IN-DEPTH ANALYSIS
Requested by the ECON committee

European Parliament

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

Banking Union Scrutiny

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Directorate-General for Internal Policies
PE 645.747 - May 2020

EN

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Abstract

The paper distinguishes two contrasting models of accountability, one based on principal-agent relations, which is backward-looking, the other a dynamic and forward-looking model. The paper argues that this second model of accountability is more appropriate for independent bodies like the ECB/SSM and the SRB, operating in technically complex, rapidly evolving environments under conditions of high uncertainty, where parliaments and other political authorities have very limited sanctioning powers. It then goes on to review the nature and effectiveness of three main forms of accountability as applied to these institutions – administrative, judicial, and political – together with the contribution of external review bodies, such as the European Court of Auditors and the European Ombudsman, to their accountability at European level. Following the dynamic, forward-looking approach advocated above, the paper argues that the best way to improve the accountability of the SSM and the SRB is to request the ECB/SSM and SRB to make the findings of their internal quality assurance and review bodies publicly available (subject to constraints on professional secrecy) and for the EP to use these findings to scrutinize and stimulate public debate about the operations and effectiveness of the two institutions.

This document was provided by the Economic Governance Support Unit at the request of the ECON Committee.

This document was requested by the European Parliament's Committee on Economic and Monetary Affairs.

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Original: EN

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Manuscript completed in May 2020

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LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
CJEU	Court of Justice of the European Union
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
DG	Directorate-General
ECA	European Court of Auditors
ECB	European Central Bank
ECJ	European Court of Justice
ECON	Committee on Economic and Monetary Affairs
EP	European Parliament
ESA	European Supervisory Authority
ESMA	European Securities Markets Authority
EU	European Union
FOLTF	Failing or Likely to Fail
ICS	Internal Control Standards
KPI	Key Performance Indicators
LSI	Less Significant Institution
MEP	Member of the European Parliament
MoU	Memorandum of Understanding
MREL	Minimum Requirements for own funds and Eligible Liabilities
MS	Microprudential Supervision
NCA	National Competent Authority
NCWO	No Creditor Worse Off

NPE	Non-Performing Exposure
NPL	Non-Performing Loan
NRA	National Resolution Authority
OSI	On-Site Inspection
P-A	Principal-Agent
PIA	Public Interest Assessment
QSR	Quality Service Review
SB	Supervisory Board
SI	Significant Institution
SQA	Supervisory Quality Assurance
SRB	Single Resolution Board
SREP	Supervisory Review and Evaluation Process
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRMR	Single Resolution Mechanism Regulation
SSM	Single Supervisory Mechanism
SSMFR	Single Supervisory Mechanism Framework Regulation
SSMR	Single Supervisory Mechanism Regulation
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership

EXECUTIVE SUMMARY

In this paper, we were asked (a) to assess whether the current accountability regime and scrutiny instruments (ranging from hearings to judicial review) are effective in counterbalancing the powers given to the SRM and the SRB; and (b) to make proposals of additional scrutiny instruments or procedures for improvement to increase accountability at European level, while respecting the institutions' independence and within the current legal framework.

In responding to these questions, the paper begins by distinguishing between two contrasting models of accountability. The first model, based on principal-agent relations, is backward-looking, focused on whether an agent has used its discretion in ways authorised and intended by the principal. Its effectiveness depends on the principal's capacity to define goals clearly enough *ex ante* to provide authoritative guidance to the agent, as well as to assess and where necessary sanction the latter's actions in pursuing those goals *ex post*. The second model is dynamic and forward-looking, based on asking actors to explain how they have used the discretion granted to them within a given legal framework to advance the goals for which the institution in question was established, subject to review by peers knowledgeable enough to challenge such explanations, as well as to explain what revisions they have made to their internal policies and practices in response to problems revealed by such reviews. We argue that this second model of dynamic accountability is more appropriate for independent bodies like the ECB/SSM and the SRB, operating in technically complex, rapidly evolving environments under conditions of high uncertainty, where parliaments and other political authorities have very limited sanctioning powers.

The paper then goes on to review the nature and effectiveness of three main forms or mechanisms of accountability as applied to the SSM and SRM: (1) administrative accountability, focusing on the role of internal boards of review or appeal panels, and the right to be heard of parties affected by decisions of the SSM and the SRB; (2) judicial accountability, focusing on the role of courts in reviewing decisions of these institutions; and (3) political accountability, focusing on the reporting and information-provision duties of the SSM and the SRB, and the role of the European Parliament and the Council, along with national parliaments, in scrutinizing and interrogating the work of these institutions. It also examines the contribution of external review bodies, notably the European Court of Auditors and the European Ombudsman, to the accountability of the SSM and the SRB at European level.

The paper's assessment of legal accountability within the Banking Union is largely positive. Both the ECB and the SRB are judicially accountable to the EU Courts, which have been faced with increasing litigation. There is now a growing body of case law that facilitates the judicial review of decision-making processes in the SSM and SRM, and which shed light on previously disputed questions of division of judicial competences between national and Union courts. Besides judicial accountability, both the ECB and the SRB are subject to administrative accountability before the Administrative Board of Review and the Appeal Panel respectively. Both bodies perform a quasi-judicial function and offer an additional remedy, besides EU courts, to credit institutions affected by supervisory or resolution measures. Lastly, the legal framework of the SSM and SRM also provides for some protection of procedural rights of credit institutions and affected individuals, such as the right to be heard before a supervisory or resolution-related decision regarding them is taken and the right to receive a statement of reasons for that decision. Nevertheless, we argue that there are significant accountability issues in the SSM and SRB which appear unlikely to be resolved without legislative reform. Those issues concern, for example, the exact remit of the ECB's mandate to apply national law, the dubious mandate of the ABoR to review ECB decisions taken in applying national law, and the lack of clear indications in the SRM's legal framework as to how the SRB should observe the right to be heard, e.g. of credit institutions concerned by decisions on *ex ante* contributions to the SRF.

