

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

Banking Union Scrutiny



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Abstract

This paper sets out recommendations for enhancing the accountability arrangements in respect of the European Central Bank and the Single Resolution Board within the confines of the presently applicable legal provisions. It recommends enhancing transparency, as a precondition for accountability. Other recommendations are that the European Parliament consider engaging the ECB and the SRB in an in-depth thematic dialogue on substantive issues of a long-term relevance, and that the European Parliament expresses an interest in how accountable and responsive the ECB and the SRB are to criticism and how they approach their internal decision-making.

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LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
AML/CTF	Anti Money Laundering / Counter Terrorist Financing
BRRD	Bank Recovery and Resolution Directive
CJEU	Court of Justice of the European Union
CRD IV	Capital Requirements Directive IV
CRD V	Capital Requirements Directive V
CRR	Capital Requirements Regulation
CRR 2	Capital Requirements Regulation 2
EBA	European Banking Authority
ECB	European Central Bank
EIOPA	European Insurance and Occupational Pensions Authority
ELA	Emergency Liquidity Assistance
EP	European Parliament
ESCB	European System of Central Banks
ESFS	European System of Financial Supervisors
ESG	Environmental, Social and Governance
ESM	European Stability Mechanism
ESMA	European Securities Markets Authority
ESAs	European Supervisory Authorities
EU	European Union
FiCoD	Financial Conglomerates Directive
FAP	Fit and Proper
GDP	Gross Domestic Product

MEP	Member of the European Parliament
MiFID	Markets in Financial Instruments Directive
MoU	Memorandum of Understanding
NCA	National Competent Authority
NCB	National Central Bank
NGFS	Network for Greening the Financial Sector
NRA	National Resolution Authority
SRB	Single Resolution Board
SRM	Single Resolution Mechanism
SRF	Single Resolution Fund
SSM	Single Supervisory Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

In response to the request to submit a paper outlining ideas for improvements in the accountability mechanisms of the European Central Bank (ECB) and the Single Resolution Board (SRB), within the currently applicable legal framework of the Treaty and the SSM and SRM Regulations, this paper sets out a number of suggested enhancements of present practices.

Starting with transparency as the basis for any meaningful application of accountability mechanisms, it is recommended that the European Parliament builds on the ECB's Supervisory Board Chair recent expression of support for more transparency and requests that the ECB publishes the Memoranda of Understanding entered into with other supervisory agencies in the context of the SSM, like the SRB already largely does. The availability of national legislation in English, and access to court judgments and orders in English are issues which impact the transparency of the operation of the ECB and the SRB: accountability can be improved if these texts are available in the language of the SSM (this is also an issue for the CJEU.) It is suggested that more information is provided about administrative review against the ECB's legal acts. Elaborating a single standard of professional secrecy across the financial sector supervisory authorities may give wider access to supervisory files, while upholding the need for secrecy (5 years confidentiality, business secrets, supervisory strategies, interests of parties that rescue a firm).

On the accountability of the ECB and the SRB, thematic dialogues between the European Parliament, on the one hand, and the ECB and the SRB, on the other, may allow for an in-depth discussion of issues of long-term relevance. A number of such issues are identified as potentially relevant for a comprehensive, focused exchange: the post-coronavirus situation; completing the banking union; climate change and sustainable finance; sovereign risk on banks' balance sheets; the expansion of big technology firms into banking, FinTech, BigTech and digital currencies; and competition in the banking sector.

Another recommendation is to identify lacunae in the legislation on banking union and act together with the ECB and the SRB to fill these gaps ('coalition building' among the EU's federal institutions). Also, the European Parliament may seek to coalesce findings from supervised entities and from society to ensure that stakeholders' and banks' experiences and suggestions are heard by the ECB and the SRB, thereby increasing the responsiveness of these authorities.

A more technical recommendation is to experiment with rotation among the political parties represented in the Committee on Economic and Monetary Affairs in taking the lead in the dialogues with the ECB and the SRB, thus ensuring that different political 'voices' are adequately heard in the debates.

Emphasis by the European Parliament on the openness and responsiveness of the ECB and the SRB would also enhance their accountability vis-à-vis Parliament; by engaging the authorities on how they have organised themselves so that internal opposition and discourse are duly taken into account in their decision-making, of course without making public the contents of any different views within the authorities, and on the different modes of approaching an issue they are capable of adopting, Parliament may further the responsiveness to feedback and criticism of the authorities it holds to account.

Finally, more systematic reporting or feedback from the European Parliament itself about how it holds the ECB and SRB to account may make the citizens aware of progress made (what did the ECB or the SRB change in response to the European Parliament's scrutiny?) and might invite reactions on these issues which Parliament could then feed into the supervisory dialogue.

1. INTRODUCTION

The accountability of the European Central Bank (ECB) and the Single Resolution Board (SRB) at the European level consists of accountability towards the European Parliament,¹ and the Council, and of judicial review, which may be preceded by, or alternated for, administrative review. This paper looks at methods to improve the accountability of the ECB and the SRB, with a focus on the ECB. Accountability can only be achieved when there is sufficient transparency on the activities of independent institutions. For this reason, the first area to explore is where improvements can be made in the area of transparency, both for the ECB and the SRB as in respect of the administrative and judicial review mechanisms (chapter 2). Independent review by the Administrative Board of Review (ABoR)² can be instituted against all legal acts adopted by the ECB pursuant to the SSM Regulation³. Selected decisions of the SRB⁴ can be appealed before its independent Appeal Body.⁵ Respecting the independence of the central bank, in both its monetary policy-centred and its prudential supervisory roles, and of the EU's single resolution authority, does not shield these bodies from substantiated criticism. As ECB director Isabel Schnabel recently observed: "Wide-ranging public debate and well-founded criticism are crucial for an independent institution like the ECB."⁶ Although Ms. Schnabel is responsible for monetary policy, her remark clearly also applies to the ECB's task in the area of prudential supervision. Prudential supervision is an area where, although the ECB is nominally⁷ as independent as in the area of monetary policy, it has to act within the framework of legislative standards that the European Parliament jointly sets with the Council and the Commission, providing more opportunity to influence the exercise of its task. Also, the prudential and resolution authorities are staffed by humans – and we humans are prone to make mistakes and are guided by assumptions and biases,⁸ cognitive and social, that we need to become conscious of to avoid them unjustifiably influencing our decisions,⁹ while scientific insights

¹ The (limited) accountability vis-à-vis national parliaments (Article 21 SSM Regulation) is hardly touched upon in this paper. A specific suggestion is made at the end of paragraph 3.1 below. See: 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* 1–15 (2019), DOI: 10.1177/1023263X18822788.

² Article 24 SSM Regulation and Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) (2014/360/EU) (OJ L 175, 14.6.2014, p. 47), as amended by Decision (EU) 2019/1378 of the European Central Bank of 9 August 2019 amending Decision ECB/2014/16 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2019/27) (OJ L 224, 28.8.2019, p. 9) (hereafter: ABoR Decision); consolidated text at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014D0016\(01\)-20190917](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014D0016(01)-20190917). All websites in this paper have been accessed on 3 April 2020.

³ 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 (OJ L 287, 29.10.2013, p. 63), hereafter: SSM Regulation.

⁴ 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 (OJ L 225, 30.7.2014, p. 1), hereafter: SRB Regulation.

⁵ See: <https://srb.europa.eu/en/about/srb-appeal-panel>.

⁶ *Narratives about the ECB's monetary policy – reality or fiction?*, Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at the Juristische Studiengesellschaft, Karlsruhe, 11 February 2020, at: https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200211_1~b439a2f4a0.en.html.

⁷ In the area of prudential supervision, the ECB's functions independently within the framework of supervisory legislation, which stands in marked difference from its performance of the monetary policy task where such a normative scheme is absent.

⁸ As a newspaper columnist put it succinctly: "The most scrupulous public servant will harbour unconscious biases"; Janan Ganesh, *Coronavirus and the comeback of the administrative state – Terms of political discourse have moved unmistakably in favour of government over just a few weeks*, *Financial Times*, 12 March 2020, at: <https://www.ft.com/content/22f51a26-6385-11ea-b3f3-fe4680ea68b5>.

⁹ On human perception and thinking, reference is made to Daniel Kahneman, *Thinking, Fast and Slow*, 2011. Wikipedia lists numerous biases: https://en.wikipedia.org/wiki/List_of_cognitive_biases. The limitation of humans was expressly recognised by Supervisory Chair Andrea Enria in a recent speech: "It is not just the amount of available information that determines market outcomes. It is also how this information is processed; and here, humans are limited – especially when it comes to risk and uncertainty. As we all know, irrational behaviour and

and societal expectations develop, marking an ever-changing environment in which the authorities fulfil their mandates. When such mandates are not linear and are open to interpretation, the benchmark against which to judge the performance of authorities is not easily identifiable, as others have rightly observed.¹⁰

The ECB is subject to what I would call ‘open mandates’ in both its monetary policy and prudential supervision functions (see Box 1). These mandates allow for self-interpretation of core elements, such as the definition of “price stability”¹¹ and the “safety and soundness of credit institutions” and “the stability of the financial system”, which require choices on the actual decisions to be taken and a weighing of various elements. The reference to the European Union’s ultimate objectives in the ECB’s secondary objective adds further elements of discretion in the ECB’s decision-making. The formulation of the mandate in such a manner makes it harder to hold the ECB to account.

As for the SRB, there is no general description of its mandate: it is to act as “a centralised power of resolution”¹² and to apply “[the] uniform rules and [the] uniform procedures” set out in the SRM Regulation.¹³ The SRB is to apply general principles,¹⁴ also set out in the BRRD,¹⁵ and resolution objectives of the SRM Regulation and the BRRD.¹⁶ Again, these principles and objectives require a discretionary balancing of interests and do not lead themselves to an easy identification of the appropriateness of the performance of the authority. So, also for the SRB, there is no clear and unequivocal benchmark to apply when assessing how the SRB discharges its task.

In spite of such ‘fuzziness’ of the yardstick(s) to apply, methods can be explored to enhance accountability vis-à-vis the European Parliament.¹⁷ An exploration of such methods of accountability is undertaken, introducing imaginative ideas (chapter 3). Administrative and judicial review, the second leg of EU-level accountability of the ECB and the SRB, might also be enhanced albeit that the independence of both sides of the accountability spectre (the entities held accountable, or accountee, and the entities entrusted with reviewing the latter’s activities) require even more respectful

exuberance sometimes prevail.”; *The case for more transparency in prudential supervision*, Speech by Andrea Enria, Chair of the Supervisory Board of the ECB, at the EBI Global Annual Conference on Banking Regulation, Frankfurt am Main, 20 February 2020, at: <https://www.bankingsupervision.europa.eu/press/speeches/date/2020/html/ssm.sp200220~6f0ae3acde.en.html>.

¹⁰ As Amtenbrink and Markakis write: “the existence of a sufficiently clear standard based on which the performance can be evaluated, as well as the availability of relevant information on the activities of the accountee, form two essential preconditions of accountability”; Fabian Amtenbrink and 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*, (2019) 44(1) *European Law Review* 3-23.

¹¹ In the *Weiss* judgment, the CJEU has ruled that the ECB’s interpretation of price stability conforms with its Treaty-given mandate: judgment of 11 December 2018 in Case C-493/17, ECLI:EU:C:2018:1000, para. 56, which reads as follows: “It does not appear that the specification of the objective of maintaining price stability as the maintenance of inflation rates at levels below, but close to, 2% over the medium term, which the ESCB chose to adopt in 2003, is vitiated by a manifest error of assessment and goes beyond the framework established by the FEU Treaty. As the ECB has explained, such a choice can properly be based, inter alia, on the fact that instruments for measuring inflation are not precise, on the appreciable differences in inflation within the euro area and on the need to preserve a safety margin to guard against the possible emergence of a risk of deflation.”

¹² Recital 11 of 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 (OJ L 225/1, 30.7.2014, hereafter: SRM Regulation).

¹³ Article 1 SRM Regulation.

¹⁴ Article 15 (**General principles governing resolution**) SRM Regulation.

¹⁵ “to ensure conformity with the principles established in Article 3(3) of Directive 2014/59/EU”: recital 25 of the SRM Regulation.

¹⁶ Article 14 (**Resolution objectives**) SRM Regulation. See, also, Article 31 BRRD (**Objectives, conditions and general principles**).

¹⁷ Similar arrangements may also be explored in the context of accountability towards the Council.

accountability arrangements. A few observations can be made in the context of the transparency chapter (chapter 2). Chapter 4 presents the recommendations resulting from the explorations in the previous chapters.

Box 1 – The ECB’s ‘open’ mandates in the areas of monetary policy and prudential supervision

Monetary policy	Prudential supervision
<p><i>The primary objective of the European System of Central Banks (hereinafter referred to as ‘the ESCB’) shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.¹⁸</i></p> <p>The ECB’s mandate on price stability may seem straightforward but the Eurosystem’s own definition of what constitutes price stability,¹⁹ accepted by the European Court of Justice (ECJ) in the <i>Weiss</i> judgement in the context of challenges of the scope of this mandate from German citizens,²⁰ and the current debate about the Eurosystem’s new monetary policy strategy show that there is ample scope for different views on this mandate. Even measuring the level of inflation is not uncontested. The current discussion on the possibility or, indeed, the (economic and legal) need to incorporate the risks posed by climate change and biodiversity in the formulation of the Eurosystem’s monetary policy also underline that there is no simple yardstick to assess the performance of the ECB.</p>	<p><i>This Regulation confers on the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions, with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage.²¹</i></p> <p>(...)</p> <p><i>When carrying out its tasks according to this Regulation, and without prejudice to the objective to ensure the safety and soundness of credit institutions, the ECB shall have full regard to the different types, business models and sizes of credit institutions.</i></p> <p><i>No action, proposal or policy of the ECB shall, directly or indirectly, discriminate against any Member State or group of Member States as a venue for the provision of banking or financial services in any currency.</i></p> <p>(...)</p> <p>The ECB’s mandate in the area of prudential supervision does not set an unequivocal standard either: the ECB is to “contribut[e] to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State” (Article 1 SSM Regulation), while “ensuring high standards of supervision” (Article 4(3) SSM Regulation); such “supervision of the highest quality” should be “unfettered by other, non-prudential considerations” (recitals 12 and 83 to the SSM Regulation). While executing this mandate, the ECB is bound by a “duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage” to which it has to pay “full regard” (Article 1 SSM Regulation).</p>

¹⁸ Article 127(1) TFEU. See, also Box 5 below.

¹⁹ The ECB’s website states under ‘The definition of price stability’: “The ECB’s Governing Council adopted a quantitative definition of price stability in 1998: “Price stability is defined as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%.” The Governing Council clarified in 2003 that in the pursuit of price stability it aims to maintain inflation rates below, but close to, 2% over the medium term.” See: <https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html>.

