial points without threatening in any way their independence. This could be done with periodic (half-yearly or yearly) meetings and, in special circumstances, ad hoc meetings with the President of the Court of Justice, the President of the General Court and the Chairs of both review bodies and, depending on the issues, this could be done in a public hearing or in camera. In such meetings the focus should be on the lessons (also for policy action) learnt in cases concerning the Banking Union already decided with *res judicata* by the European courts and cases already decided by the internal review bodies; on pending cases (or cases decided by the General Court but still on appeal at the Court of Justice) the discussion should be limited to a reasoned description of the main issues litigated by the parties, without any anticipation on the possible views of the court, the AP or the ABoR, in order to preserve fully the obligation for a person called to decide a case not to pronounce on the same issues in any other way or in any other capacity (see for instance, in this regard, Article 18(1) of the Statute of the Court).

This dialogue may, in quite exceptional circumstances, even contribute to the establishment of an occasional "policy-making partnership" between courts or review bodies and regulators. A practical example is offered by a decision of the AP on 16 October 2018¹⁶¹ on the calculation of MREL for a significant credit institution. The SRB made an MREL determination that was below 8% of total liabilities including own funds (TLOF). Since resolution rules provide that the single resolution fund (SRF) resources can be tapped only after capital/liabilities reaching 8% TLOF are bailed-in,¹⁶² the appellant was concerned that a target below that level posed the risk that, at the point-of-non-viability (PONV) of the failing credit institution authorities would have to implement the strategy without relying on SRF resources. The Appeal Panel held that the Board's decision was justified. The MREL requirement was calibrated to ensure that the target of the relevant credit institution, measured against its risk weighted assets, compared in a balanced way with the average national banks and average Banking Union banks and was proportionate in light of the bank's size, funding and business models and risk profile, the impact of that bank's failure on financial stability, and the need to prevent competitive

¹⁵⁸ Article 22 (Confidentiality and professional secrecy) of the ABoR Decision.

¹⁵⁹ Smits no. 2.2.2.

¹⁶⁰ Smits no. 2.1.2.

¹⁶¹ Decision of 16 October 2018, in case 8/18.

¹⁶² Article 44(4) and 44(5) BRRD.

distortions. Yet, the threshold of bailed-in instruments equivalent to 8% TLOF could still be reached using not only MREL instruments but also liabilities that, although not qualifying as MREL, are nonetheless not excluded from bail-in,¹⁶³ e.g. those with a less than 1 year maturity. Since this was a reasonable view, the Board had the ultimate decision, which had to be respected. This result, which was legally sound based on the existing legal framework, proved politically divisive and policymakers decided to re-regulate the matter otherwise with the 2019 BRRD2 reform.

3.3.2. Organizational matters pertaining to quasi-judicial review which may benefit from dialogues with the Court of Justice and the administrative review bodies for possible regulatory action.

This dialogue may also facilitate the improvement of some design weaknesses of the system of administrative/legal accountability which, in our view, can be summarised as (a) “compartmentalisation”, and (b) insufficient clarity as to the scope and focus of review.

“Compartmentalisation” is visible and a result of institutional design. There are three different mechanisms of review for the European System of Financial Supervision, the SSM and the SRM and they are not coordinated within a cohesive system. The main reason is that review bodies are construed as organs of their respective Union agencies or institutions (yet not as part of their staff in order to ensure independence). This entails also a lack of clarity over the status of appeal body members, and a dependence on the idiosyncrasy of each agency or institution. Participation by appeal bodies in the European agencies’ network and other ad hoc liaisons is voluntary, loose and informal, and no substitute for institutional coordination.

More importantly, the Appeal Panel of the SRB, albeit displaying a quasi-judicial role (unlike ABoR) is also compartmentalised from Union courts and cannot apparently enter into a constructive “dialogue” with the CJEU. That dialogue is typically structured through the preliminary reference procedure, under Article 267 TFEU. This provision authorizes “courts” of “Member States” to make references to the CJEU, which the latter responds through a ruling, where it answers the legal question; the referring court will ultimately resolve the case, but in a way consistent with the CJEU’s reply to the specific question. This is an excellent mechanism to ensure consistency, dialogue and cooperation in dispute resolution, but it is unavailable for EU “financial” appeal bodies. It is arguable that the Appeal Panel of the SRB (unlike ABoR) would meet all the criteria established by the caselaw of the CJEU for being a “court or tribunal”.¹⁶⁴ However, it is not a court or tribunal “of a Member State”, which are the only ones authorized under Article 267 to make preliminary references.¹⁶⁵ This is relevant because an appeal body has to apply secondary law even when it has serious doubts about its legality under primary Union law.¹⁶⁶ In all fairness, this is not new, and also the recent Court reform,¹⁶⁷ although it seems to treat boards of appeals of other Union agencies as part of the judicial review system (compare now Article

¹⁶³ The bail-in eligible liabilities are contemplated in article 44 BRRD (the bail-in sequence is in article 48 BRRD). The liabilities eligible to fulfil MREL are regulated under article 45 (4) BRRD.

¹⁶⁴ Case 61/65, Vaassen (née Göbbels), EU:C:1966:39; Case C-54/96, Dorsch Consult, EU:C:1997:413, para. 23; and Case C-517/09, RTL Belgium, EU:C:2010:82. See in particular Case C-205/08, Umweltanwalt von Kärnten, EU:C:2009:767, paras. 34-39. See also Case C-195/06, Österreichischer Rundfunk (ORF), EU:C:2007:613, paras. 10-13 and 22 and the Opinion of Advocate General Ruiz-Jarabo Colomer in the same case, EU:C:2007:303, points 24-41. The EUIPO Board of Appeal is not considered a “court or tribunal”, see Case T-63/01, Procter & Gamble v OHIM (soap bar shape), EU:T:2002:317, paras. 21-22. However, unlike the EUIPO Board of Appeal, the BoA and the AP are not “in functional continuity” with the agency, which was the decisive criterion according to the Court.