The paper's assessment of the political accountability of the SSM and the SRB is more critical. While the European Parliament, along with the Council, has a voice in the appointment and dismissal (in case of "serious misconduct") of the top officials of both bodies, it lacks other formal sanctioning powers, including over their budgets. The EP has access through a variety of channels to confidential information about the SSM, including *in camera* hearings and discussions between the Chair of the SSM Supervisory Board and the Chair/Vice-Chair of the ECON Committee, whose members may also consult records of SB meetings in a secure room. But since the information made available through these channels cannot be disclosed, it is unclear how if at all such access contributes to parliamentary and public debate on the SSM. The Chairs of the SSM SB and of the SRB appear regularly before the EP, as well as the Council and national parliaments, to report on their institutions' performance and respond to questions, both orally and in writing. Empirical studies of these interactions show that MEPs often focus their oral and written questions to the SSM SB on issues that fall outside the ECB's mandate or on requests for confidential information about actions taken in relation to individual banks that the ECB is legally prohibited from providing. These problems highlight the information asymmetry between the two institutions, as well as MEPs' lack of expertise on the complex structure of the Banking Union.

Following the dynamic, forward-looking approach advocated above, the paper argues that the best way to improve the accountability of the SSM and the SRB, while respecting their independence and within the current legal framework, is to build on the internal quality assurance and review processes of these institutions themselves, requesting the ECB and SRB to make the findings of its internal review bodies more publicly available (subject to constraints on professional secrecy). The EP, the Council, and national parliaments could then use these findings as a basis to scrutinize the operations and effectiveness of the SSM and the SRB, and to stimulate public debate about them. The CJEU and the European Ombudsman could likewise use the findings of such bodies, including the ECB Administrative Board of Review (ABoR) and the SRB Appeal Panel, to review the procedural fairness, justification, and consistency of their decisions, provided that these are made publicly available in suitably redacted form to avoid compromising the business confidentiality of the applicants.

1. INTRODUCTION[1]

Remit of the paper

(a) To assess whether the current accountability regime and scrutiny instruments (ranging from hearings to judicial review) are effective in counterbalancing the powers given to SSM and the SRB;

(b) To make proposals of additional scrutiny instruments or procedures for improvement to increase accountability at European level, while respecting the institutions' independence and within the current legal framework.

[1] This paper draws on research conducted by Jonathan Zeitlin for the EU Horizon 2020 project "Integrating Diversity in the European Union (InDivEU)", http://indiveu.eui.eu/, under grant agreement No 822304.

2. ACCOUNTABILITY: CONCEPTS AND APPROACHES

2.1. Accountability: a contested concept

Accountability is a notoriously contested concept (Bovens et al. 2014). One widely used definition is that it constitutes "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences" (Bovens 2007: 450). The question of whether public institutions act accountably can also be broken down into several essential sub-questions relating to various dimensions of accountability: "who" is accountable, "to whom", "for what", "by which standards", and "with what effect" (Mashaw 2006: 115-116, 118).

The governance of the Banking Union is characterised by a multilevel structure, where EU and Member State authorities cooperate intensely in a variety of ways (Božina Beroš 2018: 47ff). Networked administration of this kind brings many challenges, some of which are already familiar from other EU policy areas, such as pharmaceutical regulation, competition law enforcement, or management of the structural funds, just to name a few. One recurring challenge is that the dispersion of tasks in administrative networks dilutes political responsibility, while those networks' weak visibility "insulates them from public scrutiny" (Mastenbroek and Martinsen 2017: 429). Moreover, there is the "problem of many hands, many levels, and many eyes" in the accountability of European multilevel administration, insofar as the multitude of actors involved in making and implementing policies is placed under the oversight of a variety of supervisors, in a way which may not always be entirely coherent or without gaps (Wille 2015: 477-478).

Crucially, however, it should be noted that the common definition of accountability developed by Bovens and others relies, whether explicitly or implicitly, on a principal-agent model (Bovens et al. 2014: 12, 13-14). Such a definition is thus not well-suited to capture the accountability issues concerning independent institutions such as the ECB, where other political authorities (such as the Council and the European Parliament) have very limited powers to sanction their actions.[2] It should likewise be noted that this model of accountability is explicitly "retrospective" or backward-looking (Bovens et al. 2014: 6), and is thus of limited value in assessing the effectiveness of supervisory policies and practices under conditions of high uncertainty and rapidly evolving conditions, such as those characteristic of financial markets.

2.2. Principal-agent vs. dynamic accountability

In this section, we distinguish between two contrasting models of accountability, one based on principal-agent relations, which is backward-looking, and the other a dynamic and forward-looking model, which we argue is more appropriate to independent institutions operating under high levels of uncertainty.