²⁰ See footnote 11 above.

²¹ Article 1 SSM Regulation.

2. TRANSPARENCY

2.1. Using existing transparency mechanisms

2.1.1. Transparency as a basis for accountability

Since proper accountability is built on transparency it seems worthwhile to start an analysis of how accountability of the ECB and the SRB can be improved by exploring where improvements can be made in respect of openness about their activities, including about the review of their actions. Therefore, the paper identifies what has been undertaken and what can be improved in this respect.

2.1.2. European Central Bank

In recent years, the ECB has endeavoured to increase its transparency, notably by publishing monetary policy accounts,²² through public consultations,²³ and by introducing youth dialogues.²⁴ The current invitation to citizens to provide input into the discussions within the Eurosystem on the review of the monetary policy strategy is the latest sign of greater openness to engaging with the outside world.²⁵ Also in the area of prudential supervision, there is a tendency towards more openness, as the consultations on supervisory rules make clear.²⁶ These consultations take place ahead of the adoption of any general rule, not just of regulations as the SSM Regulation prescribes.²⁷ In a similar mode, the ECB has published, in 2018, the SSM Supervisory Manual²⁸. As was recently made clear by Andrea Enria

²² At: <https://www.ecb.europa.eu/press/accounts/html/index.en.html>.

²³ See: <https://www.ecb.europa.eu/paym/cons/html/index.en.html>, and: https://www.ecb.europa.eu/stats/ecb_statistics/governance_and_quality_framework/consultations/html/index.en.html.

²⁴ See: <https://www.ecb.europa.eu/ecb/educational/youth-initiatives/ecb-youth-dialogue/html/index.en.html>.

²⁵ See the video, available on the ECB's website under the title 'ECB strategy review: we want to hear from you', at: <https://www.youtube.com/watch?v=aSfHdJNvyEk&feature=youtu.be>.

²⁶ Without implying completeness, reference is made to recent past consultations on supervisory fees in 2017 and 2019 (see: https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/fees_201904.en.html), on the draft guide to fit and proper assessments (at: <https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/fap.en.html>), on the draft ECB Guides to the internal capital and liquidity adequacy assessment processes (ICAAP and ILAAP) (at: https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/icaap_ilaap.en.html), on the draft ECB guide to internal models (at: https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/internal_models.en.html) and on the draft ECB Guideline on the materiality threshold for credit obligations past due for less significant institutions (at: https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/materiality_threshold_202001.en.html), and to the on-going consultation on the ECB's methodology for assessing banks' internal models for the calculation of exposure to counterparty credit risk (at: https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/egam_202002.en.html).

²⁷ Article 4(3) SSM Regulation provides, inter alia, the following:

"The ECB may also adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation.

Before adopting a regulation, the ECB shall conduct open public consultations and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency."

Public consultations are also required for supervisory fee arrangements, as per Article 30(2) SSM Regulation:

"2. The amount of the fee levied on a credit institution or branch shall be calculated in accordance with the arrangements established, and published in advance, by the ECB.

Before establishing those arrangements, the ECB shall conduct open public consultations and analyse the potential related costs and benefits, and publish the results of both."

²⁸ See: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf>.

who declared that “transparency is one of my foremost priorities as Chair of the ECB’s Supervisory Board”²⁹, the ECB’s approach is certainly one of more openness, on the supervisory process and on bank data, naturally within the legal context (on which more below, in paragraph 2.3). It is submitted that, on transparency, there is more that can be undertaken, as will be set out below.

2.1.3. European Court of Justice and ABoR

Parliamentary accountability is an important general and topical mechanism of holding the ECB and the SRB to account for the performance of their tasks. Judicial and administrative review is necessarily case-specific and of most relevance to the individual appellants but also provides clues for the responsiveness of the authorities and may indicate issues that the European Parliament may wish to take up with the authorities of banking union. Seeing which aspects of their functioning give rise to contestation and assessing the tendency to correct policies that have been scrutinised in independent review beyond the case at hand may nourish the European Parliament’s preparation of accountability mechanisms.

Insight into the judicial oversight of the ECB and the SRB can be accessed through the *Curia* website³⁰ of the Court of Justice of the European Union (CJEU), through academic commentaries on the case law and by following comments in the media. Information on the *Curia* website may not always be complete or fully up-to-date. An overview of academic annotations of judgements is five years old³¹, while more recent information may not always be complete.³² It is submitted that more up-to-date and complete information on the issues that play out in court about banking union may provide useful information which is relevant for the accountability processes.

Several issues that arose in judicial proceedings appear to be core to the accountability of the supervision and resolution authorities (see Tables 1 and 2). They concern (1) the standing of shareholders;³³ (2) the duration of judicial proceedings, notably in respect of resolution (*Banco Popular, ABVL Bank*)³⁴ and (3) the diversity of appeal/review options available: Appeal Panel (SRB), ABoR (ECB), and the European Court of Justice – this does not even include the Joint Board of Appeal of the ESAs. There have been calls for a specialised court on supervision and resolution issues.³⁵

A total of 50 judicial proceedings against the ECB have been initiated; see Table 1 for an overview. Several of these proceedings have been concluded while others are still pending. The withdrawal of a license and the imposition of capital requirements count for the most contestations in court, even though the classification by issue does not fully reflect the facts of the case: some proceedings have

²⁹ In his speech of 20 February 2020 mentioned in footnote 9 above.

³⁰ https://curia.europa.eu/jcms/jcms/j_6/en/.

³¹ See: CJCE – Système MINIDOC Notes aux arrêts de la Cour de justice Édition du 27/10/2015, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/notes_05.pdf.

³² This author couldn’t help noticing that his comments on the *L-Bank* case had not been included among the ‘Notes on Academic Writings’ shown for the General Court’s judgment of 16 May 2017 in Case T-122/15 (*Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank*), ECLI:EU:T:2017:337; see: <https://curia.europa.eu/>.

³³ Judgment of 5 November 2019 in joined cases C-663/17 P, C-665/17 P and C-669/17 (ECB v *Trasta Komerbanka AS, Ivan Fursin and Others* (C-663/17 P), *European Commission v Trasta Komerbanka AS, Ivan Fursin and Others* (C-665/17 P), and *Trasta Komerbanka AS, Ivan Fursin and Others v ECB* (C-669/17 P)), ECLI:EU:C:2019:923, summary by René Smits (*Shareholder standing when a bank license is withdrawn*), at: https://ebi-europa.eu/wp-content/uploads/2020/02/Shareholder-standing-when-a-bank-license-is-withdrawn_final.pdf.

³⁴ See further below.

³⁵ Tomas M.C. Arons, *Judicial protection of supervised credit institutions in the European banking Union*, in Busch and Ferrarini (Eds.), *European Banking Union* (OUP, 2015), p. 474, cited by Marco Lamandini and David Ramos Muñoz, *Law and practice of financial appeal bodies (ESAs’ Board of Appeal, SRB Appeal Panel): a view from the Inside*, *Common Market Law Review* 57: 119–160, 2020.

been instituted in the context of a sequence of developments each of which is contested: the imposition of special administrators (*Carige*), the assessment of Failure-Or-Likely-to-Fail (FOLTF) decision and/or the withdrawal of the licence (*PNB Banka*, *Pilatus Bank*). It is clear that French banks have been coordinating their contestation of the imposition of capital requirements in specific cases, and have been met with success. There is no challenge from the Benelux States but the numbers and the limited time since 2014 do not allow to draw hard conclusions about the eagerness to confront the supervisor as being culturally determined or resulting from the conduct of the supervisor.

Table 1: Court proceedings against the ECB

Issue	No. of cases	Applicant(s)
Significance decisions	2	<i>L-Bank</i> (T-122/15), (C-450/17 P) <i>L-Bank</i> (T-122/15), (C-450/17 P)
Withdrawal of license (-related)	10	<i>Trasta</i> (T-247/16) ³⁶ , (T-698/16) <i>Niemelä</i> (T-321/17) <i>Ukrseľhosprom</i> (T-351/18), (T-584/18) <i>Bernis</i> , re: <i>ABLV Bank</i> (T-283/18 , FOLF), (T-564/18) <i>Anglo Austrian AAB Bank</i> (T-797/19 R), (T-797/19 R-II), (C-114/20 P(R)) <i>Pilatus Bank</i> (T-27/19) <i>PNB Banka FOLF</i> (T-730/19)
Special administrators	2	<i>Corneli</i> , re: <i>Banca Carige</i> (T-502/19) <i>Pilatus Bank</i> (T-687/18), (C-701/19 P)
Sanctions	4	<i>VQ</i> , i.e. <i>Banco de Sabadell</i> (T-203/18) <i>Crédit agricole group</i> (T-576/18), (T-577/18), (T-578/18)
Suitability of new shareholders	3	<i>Fininvest and Berlusconi</i> (T-913/16) <i>ZZ</i> (T-741/18) <i>PNB Banka</i> (T-330/19)

³⁶ Interim issue: standing of shareholders and of management of bank in liquidation: see judgment of 5 November 2019 in Cases [C-663/17 P](#), [C-665/17 P](#), and [C-669/17 P](#).

Issue	No. of cases	Applicant(s)
Governance (group; non-executive director)	6	<i>Crédit Mutuel Arkéa</i> (T-712/15), (T-52/16), (C-152/18 P), (C-153/18 P) <i>Crédit Agricole</i> (T-133/16), (T-134/16), (T-135/16), (T-136/16)
Capital requirements	13	<i>French banking industry re: Livret 1 and leverage ratio</i> (T-733/16), (T-745/16), (T-751/16), (T-757/16), (T-758/16), (T-768/16) <i>French banking industry re: deposit guarantee or resolution funds - 2017</i> (T-143/18), (T-144/18), (T-145/18), (T-146/18), (T-149/18), (T-150/18) <i>BNP Paribas - deposit guarantee schemes or resolution funds - 2018</i> (T-345/18)
Access to documents	6	<i>Aeris Invest</i> (T-827/17), (T-442/18) <i>OCU</i> (T-15/18) <i>De Masi and Varoufakis on ELA (Article 14.4 ESCB Statute)</i> (T-798/17), (C-342/19 P) <i>Malacalza Investimenti, re: Banca Carige</i> (T-552/19) <i>Corneli, re: Banca Carige</i> (T-501/19)
Issues ECB/ NCA – direct supervision	3	<i>Comprojecto-Projetos e Construções</i> (T-768/17), (C-251/19 P), (C-251/19 P-OST) <i>Triantafyllopoulos</i> (T-451/18) <i>Pilatus Bank</i> (T-139/19)
On-site inspection	1	<i>PNB Banka</i> (T-275/19)
Total number of cases	50	

From what can be assessed as an outsider of the proceedings against the SRB (see Table 2), the following may be observed. Most cases on the long list of proceedings against the SRB (and, occasionally against the Commission and the ECB, as well) calling for annulment of decisions, compensation of damages and/or a recalculation of the figures leading to a better outcome for the applicants and even requesting annulment or inapplicability of provisions of the SRM Regulation concerning the resolution of *Banco Popular* (95 in total) seem still pending. This raises questions on the ability of the CJEU to process such cases with speed. As an outsider, one is also at a loss how the Court has addressed the caseload, presumably by selecting a couple of ‘model cases’ to decide first. More openness on this would be welcome, also for the European Parliament to be able to assess the judicial accountability of the SRB.

Table 2: Court proceedings against the SRB concerning 'banking union'³⁷

Issue	Number of cases
Resolution of <i>Banco Popular Español S.A.</i>	95
Decisions in respect of <i>ABLV Bank, AS</i> and <i>ABLV Bank Luxembourg, SA</i>	4
Decision in respect of <i>PNB Banka AS</i>	1
Decisions on contributions to the Single Resolution Fund (SRF)	31
Other issues	2
Total	133

In the context of the ECB and the SRB attuning their activities, one might question whether there is a 'black hole' of judicial protection concerning FOLF findings by the ECB and subsequent SRB decisions; the forthcoming judgments of the Court in the relevant cases³⁸ will make clear if this is so, after an initial decision found that an FOLTF finding was not contestable in court.³⁹

In respect of the potential gap in judicial protection between preparatory acts of an National Competent Authority (NCA) and the legal act adopted on the basis of such preparations by the ECB, the *Berlusconi* case⁴⁰ has provided a solution: the EU judiciary will include in its assessment of the ECB's legal act any deficiencies in national preparatory acts.

A clear lack of transparency can be discerned in respect of the visibility of case law as being post-ABoR, i.e. instituted after an earlier administrative review of an ECB measure. 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. Then, this information may be contained in the summary of the case which the CJEU publishes in the *Official Journal*. Otherwise, it may be only after several years that the earlier contestation of an ECB legal act may become known, namely when mentioned in the General Court's judgement (usually after almost 2 years)⁴¹. This information is relevant in the context of accountability for two reasons. First, the level of contestation of ECB legal acts cannot be completely deduced from (on-going or concluded) judicial proceedings as administrative review (which is largely 'in the dark') should be included. Second, the interplay between administrative and judicial review, and the usefulness of the former, are better gauged when one is alerted in an early stage of follow-on proceedings – one now has to wait some years before any valid assessment of the effect of

³⁷ Source: <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.

³⁸ Case T-730/19 (*PNB Banka and Others v ECB*).

³⁹ Order of 6 May 2019 in Case T-281/18 (*ABLV Bank v ECB*), ECLI:EU:T:2019:296, appeal pending; Case C-551/19 P. See, also the Order of the same date in Case T-283/18 (*Bernis and Others v ECB*), ECLI:EU:T:2019:295, appeal pending; Case C-552/19 P.

⁴⁰ Judgment of the ECJ of 19 December 2018 in Case C-219/17 (*Berlusconi and Fininvest*), ECLI:EU:C:2018:1023.

⁴¹ Precisely: 20 months; see the Court's *Annual Report - the year in review 2018*, p. 45, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf.

administrative *cum* judicial review can be made. (More on enhancing transparency of administrative review under 2.2.2 below.)

It should be made clear here, that the lack of transparency of ABoR review is partially a direct result of the difference between appeal, which is possible against decisions of the SRB,⁴² and administrative review, which has been provided as an *option* for contesting ECB legal acts. Parties that wish to challenge a decision of the ECB can either request administrative review (and go to court after the ECB has taken a second, post-review decision) or directly go to the CJEU.⁴³ The ABoR does not *decide* a case but submits an *opinion* to the Supervisory Board, which it may or may not follow when it prepares a new decision for the ECB's Governing Council.⁴⁴ Since ABoR review is a step in the internal decision-making of the ECB, its opinions cannot be made public after delivery. (Yet, more can be done to enhance transparency as will be set out under 2.2.2 below.) The option of instituting an appeal panel at the ECB was not open to the legislator as the Treaty provides for appeals to the European Court against acts of the ECB (Article 263 TFEU), whereas, for agencies established by the legislator, such as the SRB, an appeal body may be established.