¹⁶⁵ This was the decisive criterion for denying such status to the Complaints Boards of the European Schools. See Case C-196/09, Miles and Others, EU:C:2011:388, paras. 37 to 39.

¹⁶⁶ Compare Case C-196/09, Miles and Others, para. 28, where the Complaints Board of the European School expressed a similar concern.

¹⁶⁷ Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 111, 25.4.2019, p. 1). See Alberti, J. (2019), “The draft amendments to CJEU’s Statute and the future challenges of administrative adjudication in the EU”, *Federalismi.it*, No 3, 6 February 2019, pp. 1-32.

58 a) of the Statute of the Court), does not give them the possibility to make references for a preliminary ruling. This is, however, particularly unfortunate for the AP, which, unlike those other boards of appeal, adjudicate matters without being in functional continuity with its agency.

On the clarity of the review, the competences granted to the AP are specific¹⁶⁸, but this does not dispel all interpretative doubts on matters of competence.¹⁶⁹ More importantly, it is unclear why certain matters were excluded, by the co-legislators, from the remit of the AP¹⁷⁰. This gives rise to situations that are far from ideal. For example, many of the cases on SRB *ex ante* contributions represent a significant workload for the General Court, requiring almost two years to reach a decision. There is no clear explanation why the competence was not allocated to the AP, which could have cleared the General Court's table of minute and highly technical issues, while resolving them fairly and in a timely manner. One must add to this the recurring question about the standard, or standards, of review by quasi-courts over supervisory decisions, especially in comparison to the standards of the General Court and the CJEU. So far, it remains unclear where precisely the legality control of the ABoR and AP ends. A more explicit statutory language on this issue would offer the necessary clarity, in expressly stating their specific standard of review and, if deemed appropriate, could also expressly extend it beyond manifest error of assessment, to embrace all errors of assessment.

¹⁶⁸ As noted above, the AP may hear appeals only against a decision of the SRB referred to in Articles 10(10), 11, 12(1), 38 to 41, 65(3), 71 and 90(3) of the SRM Regulation.

¹⁶⁹ E.g. the AP can review SRB decisions on impediments to resolution, but it is unclear whether this also extends to the preliminary identification of the impediments, which operates as the basis for those measures.

¹⁷⁰ E.g. decisions on access to the file by the party affected by the proceedings under Article 90(4) of the SRM Regulation or the decisions on *ex ante* contributions to the SRF are not reviewable before the AP.

4. CONCLUSIONS AND POSSIBLE WAYS FORWARD

The SSM and SRM framework provide ample opportunities for the exercise of political, administrative and legal accountability, but the devil is in the details, and seemingly small details can decidedly alter the outcome.

The framework of political accountability provides for different stopgaps where control can be exercised. However, it largely depends on whether political bodies, such as the EP, decide to leave the initiative to the ECB and the SRB to draft the annual report, and rely on that report to exercise their control, or whether they decide instead to adopt an active role, and use the questions and exchange of information (under confidentiality) to focus the debate on the issues that are politically relevant. This would not require changes at the level of rules, only, perhaps, a change of practices and a more assiduous exchange.

The framework of administrative accountability has been gradually improved, including a new Agreement between ECA and ECB, but it remains to be seen whether this translates into a steady and open information flow. A harder question still is whether the administrative expertise of ECA or EBA will be coordinated and enlisted to bolster the EP's exercise of political accountability, considering that there is currently no clear framework for coordination. Such a coordination framework could result from a specific interinstitutional agreement, but also from a more habitual exchange between administrative and political bodies.

The framework of judicial accountability was conceived for a simpler architecture. Few years after SSM/SRM the already ample body of case law by the CJEU and General Court witnesses how litigious and complex the system can be. A recurring theme is the composite architecture involving NCAs/NRAs and ECB/SRB, as well as, in crisis management, ECB, SRB and Commission. The specialised bodies (ABoR/AP) are insufficient to stem the tide of new disputes, given the lack of a binding review (ABoR), or the limited scope of issues subject to review (AP). A definite improvement could consist in a reform of appeal bodies to make their role more similar to that of courts (quasi EU administrative tribunals), avoiding compartmentalisation, improving organization and allowing them to enter into a dialogue with EU courts.

A final consideration concerns transparency. Access to information is essential for the exercise of political, administrative, and legal accountability, as well as for improving citizens' perceptions about the system. Currently the whole system pivots towards the exceptions to disclosure, such as the need to preserve the ECB/SRB independence (the former enshrined in the Treaties) financial stability, and the flexibility of decision-making processes. This gives the ECB/SRB the initiative to interpret those terms, and thus to decide what can be disclosed, and how, which sometimes provides insufficient transparency, which, in turn, may affect political and administrative accountability. The current arrangement may downplay the importance of the system's perceived legitimacy. So far, the citizens' perspective has been considered by judicial and quasi-judicial bodies, without sufficient political and administrative support.

This paper discusses the accountability mechanisms for the SSM and SRM. Both mechanisms' frameworks have the potential to provide strong political, administrative and legal accountability, but also present shortcomings at the level of practice, coordination, organisation and transparency. The paper identifies those and proposes some ways forward.

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