Principal-agent (P-A) accountability asks whether an agent has used their discretion in ways authorised and intended by the principal. Typical questions and assessment criteria include the following. Has the agent followed established legal and administrative regulations and procedures? Have they acted within their narrowly defined mandate? Have they met the performance targets set by or agreed with

[2] In his original formulation, Bovens acknowledges that political accountability typically takes the form of a principal-agent relation between the forum and the actor, but argues that it can also be extended to other accountability relations where the forums are not principals of the actors, such as legal and professional accountability. He also argues that "the possibility of sanctions" is "a constitutive element" of accountability on this definition. See Bovens (2007: 451).

the principal? Such accountability relations are typically underpinned by positive and negative incentives or sanctions (rewards and punishments).[3] The effectiveness of this framework depends on a high level of *ex ante* certainty on the part of the principal about the goals to be pursued and the means of achieving them, as well as the latter's capacity for *ex post* assessment of the agent's use of the delegated authority. Principals must have sufficient expert knowledge to be able to define goals and means of achieving them clearly enough in advance to provide authoritative guidance to agents, as well as to evaluate the agent's actions in pursuing those goals after the fact. P-A accountability is thus difficult to apply under conditions of high uncertainty and technical complexity, where "principals" lack such panoramic knowledge and must therefore be prepared to learn from the problem-solving activities of their "agents". P-A accountability is also inherently backward-looking, and thus provides limited guidance on how to improve future performance (Sabel 2004; Cohen and Sabel 2005: 773-777; Sabel and Zeitlin 2008: 304).

Dynamic accountability, by contrast, is forward-looking. This form of accountability starts from the premise that under conditions of uncertainty characteristic of complex and rapidly evolving environments, goals and tasks cannot be precisely specified in advance. Accountable behaviour under such conditions anticipates that actors will need to exercise discretion in adapting existing policies and practices to changing circumstances in order to advance the institution's goals in a forward-looking manner. Hence accountability cannot be based on asking actors to demonstrate conformity with fixed rules and instructions, as in a P-A model, but must instead be dynamic and forward-looking. Such dynamic accountability instead means asking actors to explain (give an account) of how they have used the discretion granted to them within a given legal framework to advance the goals for which the institution in question was established, subject to review by peers knowledgeable enough to challenge these explanations. Where problems or performance failures are revealed by such reviews, actors are expected to explain what revisions in their internal policies and practices they are adopting to improve the situation, and to monitor the implementation and effectiveness of such measures – for which they can then be held accountable going forward. In these explanations of how discretion has been used and how problems revealed by the reviews have been addressed, there is of course a retrospective dimension, but the purpose is forward-looking, focused on how the institution is advancing the goals for which it was established, while detecting and correcting any shortfalls in its operations. Dynamic accountability, which builds on an institution's own internal monitoring and review processes, is thus appropriate for independent authorities operating under conditions of high uncertainty and technical complexity, like the SSM and the SRB, whose operations neither parliaments nor courts have historically been able to scrutinize and assess effectively in a timely manner within a P-A framework (Cohen and Sabel 2005: 777-84; Sabel and Zeitlin 2008: 303-5, 309-12; Sabel and Zeitlin (2010: 10-13); Sabel and Zeitlin (2012: 173-175).[4]

[3] Typical examples of such P-A accountability relations include both legislative reviews of the exercise of delegated rule-making authority by administrative agencies and performance contracts between governments and independent executive authorities introduced by the New Public Management (NPM), such as the inflation targets agreed with many central banks.

[4] Mansbridge (2014: 63-66) considers dynamic accountability as an alternative to both "sanction-based" accountability, characteristic of P-A relations, and "trust-based" accountability, typically applied to independent institutions. Among the best documented cases of such dynamic accountability is Quality Service Review (QSR) in US child protective welfare services (Noonan et al. 2009; Sabel and Zeitlin 2012: 173-4), but examples can also be found across various areas of EU governance, as discussed in the works by Sabel and Zeitlin cited above. In financial regulation, a relevant case is the peer reviews conducted by the European Supervisory Authorities (ESAs) of national implementation of EU rules and guidelines. For a detailed analysis of such peer reviews within the European Securities and Markets Authority (ESMA), see Moloney (2018: ch. 4.F).

2.3. Forms of accountability

In this paper, we examine the nature and effectiveness of three main forms or mechanisms of accountability as applied to the SSM and the SRM:

- administrative accountability, focusing on the role of internal boards of review or appeal panels, and the right to be heard of parties affected by decisions of the SSM and the SRB;
- judicial accountability, focusing on the role of courts in reviewing decisions of these institutions;
- political accountability, focusing on the reporting and information-provision duties of the SSM and the SRB, and the role of the European Parliament and the Council, along with national parliaments, in scrutinizing and interrogating the work of these institutions.

We also examine the role and contribution of external review bodies, notably the European Court of Auditors and the European Ombudsman, to the accountability of the SSM and SRB at European level.

3. ACCOUNTABILITY IN THE SSM

3.1. Purpose and architecture

The legal basis for the creation of the Single Supervisory Mechanism (SSM) is Article 127(6) TFEU. That provision allows the Council, pursuant to a special legislative procedure, and after consulting the European Parliament and the ECB, to confer "specific tasks" for prudential supervision of credit institutions on the ECB. In the aftermath of the financial crisis, it was considered that the creation of a uniform framework for the supervision of credit institutions in the eurozone would be necessary to address problems such as home bias – greater forebearance of national supervisors towards national banks – and the "diabolic loop" between sovereign and bank debt (Veron 2015).