Another issue with case law is that – whereas the language of the SSM is primarily English⁴⁵ –, Court Orders may be available in a single language only, in recent examples German⁴⁶ or Greek.⁴⁷ It might be useful to request the CJEU to provide translations of case law which is relevant for the assessment of the performance of the two EU agencies entrusted with mandates under banking union in English, as well. The lack of translation may be due to lack of funding for translators; this is an issue on which the European Parliament, as one of the two budgetary authorities, can act. The availability of case law in the most-spoken second language in the EU⁴⁸ will contribute to getting a clear picture of the scrutiny of action (or inaction) of supervision and resolution authorities. Also, this may form the basis for subsequent analysis of the measure in which the ECB and the SRB have adopted a different approach to the issues subject to review, beyond the case at hand, such analysis being useful for the European Parliament in the accountability process.

An overview of banking-union relevant case law is organised under the auspices of the *European Banking Institute*,⁴⁹ an academic joint venture on banking union, whose website publishes regular updates of *The Banking Union and Union Courts: overview of cases*,⁵⁰ an outline of pending and decided

⁴² Either at the Appeal Panel and afterwards at the CJEU, or directly at the CJEU. See Articles 85 and 86 of the SRM Regulation for the apportionment of jurisdiction between the Appeal Panel and the Court of Justice.

⁴³ Article 24(11) SSM Regulation.

⁴⁴ Article 24(7) SSM Regulation and Article 17 ABoR decision.

⁴⁵ "English is used as part of the arrangements between the ECB and the NCAs", states the *ECB Annual Report on supervisory activities 2014* on page 71; see: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2014.en.pdf>.

⁴⁶ The Order of the President of the General Court of 7 February 2020 in Case T-797/19 (*Anglo Austrian AAB Bank and Belegging-Maatschappij "Far-East" v ECB*), and the earlier Order of 20 November 2019, in Case T 797/19 R among the same parties, not published, EU:T:2019:801 are a case in point; see: <https://curia.europa.eu/>.

⁴⁷ The Order of 25 September 2019 in Case T-451/18 (*Triantafyllopoulos and Others v ECB*), ECLI:EU:T:2019:715 is another example.

⁴⁸ Foreign language skills statistics, Eurostat (data extracted in April 2019): "English is by far the most widely-spoken foreign language in the EU", at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_language_skills_statistics#Analysis_of_those_knowing_one_or_more_foreign_languages.

⁴⁹ See: <https://ebi-europa.eu/>.

⁵⁰ At: <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.

cases published with a view to enhance the transparency of the cases pending before, or decided by, the Union Courts in the area of the EU banking union.⁵¹

2.2. Enhancing transparency mechanisms

2.2.1. European Central Bank and SRB

Regulations and availability of national law in English

The application of national legislation which the ECB is instructed to use when conducting supervision⁵² is an area where more transparency may be necessary to get a proper insight into the ECB's functioning. "The wide degree or rules provided in national laws inevitably leads to fragmentation, unequal treatment and distorted harmonisation", so observed an academic.⁵³ The divergence and, possibly, lack of implementation,⁵⁴ undermines the effectiveness of supervision, and the equal treatment of credit institutions, which the ECB is bound to respect.⁵⁵ This issue calls for a wider use of regulations as the legal act for the adoption of prudential standards. When the ECB is to function on the basis of a single set of coherent rules adopted at Union level, it will become less cumbersome for it to effectively and justly across the Euro Area and, also, become less difficult for the European Parliament to hold it to account. The tasks of the ECB and the SRB would be facilitated if their mandates could be exercised on the basis of EU law enshrined in regulations, which are both directly applicable and available in all EU languages. Reflection on the wisdom of basing supervision on a Single Rulebook⁵⁶ consisting of a regulation⁵⁷ and three directives⁵⁸ may be in order, also in the interest of the accountability of the ECB and the SRB.

⁵¹ Disclosure: this list is jointly organised by Federico Della Negra, a researcher associated with the European University Institute in Florence who works at the ECB, and myself.

⁵² Article 4(3) and recital 34 of the SSM Regulation.

⁵³ Gianni Lo Schiavo, *The ECB and its application of national law in the SSM*, Chapter 10 of Gianni Lo Schiavo, *The European Banking Union and the Role of Law*, Elgar Financial Law, 2019, p. 192.

⁵⁴ See: Karen Banks, *Incorrect implementation of EU directives: what effects for the ECB and the CJEU, and what mechanisms for rectification?*, in *Building bridges: central banking law in an interconnected world*, proceedings of the ECB Legal Conference 2019, p. 121, at: <https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf>. On no implementation, or incorrect or varied implementation, of directives in the Single Rulebook, see, also, René Smits, *Competences and alignment in an emerging future - After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*, October 2017, ADEMU Working Paper Series WP 2017/077 pp. 17-19, at: <http://ademu-project.eu/wp-content/uploads/2017/12/0077-Competences-and-alignment-in-an-emerging-future.pdf>.

⁵⁵ Article 1 SSM Regulation.

⁵⁶ See: <https://eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook>.

⁵⁷ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176/1, 27.6.2013), lastly amended by Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (Text with EEA relevance) (OJ L 314/1, 5.12.2019), consolidated version at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02013R0575-20191225> (hereafter: CRR).

⁵⁸ CRD IV, BRRD and FiCoD:

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176/338, 27.6.2013, hereafter: CRD IV)

Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (OJ L 150/296, 7.6.2019), lastly amended by Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds

The use of directives results in another layer of opaqueness on the functioning of the ECB. This has to do with the transposition of directives into national law and the availability of such law in English. The scope of divergence in implementation of EU directives does not become clear until the relevant legislation is available in a widely spoken common language. The internal communication of the SSM is in English⁵⁹, whereas most significant banks use English in their communications with the ECB.⁶⁰ For outsiders to the SSM,⁶¹ especially for those without command of the language in which the applicable legislation has been drawn up, it may be almost impossible to grasp the effects of the ECB's supervision based on national legislation, until a case before the courts follows. While one expects the ECB to ensure that it has access to the relevant rules in translation for its own decision-making, there is such a low level of transparency of most relevant national legislation that it hinders the oversight of how the same rules are applied (indeed: can be applied) across the Euro Area. Prudential supervisory legislation should therefore preferably be available in English, as well, as the main language of the SSM.

An example may elucidate this point: before cases⁶² arose from the application of Latvian law on the liquidation of banks immediately following the withdrawal of their banking license, a consequence of how the Latvian legislator has organised the exit of a bank from the market, there was no awareness of how the relevant law might affect judicial scrutiny of supervisory decisions. The court cases have brought this issue in the open. I expect that there are more of such issues hidden in national supervisory law. Beyond a turn to regulations as the standard legal act for the Single Rulebook, availability of laws in English may lessen this occurrence of 'hidden issues' or, at least, allow such issues to be identified earlier.

Comparability of legislative texts, when made available in English, could remedy this lack of insight into the patchwork of national legislation⁶³ that the ECB is to apply. It should be noted that the Court has stepped in by setting aside the application of Latvian legislation and Latvian case law in a case in so far

and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU (OJ L 328/29, 18.12.2019), consolidated version at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0059-20200107> (hereafter: BRRD).

Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 035/27, 11/02/2003), as amended by Directive 2011/89/EU of the European Parliament and of the Council of 16 November 2011 amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC as regards the supplementary supervision of financial entities in a financial conglomerate (OJ L 326/113, 8.12.2011), and by the CRD IV, consolidated version at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:02002L0087-20130717> (hereafter: FiCoD).

⁵⁹ See paragraph 3.10 Language policy of the *ECB Annual Report on supervisory activities 2014*, March 2015, p. 71, at: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2014.en.pdf>.

⁶⁰ See the information in the 2014 report cited in the previous footnote and the following information from the ECB Annual Report on supervisory activities 2018, p. 73 at <https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2018-927cb99de4.en.pdf>.

"Of the 119 banking groups directly supervised by the ECB in 2018, 35 asked to receive formal ECB decisions in an EU official language other than English."

⁶¹ Naturally, the availability of national supervisory legislation in English must also be very helpful for SSM staff members. Moreover, the Basel standards from which many EU and national rules derive are agreed in English, as well: see *The Basel Framework*, at: https://www.bis.org/basel_framework/.

⁶² See the judgment of 5 November 2019 in Joined cases C-663/17 P, C-665/17 P and C-669/17 (*ECB and Commission v Trasta Komerbanka AS, Ivan Fursin and Others*); ECLI:EU:C:2019:923.

⁶³ A similar observation may be made in respect of relevant case law. Making judgments available in English goes even further than providing English-language translations of statutory provisions. Even Malta, which has both English and Maltese as official languages, has court decisions adopted on bank regulation matters in Maltese, which make them inscrutable for non-Maltese speakers who require an English translation.

as such application would infringe the principle of the effective judicial protection of individuals' rights under EU law.⁶⁴

I conclude from this state of affairs that insistence from the European Parliament that national legislation in the area of banking union be available in English might enhance the comparability of applicable provisions and, thereby, show the need for further harmonisation⁶⁵ and, more importantly in this context, the potential for holding the ECB properly to account for its application of such national legislation and for adherence to the instruction to treat institutions equally. This is an area where the European Parliament does not have direct powers but where it may use its persuasive powers by calling, in tandem with national parliaments, for up-to-date English translations of national legislation in the area of prudential supervision. In the dialogue with the ECB, or in a resolution on the Annual Report, this issue may be given attention.

The reflections in the previous paragraph apply to a lesser extent to the SRB. Whereas the SRB is not mandated to apply national law itself, as the ECB is, it has to cooperate with the National Resolution Authorities (NRAs) which are so mandated⁶⁶. Also, the SRB is confronted with national law in exercising its functions.⁶⁷

Memoranda of Understanding

A different issue which concerns transparency concerns instruments of cooperation which the ECB and the SRB employ in their relations with, notably, other supervisory or resolution agencies, so called Memoranda of Understanding (MoUs). There is legal authority for the entering in such MoUs for the ECB and the SRB: this authority relates to arrangements with non-participating Member States for the SRB⁶⁸ and for the ECB,⁶⁹ and with authorities outside the European Union for the ECB.⁷⁰ Also, the ECB is to enter into MoUs with "competent authorities of Member States responsible for markets in financial instruments".⁷¹ The level of transparency of such memoranda is not equally regulated: for intra-EU MoUs with competent authorities for prudential supervision that the ECB engages in, the SSM Regulation prescribes that they "shall be published subject to appropriate treatment of confidential information"⁷²; for MoUs with market regulatory authorities it is prescribed that they "shall be made

⁶⁴ Which it held to be a general principle of EU law, also referred to in Article 19 TEU and reaffirmed in Article 47 Charter; see paragraph 55 of the *Trasta* judgment mentioned in footnotes 33 and 60 above.

⁶⁵ On the need for further harmonisation of lacunae in the field of banking supervision and resolution, see paragraph 3.3 below.

⁶⁶ See recital 28 of SRM Regulation: "Under certain circumstances the national resolution authorities should perform their tasks on the basis of and in accordance with this Regulation while exercising the powers conferred on them by, and in accordance with, the national law transposing Directive 2014/59/EU [the Bank Recovery and resolution Directive, BRRD] in so far as it is not in conflict with this Regulation";

⁶⁷ See, notably, the references to national law in Articles 5 (**Relation to Directive 2014/59/EU and applicable national law**), 29(1) (**Implementation of decisions under this Regulation**) and 36(5) (**On-site inspections**) of the SRM Regulation.

⁶⁸ Recital 38 and Article 32(2) SRM Regulation; see, also, Article 34(5) SRM Regulation.

⁶⁹ Recital 14 and Article 3(6) SSM Regulation.

⁷⁰ Recital 80 and Article 8 SSM Regulation. Moreover, Article 6 ESCB Statute (**International cooperation**) may be relevant here as it permits the ECB and NCBs, subject to the latter's approval, to "participate in international monetary institutions". In my PhD thesis (1997), I have defended that this provision should apply as well in respect of representation "in international fora which deal with subjects that fall within the ESCB's competences but which cannot be described as 'monetary institutions'". One of the reasons for this argument is that Article 6 concerns representation in respect of "international cooperation involving the tasks entrusted to the ESCB" and such tasks include prudential supervision and other functions that cannot be labelled 'monetary' in the strict sense of the term. René Smits, *The European Central Bank – Institutional Aspects*, p. 426.

⁷¹ Recital 33 and Article 3(1) SSM Regulation.

⁷² Article 3(6) SSM Regulation. The ECB's Banking Supervision website states: "For those EU countries that are not participating in the SSM, the ECB and the relevant national supervisors may set out in a memorandum of understanding how they will cooperate on supervisory matters.",

available to the European Parliament, to the Council and to competent authorities of all Member States”.⁷³

MoUs are used widely among supervisory authorities to provide the framework for day-to-day cooperation across the financial sector. These instruments have only been partially published.⁷⁴ Since they define and specify the actual performance of supervision, they may affect the legal situation of the entities subject to supervision at a level of granularity beyond the legislative provisions they expand on, so that a strong case can be made for publication of the MoUs. If needed, elements that are institution-specific, e.g. because they have been entered into in the context of supervision of an individual bank or bank holding company, can be left out of publication. Also, published MoUs give the European Parliament insight into the panoply of instruments regulating the relationships between the authorities within the SSM, and between the SSM and other supervisory agencies, both within the EU and in third countries.⁷⁵ My recommendation would be for the European Parliament to request full disclosure of the MoUs and to insist that the ECB publish these,⁷⁶ subject to relevant professional secrecy restrictions.

The ECB may take the SRB as an example here, which discloses several cooperation agreements on its website⁷⁷, although the information provided on the cooperation agreements with the Canadian and US deposit insurance corporations is limited to a press release on the conclusion of the cooperation agreement instead of providing the full texts.⁷⁸

Looking at the level of transparency of the SRB and the ECB on this issue, one may see the latter lagging behind the former when it comes to their MoUs, as the information in the footnotes makes clear. Also, the last information on the ECB’s Banking Supervision website concerning MoUs in the international context informs the reader that five years ago “the ECB has asked to take over the participation in

without specifying whether any such MoUs have actually been entered into. See: <https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html>.

⁷³ Article 3(1) SSM Regulation.

⁷⁴ See René Smits, *Reflections on euro area banking supervision: context, transparency and culture from an institutional law perspective*, Chapter 8 of Gianni Lo Schiavo, *The European Banking Union and the Role of Law*, Elgar Financial Law, 2019, p. 130.

⁷⁵ International organisations or bodies may also be the counterparty in an MoU.

⁷⁶ Not just one National Competent Authority, as is the case with the Estonian *Finantsinspeksioon*, the Estonian Financial Supervision and Resolution Authority which has published its MoUs on its website; see: <https://www.fi.ee/et/finantsinspeksioon/rahvusvaheline-koostoo/koostookokkulepped>; an English version of this page is forthcoming (information provided by the *Finantsinspeksioon* (27 February 2020) and is now live: <https://www.fi.ee/en/finantsinspeksioon/international-cooperation/memoranda-understanding>.

⁷⁷ At: <https://srb.europa.eu/en/content/cooperation>.

⁷⁸ The exchange of letters with the Japanese Financial Services Agency (at: https://srb.europa.eu/sites/srbsite/files/srb_letter_to_jfsa_on_cooperation.pdf), with the Banco Central do Brasil (at: https://srb.europa.eu/sites/srbsite/files/bilateral_ca_between_srb_and_bcb_-_signed_1.pdf), with the National Bank of Serbia (at: https://srb.europa.eu/sites/srbsite/files/bilateral_ca_between_srb_and_nbs_-_signed.pdf), with the *Instituto para la Protección al Ahorro Bancario* (IPAB, the Institute for the Protection of Bank Savings of the United Mexican States) (at: https://srb.europa.eu/sites/srbsite/files/mexico_-_ca_between_srb_and_ipab.pdf), and with the Bank of Albania (at: https://srb.europa.eu/sites/srbsite/files/albania_-_ca_between_srb_and_bank_of_albania.pdf) are available; for the cooperation agreement with the Canada Deposit Insurance Corporation (CDIC) (see: <https://srb.europa.eu/en/node/467>) and with the US Federal Deposit Insurance Corporation (FDIC) (see: https://srb.europa.eu/sites/srbsite/files/20171024pr_ca_fdic_srb_002_withca_.pdf) only press releases are provided on the SRB’s website. The CDIC-SRB cooperation agreement does not seem to have been published by the SRB’s Canadian counterpart either; see: <https://www.cdic.ca/newsroom/news/canada-and-europe-strengthen-collaboration-with-cooperation-arrangement/>. The FDIC-SRB cooperation agreement cannot immediately be found at the RDIC website either: <https://www.fdic.gov/index.html>.

existing MoUs between the SSM countries and over 80 third countries”⁷⁹ which makes one wonder about the current state of affairs.⁸⁰

Aside on transparency of ESCB Committees

By way of brief excursion on the issue of publication by the Eurosystem of details of its internal functioning, it is remarkable that one of the National Central Banks (NCBs), the Central Bank of Slovenia, published on its website⁸¹ a relatively recent update of committees which prepare Eurosystem decision-making in their respective fields, while the ECB does not have similar information on its website.⁸²

Citizens' dialogues

The European Parliament may consider inquiring about the ECB's experiences with direct dialogue with citizens, and encouraging ECB to pursue these.⁸³ The Reserve Bank of India which, like the ECB, has a monetary policy and a banking supervisory remit, has given an example on how to proceed with direct interactions with citizens in different languages across a country of continent-like proportions.⁸⁴

2.2.2. Administrative review (ECB only)

Above, a few lesser issues relating to the transparency of judicial review have been highlighted.

Before proposing further transparency on the conduct of administrative review of the ECB's decisions, it may be useful to recall the incidence of such review since 2014.

Administrative review has only been requested by a very limited number of parties: 38 review requests, leading to 28 ABoR Opinions in five and a half years.⁸⁵ While providing a relatively quick opportunity to, ideally (for the contesting party) have an ECB decision revised, and being cheap in terms of costs, administrative review does not end with an independent *decision* but with an independent *opinion* which the Supervisory Board *may* adopt. Also, a new decision may be better motivated because the ABoR is likely to have identified defects in the ECB's reasoning in the contested decision. Even if the second, post-ABoR decision is not materially better motivated, a follow-on action before the CJEU will

⁷⁹ *The SSM and international supervisory cooperation*, Remarks by Ignazio Angeloni, Member of the Supervisory Board of the European Central Bank, at the Symposium on “Building the Financial System of the 21st Century: an Agenda for Europe and the US”, Eltville, 16 April 2015, at: <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150417.en.html>.

⁸⁰ The ECB Annual Report on supervisory activities 2019 provides the following information: “So far, ECB Banking Supervision has also concluded MoUs with 15 EU supervisory authorities, including national market authorities. In addition, it has signed a Multilateral MoU setting out the practical modalities for exchanging information with 48 AML/CFT authorities supervising credit and financial institutions within the European Economic Area (see also Box 4). Therefore, in total, ECB Banking Supervision has concluded nine bilateral and multilateral MoUs with over 60 EU authorities.” See: <https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2019~4851adc406.en.html#toc76>.

⁸¹ See the website of *Banka Slovenije* under ‘About us’ and subtab ‘Eurosystem’: <https://www.bsi.si/en/about-us/eurosystem/committees>.

⁸² A brochure from April 2008 mentions the committees on page 19: see: https://www.ecb.europa.eu/pub/pdf/other/escb_en.pdf.

⁸³ Reference is made to ‘town hall meetings’, scheduled to take place in the context of the monetary policy strategy review: ‘listening events with the general public, civil society organisations and academia’, see: <https://www.ecb.europa.eu/home/search/review/html/index.en.html>.

⁸⁴ The Reserve Bank of India has experience with ‘town hall meetings’ in various languages in the wide geography of their jurisdiction; see my remarks on this in *The ECB and the rule of law*, a contribution to the ECB Legal Conference 2019; see: *Building bridges: central banking law in an interconnected world*, p. 376, at: <https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf>.

⁸⁵ See the ECB's Annual Report on Supervision 2019, Table 4 (Number of reviews performed by the ABoR), at: <https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2019~4851adc406.en.html#toc89>. The difference between the numbers of requests and opinions is explained by the withdrawal of 5 requests and a finding of inadmissibility in 5 cases.

see the General Court take the ABoR opinion into account when assessing the ECB's motivation; this follows from the *L-Bank* judgment.⁸⁶ This feature may make administrative review less attractive for a bank as it knows that, barring a complete revision of the decision, the ECB may end up having stronger case in subsequent court proceedings since its reasoning may have been fortified.

The impact of administrative review beyond the case at hand must not be underestimated. Inquisitive attention from independent outsiders on the ECB's performance of its task will lead to changes of practices and improvements, even beyond the case at hand. As I wrote earlier: "Never underestimate the incidence of independent scrutiny".⁸⁷

A more important issue is transparency in relation to administrative review. Unlike proceedings at the SRB Appeal Panel,⁸⁸ ABoR proceedings are confidential unless the ECB's Governing Council authorises the ECB President to make the outcome of the ABoR proceedings public.⁸⁹ This can be explained by the fact that administrative review by independent outsiders constitutes a phase in the (renewed) decision-making process within the ECB – an activity which is not public, of course, in view of the applicable professional secrecy requirements.⁹⁰ Although the absence of transparency for third parties about the existence and outcome of administrative review proceedings is an element that the ABoR proceedings share with many national administrative review proceedings,⁹¹ this darkness surrounding the ABoR's work is regrettable from a transparency perspective. This has already been remarked by the Commission in its Report on the first three years of the SSM⁹²:

It would be useful to take advantage of the growing jurisprudence developed by the ABoR by ensuring more transparency over the work undertaken by the ABoR, for instance through publication on the ECB's website of summaries of ABoR decisions and with due observance of confidentiality rules.

The lack of transparency of the ABoR proceedings stands in contrast to the availability of review and appeal proceedings against the SRB and the European Banking Authority (EBA), the European Securities Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).⁹³ As I have advocated earlier,⁹⁴ I would encourage the ECB to provide more frequent and more explicit information on the ABoR proceedings, perhaps even including in the President's monthly press

⁸⁶ Judgment of 16 May 2017 in Case T-122/15 (*Landeskreditbank Baden-Württemberg – Förderbank v ECB*), ECLI:EU:T:2017:337, confirmed by judgment of 8 May 2019, ECLI:EU:C:2019:372.

⁸⁷ René Smits, *Interplay of administrative review and judicial protection in European prudential supervision – Some issues and concerns*, paper presented at the Conference Judicial review in the banking Union and in the EU financial architecture, jointly organized by the Banca d'Italia and the European Banking Institute, Rome (I), 21 November 2017, in *Quaderni di Ricerca Giuridica della Consulenza Legale*, number 84, p. 47, at: <https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2018-0084/qrg-84.pdf>.

⁸⁸ See: <https://srb.europa.eu/en/content/cases>.

⁸⁹ Article 22 (**Confidentiality and professional secrecy**) of the ABoR Decision.

⁹⁰ Article 27 SSM Regulation and Article 37 ESCB Statute. The (national law provisions in implementation of) the professional secrecy provisions of the directives of the Single Rulebook (notably Article 53 CRD IV) are relevant as well.

⁹¹ But, as indicated, not with its sister body at the banking union's single resolution authority.

⁹² Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013 (SWD(2017) 336 final), COM(2017) 591 final, 11.10.2017, p. 5, at: https://ec.europa.eu/info/sites/info/files/171011-ssm-review-report_en.pdf.

⁹³ Decisions by the Board of Appeals of the European Supervisory Authorities are in the public domain; see: <https://www.esma.europa.eu/about-esma/governance/board-appeal> and <https://eba.europa.eu/about-us/organisation/joint-board-of-appeal/decisions>.

⁹⁴ René Smits, *Reflections on euro area banking supervision: context, transparency and culture from an institutional law perspective*, Chapter 8 of Gianni Lo Schiavo, *The European Banking Union and the Role of Law*, Elgar Financial Law, 2019, at p. 148-149.

conference a sentence on administrative review outcomes. More regular information could encompass:

1. The number of review requests;
2. The number of ABoR opinions adopted;
3. The nature of the ABoR opinions:
 - I. Declaring the review request inadmissible;
 - II. Proposing the abrogation of the contested ECB decision;
 - III. Proposing the confirmation of the contested decision (to be “replaced with a decision of identical content” in the wording of Article 16(2) of the ABoR Decision);
 - IV. Proposing the replacement of the contested decision with an amended one, including when the ABoR suggests better motivation;
4. Whether suspension of the contested decision has been sought, and granted (or not);
5. The nature of the contested issue (e.g., significance, Supervisory Review and Evaluation Process (SREP), fit & proper (FAP) assessment of members of the management body, corporate governance, withdrawal of a license, assessment of the suitability of a shareholder, etc.);
6. General issue(s) relevant in the review (e.g., the need for harmonisation of national supervisory law, or a banking culture issue such as the importance of good internal governance of credit institutions, as were specified in the ECB’s 2015 Annual Report)⁹⁵ ;
7. Whether follow-on proceedings have been undertaken before the General Court.
8. A statement by the ECB about the consequences for its supervisory practices, if any, that it has drawn from the opinion (beyond the adoption of a new decision which must remain confidential as it is addressed to the contesting party).

For reasons of professional secrecy, the following information must remain internal and cannot be divulged:

1. Names of the applicants, or of their legal representatives;
2. Nationality of the applicants;
3. Member State of origin of the case; and, as stated above:
4. Contents of the newly adopted decision (which is privileged between the ECB and the contestant).

It should be noted that, in its Annual Report on supervisory activities 2019⁹⁶, the ECB has already begun providing more substantial information on the issues under administrative review.

⁹⁵ ECB Annual Report on supervisory activities, March 2016, p. 15; at: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2015.en.pdf>.

⁹⁶ Under the heading “Topics under review and issues of relevance”; see: <https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2019~4851adc406.en.html#toc89>.

2.2.3. European Parliament: questions and answers visibility

There seems to be room for limited practical enhancement of the transparency of the accountability mechanisms at work which the European Parliament may itself undertake. The transcripts of hearings held with the Chair of the Supervisory Board are easily accessible at the European Parliament's website.⁹⁷ All hearings are video-recorded and available in all languages, that is in the simultaneous translation. However, the questions asked by MEPs and the answers given by the ECB are harder to find.

Box 2 - Finding MEPs questions and answers to the ECB and the SRB (EP website)

When searching for the questions asked by MEPs to the ECB and the ECB's answers, this author found them on Parliament's website when selecting 'Economic and Monetary Affairs' in the dropdown box 'Committee' and selecting 'QZ (Question to the ECB)' in the further dropdown box 'document type' on the following page: <https://www.europarl.europa.eu/committees/en/documents/search>. This delivered as a result all questions asked but not the answers given. There is also information when scrolling down on this webpage: <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union> to arrive at 'Questions to and replies from the SSM/ECB'. Similarly, when scrolling down to 'Questions to and replies from the SRB' at this page: <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union?tabCode=bank-resolution>, one finds questions to and replies from the SRB. It is unclear whether these are all the relevant questions as the latest is from three years ago.

Arranging for a space on the website of the European Parliament dedicated to questions to and answers from the ECB, and the SRB, would render clearly visible and easily accessible the questions asked and the answers given.

By way of mirror exercise, the ECB could do the same: position a dedicated space on its website with MEPs' questions and the ECB's answers.

Box 3 - Finding MEPs questions and answers to the ECB (ECB websites)

Currently, the advised method of finding answers of the ECB to questions put by MEPs implies going to the following webpage: <https://www.ecb.europa.eu/pub/pubbydate/html/index.en.html>, and filling in 'MEP' in the blue search filter on that page, which provides a list answers, neatly arranged by date. However, when selecting an individual answer and, having read the answer, going back to the main menu, one needs to fill in 'MEP' again to get the overview of all questions which the ECB has already answered. This does not seem to be a user-friendly method to give account of the answers to MEPs.

The answers are available in English, as a 'courtesy translation' in case the question has been asked in another language; in such a case, the answer in that language is available next to the English-language document.

Another method to find questions asked by MEPs and the ECB's reply to them is to go to <https://www.bankingsupervision.europa.eu/press/publications/html/index.en.html> and search among publications by year for MEPs questions and the ECB's answers – again, not a very accessible method to systemically get the questions and answers.

One may also go to <https://www.bankingsupervision.europa.eu/organisation/accountability/html/index.en.html> and click on the tab "Letters to MEPs". This opens on "Publications published in 2015". Clicking on other years, opens into a list of questions from MEPs, indeed, but – again – to be found dispersed among other publications.