The SSM architecture provides the ECB, and the national authorities that assist it in its supervisory mandate, with significant enforcement powers. Those enforcement powers are intended to ensure that the regulatory standards contained, for instance, in the Capital Requirements Directive (CRD) and the Capital Requirements Regulation (CRR), are effectively followed. To this end, financial penalties may be imposed by way of administrative sanctions on the credit institutions that violate the applicable rules. Those penalties must be effective, proportionate, and dissuasive, but the sums demanded from fined supervised institutions may amount to up to twice the amounts of the profits gained or losses avoided because of the unlawful behaviour, or up to 10% of the total annual turnover, if those profits or losses cannot be determined (Article 18 SSMR). The SSM Regulation (SSMR) confers on the ECB an important set of supervisory powers. To name just a few, under Article 16, the ECB enjoys the powers to require institutions to hold own funds in excess of the capital requirements set out in the CRD and CRR; to apply a specific provisioning policy; to require the reduction of the risk inherent in certain activities; to require additional disclosures; and to restrict or prohibit distributions to a credit institution's shareholders. The ECB may also exercise significant investigatory powers, including requiring supervised entities to provide information and to conduct on-site inspections in business premises – even without prior announcement to affected parties if required by the need for efficiency and proper conduct (Article 12). In sum, in exercising its mandate under the SSM, the ECB is equipped with far-reaching powers to enforce the applicable legislation. Within this legal framework, moreover, the ECB/SSM has substantial discretion to define supervisory policies and priorities; develop manuals and methodologies for carrying out its tasks; and exercise supervisory judgement in applying EU rules to credit institutions, for example in weighing up different risks in reaching an overall decision on additional capital requirements in the annual Supervisory Review and Evaluation Process (SREP). Adequate

accountability mechanisms are all the more necessary in view of the extent of those powers and discretion.

The administrative governance of the SSM is unique in many of its elements, such as the ECB's mandate to apply national law implementing EU directives, and its wide powers to send binding instructions to NCAs (Witte 2014). The SSM thus relies on an unusually "far-reaching mixed administration" (Wissink 2017: 434). Nevertheless, as the *L-Bank* ruling (Case C-450/17 P, *Landeskreditbank Baden-Württemberg - Förderbank*) has made clear, it is the ECB that bears the responsibility for the overall mechanism – both in terms of the Significant Institutions (SIs) under its direct supervision, and of the Less Significant Institutions (LSIs) under its indirect supervision, as well as the daily supervision carried out in a decentralised manner by National Competent Authorities (NCAs). In all the supervisory decisions it takes, the ECB is subject to judicial accountability before EU courts.

3.1.1. Multilevel administration: JSTs and common procedures

In the supervision of SIs, the ECB relies on the operations and preparatory work of Joint Supervisory Teams (JSTs). JSTs are composed of staff members of both the ECB and NCAs from the Member States where the bank, its subsidiaries, or its cross-border branches, are established. An ECB official is normally responsible for coordinating the JST, as explained in Articles 3 ff. of the Single Supervisory Mechanism Framework Regulation (SSMFR).

The SSM also comprises "common procedures", where NCAs and the ECB are involved jointly though at different procedural stages, and which lead to decisions on licensing, revocation of licenses and approval of qualifying holdings (Articles 14 and 15 SSMR). The final decision is taken by the ECB, but except for the withdrawal of licenses at the initiative of the ECB, the ECB may only take a decision after a national preparatory act has been adopted. Multilevel administrative procedures of this kind exist in many other fields of EU competence, and are commonly known as "composite administrative procedures". Many administrative decisions taken by EU authorities result from composite procedures. This is the case, to cite just a few examples, of decisions that authorise the introduction of genetically modified foods in the internal market; register protected designations of origin; or waive certain debts arising from customs duties. Composite procedures are known to raise many problems from the point of view of judicial accountability, since it may become unclear if a decision-making procedure in which both national and Union authorities are involved should be judicially reviewed by national or by Union courts (Brito Bastos 2018). The common procedures of the SSM raise similar issues (Brescia Morra 2016).

In the *Berlusconi & Fininvest* ruling (Case C-219/17), the European Court of Justice relied on previous case law concerning judicial review of composite procedures in unrelated fields, such as biotechnology, to clarify that the EU courts have the exclusive jurisdiction to review both the ECB's decisions adopted in the SSM's common procedures *and* the preparatory acts of NCAs on which those decisions are based. In so doing, the ECJ offered an important clarification as to how the judicial control of joint decision making by NCAs and the ECB should be carried out (Brito Bastos 2019).

3.2. Accountability mechanisms

3.2.1. Administrative accountability

In addition to judicial review by EU courts, the SSM also provides for an administrative (i.e., non-judicial) form of accountability for ECB supervisory decisions. The Administrative Board of Review (ABoR) is an internal ECB body which is composed of independent individuals with a high degree of technical expertise, and which operates according to the rules typical of judicial bodies (Brescia Morra 2019). Its legal status is set out in Article 24 SSMR. The ABoR's opinions are not binding on the Supervisory Board

or the Governing Council of the ECB. Given not only the independence of the ECB, but also the aversion of the Court of Justice's *Meroni* doctrine to interference with the powers of EU institutions by bodies not established by the Treaties, it would not have been admissible for ABoR decisions to bind the ECB as such. ABoR opinions are not judicially reviewable, but if a credit institution is not satisfied with the outcome of administrative review by the ABoR, it may challenge the ECB decision before the EU courts.

In adopting supervisory decisions, the ECB must observe high standards of administrative due process. This requirement, which is enshrined in Article 22 of the SSM Regulation (SSMR), to a large extent specifies the implications for the SSM of the right to a good administration enshrined in Article 41 of the Charter of Fundamental Rights. It should be noted, however, that whereas Recital (33) of the Commission's original proposal for the SSMR highlighted the need for due process, there were no actual provisions in the body of the Regulation to give effect to that purpose (COM/2012/0511 final - 2012/0242 (CNS)). It was only by insistence of the European Parliament that the procedural guarantees of affected parties made it into the final legislative text (Alexander 2015: 169-70).

According to the due process requirements of Article 22(2) SSMR, the ECB must give access to its files to the parties affected by its supervisory decisions, except in what concerns the business secrets of other persons or information deemed confidential. Moreover, the ECB must give reasons for its decisions.