Finally, there is this webpage with 'Publications on International and European Co-operation': <https://www.ecb.europa.eu/pub/pub/intco/html/index.en.html> where a great number of letters to MEPs in answer to their questions are to be found, in English and in the other language used, but also other documents that qualify as relevant for 'international and European cooperation'. This is not a dedicated section that provides insight into the dialogue with the ECB

⁹⁷ At: <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union>. The equivalent webpage at the ECB's website (<https://www.ecb.europa.eu/press/tvservices/parliament/html/index.en.html>) with Webcasts: *hearings at the European Parliament* does not function properly; clicking on the link to [ECON hearings on www.europarl.europa.eu](https://www.ecb.europa.eu/press/tvservices/parliament/html/index.en.html) leads to an Error 404 webpage.

on monetary policy, prudential supervision or other matters. Also, the caption denotes a particular perspective on the ECB's accountability to the European Parliament, labelling this as 'European cooperation'.

It is recommended that the European Parliament itself sets the example and provides for an accessible web spot to give insight into the ongoing question-and-answer dialogue between itself and the ECB, preferably also organising the display such as to sort banking union-related questions from those relating to monetary policy and other tasks which the ECB performs on the other side of the 'Chinese wall' between SSM-related tasks and monetary policy.⁹⁸ The same should be done for questions to the SRB.

The ECB could follow the example of the SRB which has a section of its webpage entitled 'Addressed Questions'⁹⁹ on which the SRB provides 'Correspondence with Members of the European Parliament' and 'Correspondence with Members of National Parliaments'. Under the latter section, one finds letters to the SRM Committee of the German *Bundestag*, the Lower House of the German Parliament.¹⁰⁰ The SRB could, in turn, follow the ECB in providing English-language translations of its correspondence with national parliaments, and add the original language of the question and answer of MEPs, if this 'correspondence' took place in another language than English.

It is recommended that the European Parliament invites both the ECB and the SRB to organise access to the exchanges between each of them and MEPs in such a transparent manner that all MEPs' questions and their answers are easily found under a single, dedicated heading. This would enhance their own accountability, to the European Parliament and to the citizens of Europe, as it would provide an insight into the contribution by the European Parliament to the accountability of both the ECB and the SRB.

2.3. Enacting more transparency: professional secrecy

Although the brief for this paper is to remain "*within the boundaries of the current legal framework*", I consider this to relate to the Treaty and the SSM Regulation which, for amendments, need unanimity among the Member States or the members of the Council, respectively. (In respect of the SRB, it should be remembered that the SRM Regulation, based as it is on Article 114 TFEU, can be amended through the ordinary legislative procedure.) Amending the currently applicable transparency regime in respect of supervisory files is not beyond these boundaries. After all, an adaptation of the rules on professional secrecy could take place in the context of an amendment of the presently pertinent provisions. These are enshrined in directives and can be amended by ordinary legislative procedure on the basis of Article 53(1) TFEU, the legal basis of CRD IV and CRD V. These provisions may also be superseded by a new legal act based on Article 114 TFEU. There is a twofold case to be made for such enactment: the need to align professional secrecy regimes among the 'silos' of supervision¹⁰¹ and the improvement of access to supervisory files which would support a more thorough holding to account of the supervisors.

Before elaborating on the relevance of broadened access to supervisory data in a new professional secrecy regime, and on the relevance for holding the ECB and the SRB to account, let me be clear about the scope of what is suggested here. It goes without saying that there is a real and justified need for professional secrecy: data involuntarily (because there is a statutory duty to do so) reported to supervisors, or shared with them on the basis of consent, by enterprises that undertake banking

⁹⁸ This separation is prescribed by Article 26 (**Separation from monetary policy function**) of the SSM Regulation.

⁹⁹ <https://srb.europa.eu/en/content/european-co-operation>.

¹⁰⁰ 'Parlamentarische Anfrage an den Einheitlichen Abwicklungsausschuss'.

¹⁰¹ Banking versus insurance and occupational pensions versus securities trading.

activities should be confidential. Customer data at individual level, whether of natural or legal persons, and business secrets (including business models and strategies) of banks need protection, probably even after a long period of time has lapsed. Also, supervisory strategies and information on the intervention of other parties (shareholders coming to the rescue of a bank in difficulty) are in need of confidentiality to be workable. However, after some time, the data on the files of supervisory and resolution authorities should be opened up for scrutiny, always subject to protection of legitimate interests, as already indicated. Legitimate interests to keep issues undisclosed include considerations of public confidence and market stability. Scrutiny permits the outside world to form an opinion on the exercise of the mandate of the authorities.¹⁰² As applies to all human activities, one learns from past mistakes, especially when the supervisor or resolution authority needs to explain the reasoning for the actions undertaken (or omitted to be undertaken) before the court of public opinion, which includes the European Parliament. Thus, an appropriate opening of professional secrecy provisions could improve the accountability vis-à-vis the European Parliament. Admittedly, this is a retrospective element of accountability.

One can counter that amending the professional secrecy regime does not directly broaden the scope of accountability or the incisiveness of the present arrangements. Yet, with the 'current legal framework' on accountability being very hard to change, at least in respect of the ECB, an indirect method to pry open some of the unnecessary secrecy surrounding supervision may have a long-term impact on the accountability in the context of banking union.

The professional secrecy regime for the SSM is laid down in Article 37 ESCB Statute and in "the relevant acts of Union law", as Article 27 SSM Regulation states. Article 37 ESCB Statute does not define "the obligation of professional secrecy" to which it submits the ECB and the NCBs.¹⁰³ Thus, the legislator is free to adopt, and amend, provisions specifying professional secrecy. The same holds true for the SRM regime of professional secrecy. The SRB is "subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation"¹⁰⁴. Article 339 TFEU¹⁰⁵ is as open-ended in its reference to the professional secrecy provision as Article 37 ESCB Statute. Thus, also in respect of the SRB, adopting a professional secrecy provision for the entire field of supervisory authorities is legally feasible.

Why suggesting a similar professional secrecy regime across the financial sector as an element indirectly broadening the scope of accountability of the Union authorities mandated under banking union? This is because of two reasons. First, the authorities entrusted with supervision and resolution

¹⁰² As three authorities on supervision wrote fifteen years ago after acknowledging the importance of non-disclosure of supervisory actions: "Nonetheless, the presumption should be that [bank supervisory] decisions and the reasoning behind them will be a matter of public record, even if this disclosure occurs well after the event. By encouraging transparency, supervisory agency decisions are more likely to be well-reasoned and grounded in both law and fact; they are also more likely to be consistent with other decisions taken in similar cases. Publicity thus reduces the scope for arbitrary decisions, and ensures that actions are in accordance with preannounced supervisory policies. This ought to be a key feature of any accountability regime." Eva Hüpkens, Marc Quintyn, and Michael W. Taylor, "The Accountability of Financial Sector Supervisors" (2005), IMF Working Paper WP/05/51, in a discussion of "Confidentiality and Transparency", p.15, at: <https://www.imf.org/external/pubs/ft/wp/2005/wp0551.pdf>.

¹⁰³ Article 37 ESCB Statute reads as follows: "Article 37 (**Professional secrecy**) 37.1. Members of the governing bodies and the staff of the ECB and the national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy. 37.2. Persons having access to data covered by Union legislation imposing an obligation of secrecy shall be subject to such legislation."

¹⁰⁴ Article 88 SRM Regulation.

¹⁰⁵ Article 339 TFEU reads as follows: "The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."

of credit institutions are mandated to exchange information with authorities responsible for supervision in adjacent areas of financial-sector activity. Any discrepancies between confidentiality requirements for the various sector supervisory agencies could be a hindrance for effective, cross-sectoral oversight. (Apart from the consideration that the rationale for some of these discrepancies is hard to explain.) Second, effective accountability for the ECB and the SRB should not halt at the Union level and should, preferably, include activities undertaken together with national authorities entrusted with supervisory and resolution roles.

Recent case law has shown that there are remarkable differences between the professional secrecy regimes in the various sub-sectors of the financial sector where, e.g., an exception to the general prescription of professional secrecy is made, under MiFID II¹⁰⁶, for criminal *or taxation* law while, under CRD IV/V, this only covers criminal law.¹⁰⁷ These discrepancies do not correspond to material differences between trade in securities and banking and may hinder a proper exchange of information among authorities. The judgments which brought these distinctions to the fore also highlighted the need of limiting professional secrecy to what is existentially necessary for a proper exercise of prudential supervision.

The Court of Justice accepted that information that is at least five years old “must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature”, with an exception and an exemption.¹⁰⁸ In the *Baumeister* judgment, the Court held that after five years, information contained in a supervisory file may be divulged to a party with an interest in seeking redress for alleged lack of proper supervision, except when a party to the proceedings who relies on the quality of the information in question as a business secret “shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties”.¹⁰⁹ Thus, the onus of proof that information older than five years may still qualify as a business secret shifts to the party invoking confidentiality. This also applies in the context of MiFID¹¹⁰. Moreover, the five year-term does not invalidate confidential treatment of information when secrecy “might be justified for reasons other than the importance of that information with respect to the commercial position of the undertakings concerned, such as, in particular, information relating to the supervision methodology and strategy employed by the competent authorities.”¹¹⁰

The Court’s cautious opening up of professional secrecy in the area of supervision of banking and securities markets in its “holistic approach which interprets the professional secrecy provisions of MiFID I and CRD IV in a parallel way”¹¹¹ provides an opening for the legislator to enact professional secrecy provisions across the financial sector in a more coherent fashion.

The reason this case law is cited here, is the opportunity this may provide for limiting the current (it is submitted) excessively wide scope of professional secrecy relating to old cases of supervision and

¹⁰⁶ Article 76(1) Directive 2014/65/EU the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (OJ L 173/349, 12.6.2014, hereafter: MiFID II).

¹⁰⁷ Article 53 (1) CRD IV, not altered by CRD V.

¹⁰⁸ René Smits, Nikolai Badenhoop, *Towards a single standard of professional secrecy for supervisory authorities – A reform proposal*, (2019) 44 E.L. Rev. 295-318, at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346946.

¹⁰⁹ Judgment of 19 June 2018 in Case C-15/16 (*Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*), EU:C:2018:464 (hereafter: *Baumeister*), paragraph 54.

¹¹⁰ Judgment in *Baumeister*, paragraph 56.

¹¹¹ Smits/Badenhoop, p. 314.

resolution oversight, and for advancing the possibilities of judicial redress against supervisory and resolution authorities, on the assumption that the right to undertake action against the authority has not lapsed.¹¹² The conflicting interests of transparency and professional secrecy might be balanced differently with a keener eye for the responsiveness of the authorities. If properly embedded in guarantees for keeping supervisory strategy and methodology secret, and their independence intact, and if respecting the need to maintain commercial secrets and to protect the interests of third parties involved in attempts to rescue a credit institution subject to resolution,¹¹³ the enactment of a single regime of prudential professional secrecy with a more limited scope might be envisioned (in line with the general thrust of this paper on that issue, the enactment should take the form of a regulation). This single regime of professional secrecy for financial-sector supervisors should extend beyond the Union authorities (the ECB, the SRB, the ESAs) and include the national authorities (within the SSM, the SRM and the ESFS). Adopting a regulation which specifies the confidentiality and transparency regime could effect this.¹¹⁴

This could allow for qualified transparency of supervisory files after a certain period of time has lapsed, thus allowing affected parties to hold the authorities to account¹¹⁵, permitting academic researchers to form a view on the conduct of prudential supervision within a time span that still bodes relevance for its current exercise¹¹⁶ and giving room for the European Parliament to exercise its oversight of accountability in a more meaningful manner. The information that becomes public after the five-year 'lock-down' in supervisory files as falling outside of 'continued privilege'¹¹⁷ could be used by the Parliament to engage in an in-depth 'post-mortem' analysis of the actions and omissions of the single supervisor and of the resolution authority. With more transparency, a supervisor's performance can be more effectively evaluated. A different balancing of the information asymmetry between the supervisory and the resolution authorities and others, including affected parties and the European Parliament, may thus be a worthwhile objective to pursue in the context of accountability for the ECB and the SRB. The European Parliament may wish to explore this issue and engage the ECB and the SRB on this matter, ultimately leading to a possible resolution calling upon the Commission to start a legislative initiative.

¹¹² Which would be an argument to harmonise and extend the statute of limitations for such actions to enable proceedings to begin within a reasonable time after the five-year period of ensured secrecy. This is an element that goes beyond the brief for this paper.

¹¹³ Their rights are protected under Article 53(1) CRD IV.

¹¹⁴ Smits/Badenhoop (pp. 314-318) propose the adoption of a regulation based on Article 114 TFEU

¹¹⁵ Again, provided that the statute of limitations does not bar proceedings after this period.

¹¹⁶ Instead of after 30 years only, which is the general period for EU archive documents to become open to public scrutiny; see Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, lastly amended by Council Regulation (EU) 2015/496 of 17 March 2015 (OJ L 79/1, 25.3.2015); consolidated version at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01983R0354-20150326&from=EN>. See, also, at the ECB's website: https://www.ecb.europa.eu/ecb/access_to_documents/html/index.en.html.

¹¹⁷ I.e., the issues falling under privacy constraints, business secrets, supervisory strategy and methodology, and the justified interests of 'rescuing' third parties.

3. INCREASING ACCOUNTABILITY: NEW ACCOUNTABILITY IDEAS

3.1. Improving the supervisory dialogue and other ideas

As has been tentatively proposed earlier,¹¹⁸ deepening the dialogue with the Chair of the Supervisory Board could enhance the accountability of the ECB. Naturally, MEPs are free to choose the focus of their interaction with the ECB and the SRB on any issue of relevance or of a topical nature. Yet, it is submitted, addressing certain issues at depth during an interchange with the authorities might lead to more meaningful exchanges and greater impact of the concerns expressed from the European Parliament. The Committee on Economic and Monetary Affairs might select an issue to tackle in-depth, focusing the discussion on an issue of relevance (3.2).

A variation to this approach might be to focus on the areas of banking union where the European Parliament sees a need to enact legislation, possibly to further harmonise the national legislation which affects the functioning of the ECB and the SRB and impacts the effects of their actions. Taking a cue from interactions between the only two ‘federal’ authorities during the 2008 crisis, when the ECB and the Commission interacted in a manner that sought to strengthen the other’s hand,¹¹⁹ there may be benefit in aligning positions of the European Parliament and the ECB on crucial issues where resistance to improvements in prudential supervision from Member States, or from the industry, is strongest (3.3). Thus, on topics where this is relevant, the European Parliament could enhance its influence through – selective and strategic – engagement with other institutions.

Another idea would be for the European Parliament to pro-actively engage with banking industry, advisors and academia on long-term issues concerning banking union and, on the basis of such engagement, bring the issues that came up into the dialogue with ECB. Naturally, this should be done in a fully transparent manner and, again, on topics on which Parliament considers that it needs to ‘lend an ear’ to justified concerns from the field. This would also be a form of “coalitions building”, this time between stakeholders and the European Parliament and might see the ECB be engaged to ‘work for’ the Parliament (3.4).

A different idea could also be explored, namely to give prominence to a political grouping represented among lawmakers, which would, alternating amongst themselves, each take turns in preparing and organising the interaction with the ECB, thus giving a higher profile to the supervisory dialogue (3.5).

Furthermore, one might envision that the European Parliament extends its interest into how the authorities that are subject to its accountability organise themselves in a manner that is conducive to their adaptability and openness to change and constructive criticism (3.6).

Finally, in a similar vein, the European Parliament may assess the measure of responsiveness of the ECB and the SRB to feedback from supervised entities or others, thereby also gauging their responsiveness to suggestions in the accountability process (3.7).

¹¹⁸ “Change the format of public hearings to streamline the Q&A session” is the heading of policy recommendations made by Adina Maricut-Akbik, *Holding the Supervisor to Account: The European Parliament and the European Central Bank in Banking Supervision*, Technical Report · November 2018, DOI: 10.13140/RG.2.2.10924.72326. See, also, the recommendation “to align the questions that MEPs want to raise so as to ensure that there are no duplicates and, possibly, to group questions by topics to organise the hearing’s agenda accordingly”, admittedly made for the monetary dialogue by Positive Money Europe in *FROM DIALOGUE TO SCRUTINY: Strengthening the Parliamentary Oversight of the European Central Bank*, at: http://www.positivemoney.eu/wp-content/uploads/2019/04/2019_From-Dialogue-to-Scrutiny_PM_Web.pdf.

¹¹⁹ See René Smits, *European supervisors in the credit crisis: issues of competence and competition*, Chapter 15 in Mario Giovanoli and Diego Devos (eds.), *International Monetary and Financial Law in the light of the Global Crisis*, OUP, 2010, pp. 305-327, notably paragraph 15.44.

This chapter concludes with an idea on how the European Parliament itself may enhance its legitimacy, through interaction with concerned citizens and its electorate at large (3.8).

This paper will not go into wider accountability mechanisms, such as involving other players like the Court of Auditors, or the Ombudsman. The same holds for the issue of responsiveness towards national parliaments as an additional venue of accountability. Here, I only give one suggestion, namely that one might envisage actively requesting issues that play out before national parliaments, or their dedicated committees, ahead of dialogue sessions between the European Parliament and the ECB or the SRB, and feeding back to national parliaments what the European Parliament has learned on these issues.

3.2. A substantive dialogue on issues of relevance – selecting an issue to discuss in-depth

3.2.1. General issues affecting prudential supervision

A fruitful manner in which the supervisory dialogue may be enhanced could be the selection of an issue of general importance which stands out among the day-to-day concerns and market developments. Respecting the right of MEPs, individually or as a political group, to address issues that they consider relevant and topical, choosing in advance an issue that deserves an in-depth exchange with the ECB, or the SRB, may expand the accountability of either. It may be worthwhile to explore the venue of instituting such thematic dialogues. Preparations of dialogues could permit MEPs to delve deeper and would expose the ECB and the SRB to more incisive scrutiny than a discussion of issues of the day. This approach may allow the European Parliament to give input into prudential thinking and to assess the performance of the ECB and the SRB in these areas, thus giving more substance to their accountability.

Below, a selection of such issues is offered *by way of example* of topics that may deserve such treatment, subject to MEPs' preferences and focus of attention. Some of these issues may be of less acute relevance to the SRB, as it comes into the picture at the end of a bank's life and does not supervise it during its existence¹²⁰ but it is not excluded that these issues are relevant to the accountability of the SRB, as well.

In a spirit of support of the European Parliament and by way of illustration of how a thematic dialogue might work, this paper mentions a number of such themes, without at all suggesting that this would be an exhaustive list of issues for thematic dialogues. If the idea resonate with MEPs, they may consider putting any thematic issue deemed relevant on the agenda in their interactions with the ECB and the SRB.

In the current context, issues resulting from the coronavirus pandemic and the incidence of the sharp economic downturn on banks may be the first of such topics that come to mind. The other are not immediately corona crisis-related but are likely to undergo the impact of the current situation.

3.2.2. Completing banking union

This is an issue of perennial interest, and has been in past interactions between the European Parliament and the ECB and the SRB. However, there may be merit in revisiting this issue from time to time. Completing the banking union, prominently by the adoption of a European Deposit Insurance System¹²¹, originally due to be operational by 2024, de-risking measures for banks' balance sheets and

¹²⁰ Except for the elaboration of recovery and resolution plans.

¹²¹ See the legislative train for this proposal at: [https://www.europarl.europa.eu/legislative-train/theme-economic-and-monetary-affairs-econ/file-jd-european-deposit-insurance-scheme-\(edis\)](https://www.europarl.europa.eu/legislative-train/theme-economic-and-monetary-affairs-econ/file-jd-european-deposit-insurance-scheme-(edis)).

the creation of a common backstop to the Single Resolution Fund (SRF) provided by the European Stability Mechanism (ESM) are still very relevant today.

3.2.3. Impact of climate change and sustainable finance

The impact of climate change and loss of biodiversity on the financial sector has a 'prudential side' in that the supervisory authority will take risks into consideration which banks are exposed to, including the prospect of losses from lending to sectors which will necessarily go into decline and the sunk costs of investing in 'brown assets'. With the prudential regulation only inching forward towards a future inclusion of climate change in supervision¹²², the ECB may be expected to engage pro-actively on this front, as it does on the monetary policy side of its mandate. (The review of the ECB's monetary policy strategy specifically includes the impact of climate change among the issues included in the review.)¹²³

Box 4 - Legislative changes relating to climate change in the area of prudential supervision

The CRD V instructs to the EBA to report

- by 28 June 2021 on inclusion of ESG risks in the SREP (Article 98 (8) [CRD V](#))
- by 28 June 2025 "whether a dedicated prudential treatment of exposures related to assets or activities associated substantially with environmental and/or social objectives would be justified", 'if appropriate' followed by a legislative proposal from the Commission ... (Article 501 c [CRR 2](#))

The CRR 2¹²⁴ provides for

- disclosure of ESG risks, as defined by the EBA report, by large institutions as of 28 June 2022 "on an annual basis for the first year and biannually thereafter" (Article 449a CRR 2)

Questions which the ECB may be faced with are how, ahead of legislative changes (see Box 4), to incorporate climate change and other Environmental, Social and Governance (ESG) issues in the SREP and what its input is likely to be in the forthcoming EBA Reports on the issue. The evolving thinking of the ECB in the context of the Network for Greening the Financial Sector (NGFS)¹²⁵ and its contribution to that forum are important for the European Parliament to gauge, also to establish how the ECB fulfils its mandate as a European institution bound to provisions such as Articles 11 and 13 TFEU, and to its very own secondary objective which refers to Article 3 TEU (Box 5). Parliament may consider to also request views from the Chair of the NGFS, as the (Democrats in the) US Senate did.¹²⁶ Reference is made

¹²² Last year's amendments to the Capital Requirements Directive IV (CRD IV) and Capital Requirements Regulation (CRR) did not go beyond the introduction of a potential Basel pillar 2 (SREP) requirement and a minimal Basel pillar 3 (disclosure) requirement and, possibly, future legislation; see Box 4.

¹²³ See the ECB's Press Release of 23 January 2020, *ECB launches review of its monetary policy strategy*, at: <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200123~3b8d9fc08d.en.html>, and the indication of workstreams on the ECB's website at: <https://www.ecb.europa.eu/home/search/review/html/workstreams.en.html>.

¹²⁴ Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ L 150, 7.6.2019, p.1), hereafter: CRR 2.

¹²⁵ <https://www.ngfs.net/en>.

¹²⁶ Introductory statement by (DNB Executive Director and NGFS Chair) Frank Elderson for the Meeting with the Senate Democrats' Special Committee on the Climate Crisis Washington DC, 17 October 2019, at: https://www.dnb.nl/binaries/Special%20Committee%20on%20the%20Climate%20Crisis_tcm46-385981.pdf. See, also: <https://www.democrats.senate.gov/climate>, and: <https://www.democrats.senate.gov/newsroom/press-releases/schatz-statement-on-senate-democrats-climate-committees-meeting-with-international-central-bank-leaders>.

to the NGFS's 2019 Annual Report, in which Frank Elderson, its chair, states: "Currently, the corona virus and its consequences seem to overshadow everything else and, no doubt, they require coordinated action. However, even in this crisis, we should not lose sight of the fact that climate change stays an urgent and vital issue. Hence, the NGFS members' strong response to continue their collective contribution to the greening of the financial system is key. The greener the recovery from the current crisis is, the better."¹²⁷

Box 5 – Treaty provisions relating to the ECB's mandate in the context of climate change [relevant elements underlined]

Article 127(1) TFEU

The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

Article 11 TFEU

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Article 3 TEU

1. The Union's aim is to promote peace, its values and the well-being of its peoples.¹²⁸
2. (...)
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
- It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.¹²⁹ (...)
4. The Union shall establish an economic and monetary union whose currency is the euro.
5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child,¹³⁰ as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

An issue which is closely linked to the first of these specific issues, is the availability of sustainable financial products, and the role of the ECB in encouraging banks to provide these to their customers, if any. While fully respecting the independence of the ECB and the autonomous decision-making by business in providing services in a market economy, the European Parliament might be interested in becoming better informed about the availability of sustainable banking products and about the ECB's supervisory role in this: does it see a role for itself, or for the other authorities within the SSM? If so, which? And: which other actors does it engage with in this area? Does it proactively engage with NCAs,

¹²⁷ Network for Greening the Financial System, Annual report 2019, March 2020, at: https://www.ngfs.net/sites/default/files/medias/documents/ngfs_annual_report_2019.pdf.

¹²⁸ Protection against climate change would contribute to the well-being of Europeans.

¹²⁹ Future generations will bear the burnt of climate change so that solidarity with our off-spring is an imperative.

¹³⁰ Human rights include the right to life (Article 2) and environmental protection (Article 37) under the Charter of Fundamental Rights of the European Union.

who are in the first line when it comes to applications for banking licenses¹³¹, to ensure that innovative initiatives on sustainable finance receive a benevolent ear at national level? Does it see any reason for amending existing supervisory legislation to allow such sustainable finance to become more mainstream? The link with the ECB's mandate here is twofold. First, prudential risks that it is to assess include climate-change related risks; when banks engage in sustainable finance, this may reduce such risks. Second, the ECB's mandate is linked to the Union's wider objectives (see Box 5), which include "sustainable development".

Sustainable financial products may include Islamic finance products which might be seen as less prone to excesses: does the ECB have a vision on the provision of these banking products,¹³² also in view of adequate catering to potential preferences of perhaps up to 20 million Euro Area citizens who confess to Islam?¹³³ The links with the ECB's mandate on this issue are multiple. The ECB has been conferred with "prudential supervision of *credit institutions*" – a term that is defined in Article 4(1)(1) CRR as "an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account". We know from the EBA study on this¹³⁴ that here is still variation among Member States regarding the perimeter of prudential supervision: some jurisdictions qualify entities as banks that others exclude. The ECB should take an interest in the scope of the entities subject to its supervision and in those that fall outside its 'perimeter', and the European Parliament, from an accountability perspective, may share this concern. Businesses that engages in such forms of sustainable finance are likely to fall outside the definition of 'credit institution'. The legislator has acknowledged the issue that Islamic banking may not 'fit' in the mould of the European definition of 'credit institution' or the application of prudential standards: Article 161 (8) of CRD IV entrusts the EBA with the task of reporting on the adequacy of the Single Rulebook for the provision of Islamic finance.¹³⁵ Finally, the ECB is to work for the citizens of Europe,¹³⁶ who include a sizable minority of potential clients of Islamic banking products. This is also the perspective from which the European Parliament may include this issue: including this issue in its attention span may help increase its connection with all the citizens of Europe.

3.2.4. Treatment of sovereign risk and de-coupling of banks from sovereigns

The treatment of sovereign risk and the de-coupling of banks from their sovereigns has been the subject of a lot of debate already, in hearings between the ECB and the European Parliament and in a

¹³¹ Articles 73-79 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141/1, 14.5.2014) (hereafter: SSM Framework Regulation).

¹³² Disclosure: as an academic coach of a University of Amsterdam spin-off, I am involved with an initiative in this area: *Adab Finance*. See: <https://adabfinance.nl/>.

¹³³ Based on figures from 2017; see: <https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>.

¹³⁴ *Opinion of the European Banking Authority on matters relating to the perimeter of credit institutions*, EBA/Op/2014/12, and *Report to the European Commission on the perimeter of credit institutions established in the Member States*, EBA, 27 November 2014, at: <https://eba.europa.eu/eba-publishes-an-opinion-on-the-perimeter-of-credit-institutions>.

¹³⁵ This provision has not been activated as yet. A Commission mandate is needed for the EBA to act: Article 161 (**Review and report**), paragraph 8: "Upon receiving a mandate from the Commission, EBA shall explore whether financial sector entities which declare that they carry out their activities in accordance with Islamic banking principles are adequately covered by this Directive and by Regulation (EU) No 575/2013. The Commission shall review the report prepared by EBA and shall submit a legislative proposal to the European Parliament and to the Council if appropriate."

¹³⁶ See the references to "citizens of Europe", who the European Parliament represents, made by ECB President Christine Lagarde in her closing remarks before the European Parliament on 11 February 2020; see: https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200211_annex~71bfff6f241.en.pdf.

question by an MEP.¹³⁷ Also, academic papers have been published on this issue, which lends itself to a discussion in the supervisory dialogue. The current situation is likely to lead to an increase in governments' bond-issuance and in banks' exposure to national sovereigns – the sovereign/bank 'doom loop' which banking union sought to break.¹³⁸ The European Parliament may wish to consider inviting the ECB to explain its long-term vision on how to tackle the ensuing risks and how to ensure that its prudential stance does not undermine the impact of its monetary policy 'bazooka'.¹³⁹ Hitherto, the ECB has announced major prudential measures that all go in the same direction of releasing capital for the funding of affected companies and citizens.¹⁴⁰ Without in any way implying that there is a mismatch between the two functions of the ECB, or that the Chinese wall between the two tasks¹⁴¹ has not been observed, the European Parliament might consider enhancing the *ex ante* accountability of the ECB by requesting an analysis of the long-term strategies of the monetary and prudential authority of the Euro Area, in preparation of a dedicated dialogue on this after the worst of the corona crisis is over.