The right-to-be-heard regime requires some additional considerations. Article 22(1) determines that the ECB must give all persons who are the subject of supervisory proceedings an opportunity to be heard before a decision is taken. A few cases are currently pending in EU Courts where applicants have challenged ECB decisions on the grounds of violation of that right, but to date no judgments have yet been delivered on this matter (Case T-351/18, *Ukrselhosprom*; Case T-275/19, *PNB Banka*).

The requirement to offer a hearing before a decision is taken does not apply whenever "urgent action is needed in order to prevent significant damage to the financial system" (Article 22(1) SSMR). In cases of emergency, where decisions must urgently be taken, the ECB may adopt a provisional decision and give the persons concerned an opportunity to be heard "as soon as possible" after the decision is taken. While this provision appears to be in line with the case law of EU courts on restrictions to the right to be heard by authorities in cases of emergency – for instance, in the field of public health – that case law must be understood in a contextual manner. As every emergency is different, not all urgent decisions will require setting aside the right to be heard in order to address it adequately. In fact, there may be circumstances where even the quickest of exchanges between an authority and the parties concerned may help the authority in making more informed urgent decisions and even to detect manifest flaws in its intended course of action (Brito Bastos and de Ruijter 2020). Hence Article 22(1) SSMR must be read in conformity with Article 52(1) of the Charter, which determines that any limitation to a fundamental right, including the right to be heard, must be proportionate and necessary, and genuinely meets the objectives of that limitation. The ECB's discretion to set aside the right to be heard in cases of financial emergency, and to hear affected parties after an urgent decision is taken, should not be understood as a blank cheque to ignore due process requirements. If those urgent decisions are to be taken accountably, the ECB must consider carefully in every circumstance whether making use of that discretion is appropriate and actually necessary.

3.2.2. Judicial accountability

The decisions taken by the ECB within the SSM are judicially reviewable by EU courts. There is a growing body of case law, both in terms of actions for annulment under Article 263 TFEU – which provides for actions against EU institutions such as the ECB – and in terms of preliminary rulings under Article 267 TFEU.

In terms of actions for annulment, the EU courts have ruled on the validity of different kinds of ECB decisions. In *L-Bank* (Case T-122/15), the General Court and, upon appeal, the Court of Justice, dismissed the application for annulment by a bank that contested the ECB's decision to classify it as a significant credit institution. In *Arkéa* (Case T-712/15), the General Court dismissed an action for annulment against an ECB decision imposing prudential requirements on a credit institution, though on procedural grounds, as the decision had subsequently been replaced. One difficult recent case concerns the *locus standi* of shareholders of a bank once its license has been withdrawn by the ECB. The Court of Justice considers that shareholders do not have standing to sue the ECB for the decision to withdraw, which rests instead with the bank itself (Judgment in Joined Cases C-663/17 P, C-665/17 P and C-669/17 *Trasta*). While judgments such as *L-Bank, Arkéa,* and *Trasta* did not lead to a favourable outcome for the credit institutions and shareholders in question, it must be emphasised that the EU courts have recognised the critical importance of their role in ensuring full observance of the fundamental right to an effective judicial protection of the credit institutions impacted by ECB decisions, which is a postulate of the EU's commitment to the rule of law.

To date, the Court has only delivered two preliminary rulings in the domain of the SSM: the *VTB Bank* judgment (C-52/17) and the *Berlusconi & Fininvest* judgment (Case C-219/17). Whereas the former concerned the interpretation of several provisions of the CRD, CRR, and SSMR on exposure limits of credit institutions, the latter represented a particularly important ruling in that it clarified the nature of the relation between NCAs and the ECB and the implications of that relation for the division of judicial review tasks between national and EU courts. More specifically, after the *L-Bank* ruling made clear that the primary responsibility for decision-making within the SSM falls to the ECB, and that it is for EU courts to review the ECB's decisions, the *Berlusconi & Fininvest* ruling clarified that EU courts may also review the preparatory acts adopted by national authorities on which the ECB relies when making its own decisions.

3.2.3. Political accountability

a. Accountability arrangements on paper

Article 20(9) of the SSM Regulation states that "the ECB shall be accountable to the European Parliament and to the Council" for its implementation. Following the 2013 Interinstitutional Agreement between the ECB and the EP, which is referenced in the SSMR, the ECB is obliged to present an annual report on its execution of supervisory tasks within the SSM to a public hearing of the EP. The EP's Committee on Economic and Monetary Affairs (ECON Committee) is empowered to convene the Chair of the SSM Supervisory Board (SB) for ordinary hearings, ad hoc exchanges of views, and *in camera* confidential meetings. The ECB is required to provide members of the ECON Committee access to "a comprehensive and meaningful record of the proceedings of the SB that enables an understanding of the discussions, including an annotated list of decisions". The ECB is further obliged to respond in writing to questions from MEPs within a five-week time period. Should the EP set up a Committee of Inquiry, the ECB must assist the Committee in carrying out its tasks, including through the provision of information, subject to confidentiality requirements. The ECB is also obliged to transmit to the ECON Committee for advance comments those of its draft acts that are subject to public consultation, and inform it of the "principles and kind of information it is generally using in developing acts and policy recommendations, with a view to enhancing transparency and policy consistency." Finally, the EP has the right to approve the appointment of the Chair and Vice-Chair of the SSM Supervisory Board, as well as any proposal by the ECB to remove these figures from office, which can only be done in cases of "serious misconduct" or if they no longer fulfil the conditions for performance of their duties

(Interinstitutional Agreement 2013; Fromage and Ibrido 2019: 72-74; Amtenbrink and Markakis 2019: 9-12, 14-15, 17).