3.2.5. Influence of fintech, BigTech and digital currencies

On the influence of fintech and of Big Tech, several issues come together that the ECB will have a policy stance on that the European Parliament may wish to know more of and may wish to influence in the context of accountability, while fully respecting the ECB's independence. These issues include but are not limited to digitalisation¹⁴², privacy protection, innovation, Artificial Intelligence. This issue is closely connected to the advent of digital currencies, which is at the heart of the mandate for central banks and the impact of digital currencies for monetary policy, but also affects the position of commercial banks and, hence, is relevant for their supervision. Learning the views of the ECB, and imparting the concerns of the European Parliament, could contribute to the former's accountability towards the latter. Also here, the preparation of a stance of the European Parliament as its input into the dialogue on these longer-term developments and into the ECB's position in respect of them might enhance the ECB's accountability and the European Parliament's influence on the conduct of supervisory policies.

¹³⁷ See the ECB's answer to Mr Jonás Fernández' question on the issue of public debt securities as risk-free assets, at: https://www.ecb.europa.eu/pub/pdf/other/151116letter_fernandez.en.pdf?9f3ee140769fd835b98f53523a688ffd. Other questions on this issue may have escaped this author.

¹³⁸ "We affirm that it is imperative to break the vicious circle between banks and sovereigns", Euro Area Summit Statement, 29 June 2012, at: https://www.bankingsupervision.europa.eu/about/milestones/shared/pdf/2012-06-29_euro_area_summit_statement_en.pdf.

¹³⁹ Reference is made to the Pandemic Emergency Purchase Programme (PEPP), announced on 18 March 2020; see: *ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)*, press release of 18 March 2020, at: https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html. For Q&As, see: <https://www.ecb.europa.eu/mopo/implement/pepp/html/pepp-ga.en.html>. See, also, Decision (EU) 2020/440 of the ECB of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91, 25.3.2020, p. 1.

¹⁴⁰ Press Release, *ECB Banking Supervision provides temporary capital and operational relief in reaction to coronavirus*, 12 March 2020, at: <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200312~43351ac3ac.en.html>; Press Release, *ECB Banking Supervision provides further flexibility to banks in reaction to coronavirus*, 20 March 2020, at: <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200320~4cdbbcf466.en.html>; and Press Release, *ECB asks banks not to pay dividends until at least October 2020*, 27 March 2020., at: <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200327~d4d8f81a53.en.html>.

¹⁴¹ See footnote 96 above.

¹⁴² Which is also one of the workstreams in the monetary strategy review.

3.2.6. Competition in banking services

Effective competition in the area of banking services is relevant for the banks' customers and for society at large. Ensuring that prudential supervision, and the resolution decisions taken by the SRB,¹⁴³ promote competition is mandated by law, including the injunction to the ECB to act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources.¹⁴⁴ Although an issue at the other side of the dividing line between prudential supervision and monetary policy, one may note that effective competition may also further the effects of monetary policy as interest rate changes may not translate into effective rates applied to economic operators and households when lack of competition allows banking players to act with undue market power. Cross-border competition of retail banking services is another area of concern since the financial crisis. The lack of effective interpenetration of banking markets may have increased because of the closing of borders and a reversion to purely national approaches during the current corona virus crisis. On the other hand, the European context of a plethora of banks that are in competition for business, which has strong negative effects for their profitability, is an aspect of inter-bank competition that also merits attention.

In the context of enhanced accountability, the European Parliament may wish to engage with the ECB, and the SRB, on the question of effective competition on the banking markets and their assessment of such competition. Should a dearth of competition be established on appropriately defined (geographical and product) submarkets, such a finding may be brought to the attention of the Commission and of national competition authorities. Issues of excessive competition (too many players in an 'overgrazed' field) may be addressed through (cross-border) mergers, an issue on which the ECB has a stance.¹⁴⁵ Encompassing competition among the issues of focus for in-depth discussions with the banking union authorities may ultimately serve customer satisfaction and the functioning of the internal banking market.

3.3. Identifying lacunae and need to harmonise: coalition building

A variation to the suggestion made in the preceding subsection might be for the European Parliament to focus on the areas of banking union where a need to enact legislation can be discerned. Parliament may wish to invite the ECB and the SRB to make an inventory of issues where national legislation hampers or impedes an effective oversight or resolution, as has been done in the past. Such a catalogue may then be discussed between the lawmakers and the authorities, with a view to inviting the Commission¹⁴⁶ to propose amendments or come up with new legislative plans. These may further harmonise the national legislation which affects the functioning of the ECB and the SRB and which has an impact on how their actions effect the market and its players and, ultimately, financial stability in the Euro Area and the individual Member States. Examples of areas of the law which the European Parliament may wish to focus on harmonising likely include, the assessment of bank board members

¹⁴³ Avoidance of distortion of competition in the internal market or ensuring fair competition is mentioned in several instances in the SRM Regulation: recitals 9, 19, 21, 75 and Article 19(3).

¹⁴⁴ Article 127(6) TFEU.

¹⁴⁵ In the Introductory interview to the ECB Annual Report on supervisory activities 2019 with Andrea Enria, Chair of the Supervisory Board, he stated: "Well, it seems obvious to me that the euro area banking sector needs to consolidate. Excess capacity is part of the profitability problem, so it needs to be removed. So yes, bank mergers, whether within or across borders, would be useful."; see: <https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2019~4851adc406.en.html#toc2>.

¹⁴⁶ Through resolutions calling for Commission proposals in this field.

as fit & proper, where law and practice is widely different, or supervisory involvement in the area of AML/CTF.¹⁴⁷

Box 6 – Different laws and practices: an example (FAP)

An example of widely different laws and practices concerns the approach to the fit & proper (FAP) testing of members of a bank's management body. Both executive and non-executive directors need to be assessed for their good reputation and sufficient knowledge.¹⁴⁸ The responsibility of the companies concerned for adherence to these FAP requirements is emphasised in the amended provision of CRD IV¹⁴⁹ which begins with stating the "primary responsibility" of the supervised entities for ensuring they are managed by fit and proper persons, suggesting that supervisory control only comes *after* the appointment of a member of the management body.¹⁵⁰ The practice of several supervisory authorities to apply an *ex post* assessment is thereby validated, thus marking an even bigger contrast with the approach of *ex ante* assessment and *prior* authorisation of starting a position as a managing or non-executive director applied in several jurisdictions. It would seem that this diversity¹⁵¹ does nothing to ensure a level playing field and adequate advance monitoring of the suitability of members of the management body.¹⁵²

Should the European Parliament decide to adopt the option of aligning with the authorities over which the European Parliament exercises accountability in the context of banking union, this approach might lead to the building of a coalition of the supervisor and the legislator against vested interests, whether from the banking industry or the Member State, that obstruct effective oversight and resolution.

3.4. Steady input from affected and interested parties: coalition building

Different from the approach above, which includes the option of aligning Parliament's stance with that of the two authorities responsible for banking union at Union level, would be an approach where the European Parliament would pro-actively engage with banking industry, advisors and academia on

¹⁴⁷ AML/CTF: Anti Money Laundering/Counter Terrorist Financing.

¹⁴⁸ Article 91 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338), hereafter: CRD IV.

¹⁴⁹ Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (OJ L 150, 7.6.2019, p. 253), hereafter CRD V.

¹⁵⁰ Article 91(1) CRD IV reads as follows:

"Members of the management body shall at all times be of sufficiently good reputation and possess sufficient knowledge, skills and experience to perform their duties. The overall composition of the management body shall reflect an adequately broad range of experiences. Members of the management body shall, in particular, fulfil the requirements set out in paragraphs 2 to 8."

Article 91(1) CRD V is phrased as follows:

"Institutions, financial holding companies and mixed financial holding companies shall have the primary responsibility for ensuring that members of the management body are at all times of sufficiently good reputation and possess sufficient knowledge, skills and experience to perform their duties. Members of the management body shall, in particular, fulfil the requirements set out in paragraphs 2 to 8.

Where members of the management body do not fulfil the requirements set out in this paragraph, competent authorities shall have the power to remove such members from the management body. The competent authorities shall in particular verify whether the requirements set out in this paragraph are still fulfilled where they have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted, or there is increased risk thereof in connection with that institution."

¹⁵¹ Recently also highlighted in the ECB Annual Report on supervisory activities 2019: "The outstanding issue is the fragmentation of the rules for fit and proper assessments across the euro area", at: <https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2019~4851adc406.en.html#toc50>.

¹⁵² On which the ESM and the EBA have issued *Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU*, EBA/GL/2017/12/ESMA71-99-598, 26 September 2017, at: <https://eba.europa.eu/regulation-and-policy/internal-governance/joint-esma-and-eba-guidelines-on-the-assessment-of-the-suitability-of-members-of-the-management-body>.

long-term issues concerning banking union and, on the basis of such engagement, bring the issues that may come up into the dialogue with the ECB.

This approach is different from the one in the preceding section, which concerned coalition building to overcome resistance from the banking industry. There may be topics where the European Parliament should lend the industry a willing ear and make itself the spokesman of justified concerns. Naturally, there is a fine line between acting as a spokesperson for issues identified as warranting remedies and being a mouthpiece for vested interests. Transparency on the preparations and conduct of supervisory dialogues on such issues is crucial to fend off any criticism of such a role.

Beyond individual academic papers by way of input into the supervisory dialogue, this approach would invite the supervised, their trade associations, customers and their representatives, trade unions, business organisations and the public at large, including researchers in this field, to flag issues (beyond individual cases) that justify an interest of the European Parliament in the context of the accountability of both the ECB and the SRB. A dedicated portal might be opened to this effect, not unlike the breach reporting page on the ECB's website¹⁵³ which contains a standing invitation to 'whistle blowers' to come forward to "report breaches of relevant European Union law committed by a supervised bank, national supervisor or the ECB itself". Where this latter portal seeks reporting of breaches, the European Parliament might consider issuing a standing invitation to every interested party to inform it about 'issues' (i.e., more than 'breaches') in respect of the Single Rulebook¹⁵⁴ and its application by the ECB¹⁵⁵ and the SRB. This input could then be used in the supervisory dialogue.

A specific element of this manner of enhancing the accountability of the ECB and the SRB may be to actively request input from credit institutions, individually or through their trade associations, notably on the perceived regulatory burden, the learning capabilities of the banking union authorities (do they take on board information and elucidation from market parties or do they stick to perceived prior ideas?), the cooperation among the ECB and the SRB to avoid over- or underlap, and to solicit suggestions for improvement. One may also wish to invite banks to report on the possible incidence of extra surveillance or severity on a different issue of supervisory concern than the one on which the bank has opposed the ECB in administrative or judicial review proceedings, such incidence – should it occur – providing a sign of supervisory irritation or resistance to correction. There is no indication whatsoever that either the SRB or the ECB would engage in such practices of 'retribution' for 'troublemakers' but similar administrative practices are rumoured to have taken place in different areas of the exercise of public authority by national administrations.

With sufficient and steady input from society, such a portal may help form another kind of 'coalition', this time between various and different stakeholders and the European Parliament. When put to good use, the accountability of the ECB and the SRB may be utilised to see both 'work for' the European Parliament as they would be called upon to answer to the issues raised.

3.5. Rotating leadership in the supervisory dialogue

A completely different idea could also be explored, namely to give prominence to a political grouping represented among lawmakers, which would, alternating amongst themselves, each take turns in developing the interaction with the ECB and the SRB. This approach would allow the different voices in the European Parliament to be prominently heard, as one might expect the leadership for this turn

¹⁵³ See: <https://www.bankingsupervision.europa.eu/banking/breach/html/index.en.html>.

¹⁵⁴ See: <https://eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook>.

¹⁵⁵ Possibly including NCAs as, together with the ECB, they form the SSM.

to emphasise issues that are core to its platform and its share of the electorate. This would make the supervisory dialogue more attractive to outsiders as issues which they have close at heart may, on a revolving basis, be given prominent attention.

3.6. Beyond ‘issues’: the ECB and SRB as accountable organisations

Beyond substantive issues on which the European Parliament may fruitfully engage with the ECB and the SRB, there is another angle from which accountability may be approached. This is the perspective of the accountable organisation organising itself in a manner which reinforces independent thinking and accountable behaviour. By including such issues in its focus, the European Parliament may reinforce auto-correction against biases and tunnel vision at the central bank and the resolution authority, and encourage an open mind towards critical voices, including its (i.e., Parliament’s) own. While fully respecting the independence of the ECB and the SRB to organise themselves, Parliament’s interest in how they build into their organisations channels for outside input and internal dissent may help reinforce the balanced fulfilment of their mandate by the ECB and the SRB.

A relevant issue may be how diverse the organisations are. The ECB reports on the percentage of female staff,¹⁵⁶ whereas the SRB provides the same information¹⁵⁷ but in more detail, and gives information about the breakdown of nationalities among its staff¹⁵⁸. The latter information may not seem supportive of a common *esprit de corps* for a European organisation.¹⁵⁹ Other information may give the outside world some idea as to how the authorities function: a breakdown by age groups and information about a breakdown by training may provide insight into issues such as succession and ‘colour’ of the organisation. An organisation’s predominant ‘colour’, and the dominant ‘colour’ in which its staff members may be said to function¹⁶⁰ in their daily tasks may help understand the proclivity to change and the adaptability when confronted with substantiated criticism. Reference is made to management literature on organisations and individuals.

Box 7 – Colour perspectives on problem solving and organisation

One example is the ordering by social psychologist and change management consultant Léon de Caluwé of modes of thinking¹⁶¹ that are prevalent and that may assist in understanding, or fostering, change: ‘blue’ for management, planning and control, ‘red’ for motivation and a sense of togetherness (the ‘soft side’ of an organisation), ‘yellow’ for politics and power play, ‘green’ for reflection on changes and sharing knowledge, with ‘white’ standing for openness to change.

¹⁵⁶ At 41% in 2019; see p. 90 of the ECBs ECB Annual Report on supervisory activities 2019, at: <https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2019~4851adc406.en.pdf>.

¹⁵⁷ An almost even distribution of female and male staff members in 2017 and 2018, see p. 61 of the SRB’s Annual Report 2018, at: https://srb.europa.eu/sites/srbsite/files/srb_annual_report_2018.pdf.

¹⁵⁸ In Annex 5 of its Annual Report 2018, the SRB specifies the nationality of its staff members.

¹⁵⁹ For an aggregate breakdown of nationalities represented in banking supervision at the ECB, see the Letter from Andrea Enria, Chair of the Supervisory Board, to Ms Stark-Watzinger, Member of the German Bundestag, on ECB Banking Supervision, at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter200320_Stark-Watzinger~b69e60eeca.en.pdf.

¹⁶⁰ It goes without saying that this idea has nothing at all to do with racial or ethnic profiling: in this context, ‘colour’ relates to a mode of operation of an organisation, or a way of functioning of a staff member, and not to skin colour or lineage. Note that such ‘colour coding’ often is not linear: people and organisations may have dominant and auxiliary ‘colours’ and their patterns of behaviour may shift over time or relating to the kind of task undertaken.