As regards the Council, the ECB has a similar Memorandum of Understanding that mandates two exchanges of views per year between the Chair of the SSM SB and the Eurogroup. The ECB is also required to answer questions put to it by the Eurogroup and to submit its draft annual report to the Council and the Eurogroup for advance comment (Fromage and Ibrido 2019: 75-76).

The SSM Regulation likewise empowers national parliaments to invite the Chair or another member of the SB for an exchange of views on the supervision of national credit institutions. They may also submit written questions and "reasoned observations" on the SSM Annual Report, which the ECB must answer in writing (Fromage and Ibrido 2019: 78-80; Fromage 2019: 9).

b. Accountability arrangements in practice

Thus far, the Chair and Vice-Chair of the SB have appeared before the EP between five and eight times per year to present the SSM's annual report, and to participate in public hearings and ad hoc exchanges of views. Between 2014 and 2019, according to the SSM's Annual Reports,[5] the ECB answered 158 letters from MEPs on supervisory issues. The Chair and Vice-Chair have likewise participated regularly in meetings of the Eurogroup, ranging from two to six times per year. Between 2014 and 2017, the SB Chair participated in two to four exchanges of views per year with parliamentary committees and plenaries in five Member States (France, Germany, Italy, the Netherlands, and Slovenia), while three written questions were submitted to the ECB (Fromage and Ibrido 2019: 74-77; Fromage 2019: 8-9; Dawson et al. 2019: 86-7; Maricut-Akbik 2020).

Empirical research on the exercise of political accountability by the EP through these arrangements presents a general sceptical assessment of their effectiveness in practice. Amtenbrink and Markakis (2019) and Maricut-Akbik (2020) have analyzed in detail the issues raised by MEPs in public hearings and written questions, together with the responses provided by the Chair and Vice-Chair of the SSM Supervisory Board. They find that MEPs rarely ask questions about achievement of the SSM objectives, but typically focus on the "overall performance of the banking sector and financial health of individual banks", as well as equal treatment of individual banks across Member States and the administrative burden on smaller credit institutions. MEPs' questions often address issues that fall outside the ECB's mandate, invite the SB Chair to comment on other current policy dossiers, or request confidential information about actions taken in relation to individual banks that the ECB is expressly prohibited from providing under the professional secrecy provisions of the Capital Requirements Directive (CRD) IV and the Interinstitutional Agreement with the EP (Amtenbrink and Markakis 2019: 17-22; Maricut-Akbik 2020: 8-13). Moreover, even when the ECB has eventually agreed to publish redacted non-confidential versions of key documents, such as the Failing or Likely to Fail (FOLTF) assessments for three banks wound up in 2017 (Banco Popular Español, Veneto Banca, Banca Popolare di Vicenza), MEPs do not necessarily follow up on the information provided in their subsequent interactions with SSM representatives once media attention has moved on to other issues (Dawson et al. 2019: 83-84).

While the SSM Chair is generally responsive to MEPs' demands to justify decisions, and is increasingly willing to "provide general considerations about the bank in question and what the ECB does to address similar circumstances for any bank", as well as redacted non-confidential documents after the fact, the SSM rarely undertakes to change its policies or conduct as a result of MEPs' questions. Out of 706 answers to single-issue questions raised by MEPs' in letters and public hearings between October

[5] https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/index.en.html.

2013 and April 2018 (Maricut-Akbik 2019: 8-9), in only five cases did the ECB clearly promise to change its policies or conduct going forward. Two of these concerned procedural issues (more frequent provision of a confidential record of SB proceedings to the ECON Committee; ensuring translation of SSM documents for NCAs wishing to be address in their national language), while the other three involved commitments to improve the drafting of ECB guidance documents (on banks' provisioning for non-performing loans [NPLs] and management of capital shortfalls) in response to criticisms expressed by MEPs in public hearings.[6]

The single episode which is claimed in recent research to have demonstrated the effectiveness of the EP as a political accountability forum is the ordinary hearing in November 2017 on the ECB's draft Addendum to its Guidance on NPLs, which was criticized for effectively increasing provisioning obligations for banks beyond the existing regulatory requirements. But three points are worth noting here that severely qualify this assessment. First, this episode comes closest to a classic P-A model of accountability, focused on whether the ECB's actions exceeded its legal mandate, rather than on their substantive contribution to the SSM's goals of ensuring financial stability and a level playing field among eurozone banks. Second, the ECB's revision of its draft guidance was influenced not only by the EP hearing, but also by a contentious public consultation with banks themselves and by a critical opinion from the Council Legal Services, as well as the Parliament's own Legal Services. Finally, while the ECB revised its guidance in less prescriptive language, a new Regulation adopted in 2019 "requires all banks to make a deduction from own funds where NPEs [non-performing exposures] are not sufficiently covered by provisions or other adjustments in an automatic manner", thereby achieving the same objective through an alternative route (Maricut-Akbik 2020: 10-11, 13; del Barrio Arleo 2020: 311-323; SSM Annual Report 2019: 19-22).

3.2.4. External review

The European Court of Auditors (ECA) produces occasional reports on the operations of the SSM (ECA 2016, 2018). These highlight weaknesses as well as strengths in the organization and operation of these bodies, and make detailed recommendations for improvements (Nicolaides 2019: 144-145). Reviews by the Commission and interviews with senior officials of ECB Banking Supervision indicate that these recommendations are taken very seriously, and have resulted in changes in the organization and practices of the SSM (such as an increase in the number of on-site inspectors employed directly by the ECB).[7] A key issue in the first two reports produced by the ECA was that the ECB refused to give it access to many confidential documents that it requested. This now appears to have been satisfactorily resolved through a 2019 MoU between the two bodies, which sets out the terms and conditions through which such documents can be shared with the ECA (ECA-ECB 2019).