¹⁶¹ Léon de Caluwé (1950-2019)’s ‘colors of change’; see: <https://hansvermaak.com/en/genre/colors-of-change/>.

Another example of 'colouring' is from Eduardo de Bono's *Six thinking hats*¹⁶² in which the author proposes that one can consciously adopt a certain 'thinking mode' to approach a problem: 'blue' for the big picture, 'white' for factual information, 'red' for an emotional perspective, 'black' for critical judgment, 'yellow' and 'green' for welcoming new ideas and solutions; a sequence of 'thinking modes' may help solve an issue the organisation faces.

An further example is from Frederic Laloux's *Reinventing Organizations*,¹⁶³ in which the author labels organisations (in business, government, or health care) as 'red' when characterised by a top-down command structure, as 'amber' where conformism and discipline prevail, as 'orange', when characterised by entrepreneurial effectiveness as norm, as 'green' where relationships trump outcomes as organisational value, and as 'teal' for self-managed organisations.¹⁶⁴

Without suggesting that the authorities label themselves or their staff according to this kind of 'colour' operating mode, information about the diversity of staff in terms of age group, training and professional education¹⁶⁵ may inform the outside world on their adaptability and openness. Asking the ECB, or the SRB, how they see themselves; whether and, if so, how their staff members are encouraged to adopt different attitudes to issues before a decision is adopted;¹⁶⁶ and what they do to stimulate creative and original thinking may give the European Parliament an insight into how 'open' and 'reflective' these authorities are. Such information may also bring home how they may respond to suggestions from the supervised entities and from outside in general, including from the European Parliament.

It goes without saying that such inquisitiveness of the European Parliament should respect the independent operation of the SRB and the ECB, and the privacy of their staff members. Similarly, Parliament's interest in how the SRB and the ECB organise their decision-making does not imply that any different views should be shared – this interest concerns the *organisation* of the institution and agency, not the *contents* of possibly varied strands of opinions which should remain confidential and privileged. For the sake of avoiding any misconception, it should be emphasised that the ECB and the SRB are expected to produce clear decisions and adopt a coherent approach across the variety of entities 'under their wings', which should be treated equally. Any openness to various perspectives is to precede decision-making (and may recur when review of a decision is requested).

Continuing on this issue, information about how 'internal opposition' is organised may provide valuable insights into the ECB and the SRB in the context of their accountability. Reference is made to mechanisms that stimulate non-traditional and non-hierarchical thinking and behaviour and incentives against 'groupthink'.¹⁶⁷ Are there strategies in place within the SRB and the ECB to ensure the contestability of ideas? Multi-national, continent-spanning bodies where teams from culturally

¹⁶² Reference is made to his book *Six Thinking Hats*, 1985, ISBN: 0-316-17791-1. See, also: <https://www.edwdebono.com/>.

¹⁶³ Frederic Laloux's *Reinventing Organizations*, 2015, ISBN 978-2960133554; see: <https://www.reinventingorganizations.com/>. See, also, his, *The Future of Management Is Teal - Organizations are moving forward along an evolutionary spectrum, toward self-management, wholeness, and a deeper sense of purpose*, in: *strategy+business*, Autumn 2015, at: <https://www.strategy-business.com/article/00344?gko=30876>.

¹⁶⁴ Along the lines of Ricardo Semler's democratic management style, epitomised in his book *Maverick! : The Success Story Behind the World's Most Unusual Workplace* (1993), ISBN 978-0-446-67055-5.

¹⁶⁵ Are more diverse disciplines well-represented among staff than economists, lawyers and accountants?

¹⁶⁶ Reflecting the observation by Israeli historian/philosopher Yuval Noah Harari: "(...) discord in our thoughts, ideas and values compel us to think, re-evaluate and criticise. Consistency is the playground of dull minds", *Sapiens – A Brief History of Mankind*, 2011, ISBN 978-0062316097, p. 184. See: <https://www.ynharari.com/>.

¹⁶⁷ This term, derived from the novel *1984* by George Orwell, denotes a "mode of thinking that persons engage in when concurrence-seeking becomes so dominant in a cohesive ingroup that it tends to override realistic appraisal of alternative courses of action", and was introduced by American social psychologist Irving Janis; see: <https://archive.org/details/groupthinkpsycho00jani> and https://en.wikipedia.org/wiki/Irving_Janis. See, also, Charlan Nemeth, *In Defense of Troublemakers: The Power of Dissent in Life and Business*, 2018, ISBN 978-0465096299. [reference to recent An interesting exposition about how to avoid 'groupthink' at a regulatory agency was given by Martijn Snoep, then advocate contesting decisions of the Netherlands Competition Authority, currently its Chairman, in "*NMa'ers zijn ook mensen*" ('Staff members of the Competition Authority are humans, too') in *Contouren van het Economisch Bureau NMa* (2005).

diverse backgrounds need to cooperate, e.g. in Joint Supervisory teams (JSTs), may benefit from such mechanisms even more than locally operating entities.

Openness about how the ECB and the SRB have organised themselves in this respect may have a longer-lasting impact on the interaction between them and the European Parliament than a sole focus on topical issues. I recommend expanding the dialogue to include such matters as a means to get more insight into the (independent) organisation by the ECB and the SRB of the fulfilment of their mandates, potentially thereby increasing the impact of any future calling to account by the European Parliament.

3.7. Beyond ‘issues’: the ECB and SRB as responsive organisations

Also from the same perspective of how the SRB and the ECB have organised themselves, it may be worthwhile for the European Parliament to show an interest into their ‘responsiveness’ to feedback.

Testing the responsiveness to feedback and criticism from supervised entities may reveal whether there are unnecessary repetitions in supervisory requests for the same sort of information, whether there is understanding for the burden of reporting, whether there is a tendency to insist on compliance with norms that cannot reasonably be considered to be included in applicable prudential standards, whether there is proper alignment between the ECB and the SRB, and whether supervision and resolution are conducted with a keen eye for the functioning of the market and for the conduct of business or, rather, are more remote and ‘bureaucratic’, or built around ‘box ticking’ instead of actually assessing and addressing real risks.

It may be that, for the European Parliament to get an insight into this, methods to discretely ask supervised entities to inform the lawmakers may need to be found, beyond asking direct questions to the supervision and resolution authorities. Again, including this aspect of the functioning of the SRB and the ECB may enhance the scope of their accountability vis-à-vis the European Parliament.

Another aspect of responsiveness concerns the mutual alignment between the Union and State level organisations assembled in the SSM and the SRM, respectively. The interaction between the ECB and the NCAs, as well as between the SRB and the NRAs, may be of interest to the European Parliament in the context of holding both authorities to account. By way of example, there may be an interest in the passivity or, rather, active stance, of the ECB when composite procedures are concerned which NCAs are to initiate. These ‘common procedures’ in the terminology of the SSM Framework Regulation¹⁶⁸ rely on open communication and alertness of the part of the NCAs as initiators of decisions that the ECB is to take.¹⁶⁹ By way of example, insight into the organisation by the ECB of its own investigations to establish circumstances that potentially justify the withdrawal of a banking license¹⁷⁰ might be helpful to establish the kind of interaction within the SSM that proves both alertness and agility among 20 supervisory agencies. The way to handle similar issues of alignment within the SRM may be assessed by the European Parliament from an accountability perspective.

3.8. The European Parliament giving account to its electorate

There may be merit in the European Parliament itself organising feedback on its supervisory dialogue with the ECB and the SRB to interested parties and to its electorate. By publicly reporting on the

¹⁶⁸ See Part V of the SSM Framework Regulation. These composite procedures concern the authorisation of credit institutions and the withdrawal of authorisations, as well as the assessment of qualifying holdings). The CJEU’s review of the legal acts under these procedures has been the subject matter of the judgment of the ECJ of 19 December 2018 in the *Berlusconi* case (Case C-219/17 (*Berlusconi and Fininvest*), ECLI:EU:C:2018:1023).

¹⁶⁹ Pursuant to Article 4(1)(a) and (c) SSM Regulation.

¹⁷⁰ Article 82 SSM Framework Regulation.

exchanges with the authorities responsible for prudential supervision and resolution in the Euro Area, Parliament may engage the players most affected in providing input in future dialogues with the ECB and the SRB. Also, systematic reporting may give the European citizens insight into what Parliament does for them and, thereby, engage the electorate with the lawmakers more intensely. One may expect (associations of) credit institutions, consumer groups, elements of civil society interested in banks and their supervisors, and journalists to be interested in such feedback and to start 'participating from a distance' in the dialogue. The feedback may also lead to entries into the portal dedicated to reporting to the European Parliament of issues of relevance (see 3.4. above).

Systematic reporting or feedback would go beyond the availability of the current set of information on Parliament's website and would include brief summaries of the main issues raised and the answers provided by ECB and the SRB during dialogues. The recent reformatting of the website provides useful overviews already, with transcripts of the hearings¹⁷¹, experts' reports submitted in preparation of the hearings, and questions from MEPs and answers given, as well as outside expert reports.

One may envisage an even more systematic and specific provision of information which informs the visitor about the main issues that play and how Parliament has interacted with the EU authorities on these, as well as on the latter's response. In a way, the reporting would be the *ex post* counterpart to *ex ante* papers provided as input: the feedback would highlight issues, inform the public on progress made (what did the ECB or the SRB change in response to the European Parliament's scrutiny?) and might invite reactions on these issues. This would go beyond the practical issue of systematically publishing the questions put to the ECB and the SRB, as already recommended in paragraph 2.2.3 above.

¹⁷¹ As is currently the case at: <https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union>.

4. RECOMMENDATIONS

In pursuit of a more effective exercise of accountability over the ECB and the SRB, the European Parliament may wish to focus, first, on **the issue of transparency**. Here, several recommendations have been made which, in ascending order of gravity, relate to:

1. Making available for scrutiny information on elements of the supervision and resolution framework that hitherto are difficult to find, notably MoUs among supervisory and resolution authorities, both within the EU and with third countries or international bodies; this would allow for greater accountability on the day-to-day exercise of supervision and resolution;
2. Making questions from MEPs and answers of the ECB and the SRB easy to find on the websites of the ECB, the SRB and the European Parliament, thereby making clear to citizens how Parliament exercises its accountability oversight and how responsive and transparent the authorities are;
3. Providing extensive albeit necessarily somewhat limited information on requests for independent administrative review of ECB decisions, as the ABoR proceedings are a step in the internal decision-making process of the ECB; this would give insight which may feed the European Parliament's accountability approach vis-à-vis the ECB;
4. Adopting a consistent approach in favour of regulations instead of directives in the Single Rulebook, thus minimising different treatment among banks in the Euro Area and permitting easier comparability of the performance of their tasks by the ECB and the SRB;
5. Making national legislation that the ECB and the SRB are to apply and all banking-union relevant case law¹⁷² available in English; this would facilitate the assessment by the European Parliament of the equal treatment of banks across the Euro Area;
6. Exploring the possibility of adopting a regulation establishing a new regime of professional secrecy across the financial sector for EU and national authorities alike. While upholding the justified need for secrecy (privacy, business secrets, supervisory strategies, third-party rescue) and respecting the independence of the authorities, a new confidentiality standard would allow access to supervisory files to interested parties after five years while permitting third parties and supervision and resolution authorities to stand up for confidentiality of certain information, thereby also enhancing the information basis for holding the ECB and the SRB (retrospectively) accountable vis-à-vis the European Parliament.

Specific **accountability recommendations** relate to:

1. Considering to extend and deepen the accountability of the ECB and the SRB by engaging in a thematic dialogue. Respecting the MEPs' own choices to select themes, a number of substantive issues are mentioned by way of illustration of how engaging the authorities in in-depth discussions might work:
 - corona virus crisis-related issues;
 - completing banking union;
 - climate change and sustainable finance;

¹⁷² Lesser transparency issues in respect of case law have also been identified, such as more up-to-date and complete information on banking union-related proceedings at the *Curia* website, the visibility of case law as being post-ABoR, and transparency about the ability to process the many proceedings against the SRB.

- treatment of sovereign risk and de-coupling of banks from sovereigns;
- Influence of fintech, BigTech and digital currencies;
- competition in banking services.

Well-prepared in-depth dialogues on selected issues with long-term relevance that MEPs consider worthwhile to pursue might deepen the interaction between the European Parliament and the banking union authorities, thereby enhancing the accountability of the ECB and the SRB and increasing the influence of the European Parliament on supervisory and resolution policies.

2. Identifying lacunae in the harmonisation of banking supervisory rules and building coalitions with the ECB and the SRB, to put pressure on the Commission to come with proposals, or on the Council to adopt proposals, which are relevant for the proper functioning of banking union. This might increase the effect of the accountability mechanism through a focus on matters where progress can be made.

3. Inviting interested parties to submit to the European Parliament any issue of relevance to banking union that they consider might merit to be taken up in the supervisory dialogue; through this steady input from practice and academia, coalitions may be forged with pressure groups in society for improvements of the supervision and resolution frameworks, thus enhancing the societal exposure of the ECB and the SRB through the accountability process of the European Parliament.

4. Introducing a revolving leadership among the political groupings represented in the Committee on Economic and Monetary Affairs for the conduct of supervisory dialogues, thus enabling political 'colours' to be shown prominently on a rotating basis and thereby possibly making the accountability mechanism more attractive to engage with for citizens.

5. Focusing on the internal organisation of the ECB and the SRB as accountable organisations that are open to constructive criticism and organise their own internal opposition in order to avoid 'groupthink' and to ensure the contestability of ideas prior to the adoption of clear decisions, thereby making these authorities better equipped to accept and implement ideas from outside, including ideas shared by the European Parliament, thus enhancing its role in the accountability process.

6. Focusing on the internal organisation of the ECB and the SRB as responsive organisations that respond to feedback and criticism from supervised entities and to signals from the other players in their respective mechanisms (NRAs for the SRB, NCAs for the ECB); thereby insisting on the proper functioning and flexibility of the ECB and the SRB, as elements for the European Parliament to scrutinise in holding them accountable.

7. Organising feedback to the electorate on the supervisory dialogue by the European Parliament itself, thus enhancing the usefulness of the supervisory dialogue and elicit responses on pending issues; this element addresses the accountability of the European Parliament itself for how it performs accountability oversight in respect of the SRB and the ECB.

This paper sets out recommendations for enhancing the accountability arrangements in respect of the European Central Bank and the Single Resolution Board within the confines of the presently applicable legal provisions. It recommends enhancing transparency, as a precondition for accountability. Other recommendations are that the European Parliament consider engaging the ECB and the SRB in an in-depth thematic dialogue on substantive issues of a long-term relevance, and that the European Parliament expresses an interest in how accountable and responsive the ECB and the SRB are to criticism and how they approach their internal decision-making. This document was provided by the Economic Governance Support Unit at the request of the ECON Committee).