The European Ombudsman has a general mandate to launch inquiries into instances of maladministration and performs a crucial role in ensuring the accountability of EU authorities through informal means. This mandate extends to the exercise of power by EU authorities within the Banking Union. The European Ombudsman has already launched six inquiries that touched upon the functioning of the SSM at the level of the ECB. Some complaints involved an alleged failure of the ECB to exercise its supervisory powers by intervening in a dispute between a Dutch bank and a client, which the ECB and indeed the European Ombudsman considered to be a matter of consumer protection

[6] Analysis of Atlas.ti report "EP_ECB_Q&A_BaSu – Promise to change conduct", kindly provided by Adina Maricut-Akbik. We are extremely grateful to Dr. Maricut-Akbik for sharing and discussing the coding data underlying her pioneering study.

[7] European Commission (2017: 5); interview with official of the Centralised On-site Inspection Division of ECB Banking Supervision, Frankfurt, 29 January 2020.

rather than banking supervision (European Ombudsman's Decision in Case 1669/2016/CEC). Other cases concerned access to information held by the ECB. One, for example, related to a complaint originally brought to the attention of the Bank of Spain, but subsequently transferred to the ECB, concerning alleged irregularities in mortgage loans and the securitisation of mortgage credits by a Spanish bank. The complainant later requested information from the ECB about the processing of the complaint, but ultimately received the response – deemed appropriate by the European Ombudsman – that due to strict professional secrecy requirements in banking supervision the ECB was not authorised to disclose "information received, the assessment thereof, as well as any steps taken with respect to an individual credit institution" (European Ombudsman's Decision in Case 604/2018/JAP).

3.3. Accountability problems

3.3.1. Reconciling formal accountability to the EP and the Council with ECB independence

Here it is necessary to draw attention to the limited sanctioning powers available to the European Parliament and the Council. As discussed earlier, the EP must approve the appointment or dismissal of the Chair and Vice-Chair of SSM SB, along with the Council, but neither have powers over its budget. Given the very restrictive conditions for the use of the dismissal procedure set out in the SSM Regulation, legal scholars have concluded that it "cannot in principle be used by the EP (or the Council, for that matter) as an accountability instrument to assign consequences to bad performance." While the Council could in principle revise the ECB's mandate, the EP has no formal voice in this process, as the SSM Regulation was not adopted under the ordinary legislative procedure (Amtenbrink and Markakis 2019: 13-17, 22). The formal limitations to the EP's sanctioning powers means that most that can be said about these accountability arrangements is that "the ECB can face informal consequences", as "when MEPs make statements condemning supervisory decisions or ECB conduct" (Adicut-Akbik 2020: 19-20).

3.3.2. Reconciling confidentiality and professional secrecy with transparency and publicity

a. Access to ECB documents

The regime and practices of access to ECB documents have largely been designed for its tasks in monetary policy. Nevertheless, it has been argued that the ECB's new supervisory tasks are sufficiently different to justify a more open approach to transparency, and to balance such transparency with the need to protect the business secrets of credit institutions. One particularly strong reason to promote greater transparency of supervisory decisions is that it would offer an additional check on the equal treatment of credit institutions (Leino-Sandberg 2019). On the other hand, unmoderated transparency of the ECB in the SSM could undermine its effectiveness a supervisor, not least because it could undermine the trust of supervised institutions that their business secrets will be kept safe by the ECB. Some have suggested that the CJEU's case law on similar dilemmas in neighbouring policy areas, such as the securities market, could offer valuable lessons in this regard (Smits and Badenhoop 2019; Case C-15/16 *Baumeister*).

b. The limited value of parliamentary access to confidential information

The EP has access through a variety of channels to confidential information about the SSM, including *in camera* hearings and discussions between the Chair of the SSM SB and the Chair/Vice Chair of the ECON Committee, whose members may also consult records of SB meetings in a secure reading room.

But since the information made available through these channels cannot be disclosed, it is unclear how if at all such access contributes to parliamentary and public debate on the SSM. Instead, as Deirdre Curtin argues, "A parliamentary confidential information provision may well provide only the appearance—rather than the reality—of a parliamentary check on matters of substance" (Curtin 2017: 38).

c. The ABoR's lack of transparency

The ABoR has already examined dozens of administrative appeals within the SSM, and fulfils an important role in holding the Supervisory Board to account. But the wording of the mandate of the ABoR as defined in Article 24 SSMR appears to be out of sync with the standards which the Supervisory Board must apply. Indeed, whereas the Supervisory Board exercises a mandate not only to enforce Union law, but also the national law transposing Union Directives, the ABoR's mandate appears to be confined to checking compliance with Union law. One distinct issue concerns the ABoR's lack of transparency. Though not constituting a judicial body, but one of an administrative nature, the ABoR does perform a quasi-judicial function. Its members must deliberate in full independence when adjudicating on disputed in prudential supervision. Nevertheless, without specific authorisation by the Governing Council of the ECB (Article 22 (2) of ECB decision ECB/2014/16 concerning the establishment of the Administrative Board of Review and its Operating Rules), the opinions of the ABoR are not accessible to the public, nor indeed to other credit institutions which may have an interest in knowing how the ABoR reviews supervisory decisions in practice.

3.3.3. Information asymmetry and limited focus of parliamentary questions

As discussed in the previous section, MEPs often focus their oral and written questions to the the SSM SB on issues that fall outside the ECB's mandate or on requests for confidential information about actions taken in relation to individual banks that the ECB is legally prohibited from providing. These problems highlight the information asymmetry between the two institutions, as well as MEPs' lack of expertise on the complex structure of the Banking Union (Maricut-Akbik 2020: 12, 14).

3.3.4. Absence of a clear and detailed performance assessment framework

The SSM has multiple, broadly defined objectives (Amtenbrink and Markakis call them "vague") – "contributing to the safety and soundness of credit institutions and stability of the financial system", and promoting integration of banking markets within the Euro Area. Nor, as a number of critics have observed, does the SSM have a "quantified objective", "easily measured yardstick", or formal set of performance indicators and metrics for monitoring and assessing its effectiveness (European Court of Auditors 2016; Fromage and Ibrido 2019: 70; Amtenbrink and Markakis 2019: 11-14; Nicolaides 2019). Here, however, it is important to note the explicit principal-agent accountability model behind this line of criticism, whose limitations have been set out above.

3.3.5. ECB instructions and allocation of judicial review

While the supervisory decisions taken by the ECB are subject to judicial review by the EU courts, it remains unclear whether the binding instructions that the ECB sends to NCAs are themselves reviewable. Indeed, the extensive use of instructions to NCAs, both specific and general, may blur accountability for decisions that NCAs must take in respect of LSIs. Some have argued that credit institutions enjoy no judicial protection against ECB instructions addressed to NCAs (Chiarella 2018). Others have argued that judicial protection against those instructions is admissible either by way of direct judicial challenges brought to EU courts if they leave NCAs no discretion, or indirectly, if the instructions do leave a margin of discretion, and by way of references for preliminary rulings on the

legality of those instructions, once the NCA adopts decisions in respect of the credit institutions (Türk and Xanthoulis 2019).

3.3.6. Scope of the ECB's mandate to apply national law

One of the most unique legal issues of the SSM concerns the ECB's mandate to apply national law. It is a mandate without precedent in any other field of EU law. Article 4(3) SSMR provides: "For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options."

What exactly "national law transposing directives" means has remained a matter of intense debate among academics and practitioners (Witte 2016; de Guindos 2019; Prek 2019). The ECB may certainly apply national laws that implement verbatim provisions of the Capital Requirements Directive, or national legislation enacted specifically to transpose EU Directives in banking law. What is more controversial is whether, for instance, the ECB must apply national laws which, though not adopted specifically to transpose EU Directives or even precede those Directives, are presupposed by the national laws that NCAs would have to apply. One author points out, for instance, that the ECB is not subject to national administrative law, but that its mandate to apply national law arguably should include the national procedural rules concerning NCAs' deadlines to take decisions (Arranz 2017; Wissink 2017).

4. ACCOUNTABILITY IN THE SRB

4.1. Purpose and architecture

The Single Resolution Mechanism (SRM), which constitutes the second pillar of the Banking Union, has the primary purpose of providing a uniform framework for the orderly resolution of failing banks in a manner which reduces the potential costs to taxpayers, and which protects depositors, as much as possible. To that end, a new EU Agency has been set up, the Single Resolution Board (SRB). The SRB has an especially important role when the recovery of a bank becomes unlikely. It drafts resolution plans and takes the lead in initiating the resolution process, if need be by resorting to the Single Resolution Fund (SRF), owned by the SRB and financed by contributions from credit institutions that fall under the scope of the SSM.

Much as in the SSM, the responsibility for the resolution of banks is divided between National Resolution Authorities (NRAs) and the SRB depending on their size. In broad terms, the SRB has jurisdiction over the significant credit institutions that fall under the supervisory jurisdiction of the ECB in the SSM; NRAs have jurisdiction over less significant credit institutions.

The governance of the SRM is notoriously complex, and its decision-making processes involve "close cooperation" between the SRB and NRAs, as well as cooperation between the SRB, the ECB (which has an important role in assessing whether a bank is failing or likely to fail), the Commission, and the Council. Part of this complexity results from the fact that, unlike the ECB, the SRB is neither an EU institution nor an EU body established in the Treaties, which implies that only limited and clearly circumscribed powers could be delegated to it under the CJEU's *Meroni* doctrine (see for instance Case C-270/12, *United Kingdom v European Parliament and Council (ESMA)*). For that reason, the final decision on the resolution of a credit institution must be taken by the Commission and the Council, even though measures to resolve a bank are proposed by the SRB.

Because of such complexity in SRM decision making, many authors have highlighted difficulties in clearly attributing responsibility to the various authorities involved. The lack of clarity in the distribution of operational tasks between NRAs and the SRB is an issue to which the European Court of Auditors has drawn particular attention in its first report on the SRM (ECA 2017). In turn, the convoluted distribution of tasks between the different institutional actors raises difficult issues in terms of who should be held judicially accountable for the decisions taken in the SRM (Timmermans 2019).

4.2. Accountability mechanisms

4.2.1. Administrative accountability

The SRM Regulation (SRMR) establishes a board for administrative review of SRB decisions – the Appeal Panel – and explicitly recognises that the SRB's decisions are subject to judicial review by the EU courts (Articles 85 and 86). Both constitute important forms of legal accountability. In terms of the procedural standards with which the SRB must comply in imposing penalties on credit institutions, it is worth pointing out that it must observe the right of credit institutions to be heard before the decision imposing a penalty is adopted (Articles 38-40 SRMR).

Bank creditors also have a right to be heard on the application of No Creditor Worse Off (NCWO) determinations in resolution decisions – e.g. the Banco Popular case, https://srb.europa.eu/en/-content/banco-popular-right-be-heard. Whereas at the time of writing there have been no judicial cases where the SRB has been formally found to have violated the right to be heard in its administrative procedures, it should be noted that a few cases are pending in the General Court where applicants invoke such a violation (Case T-281/18, *ABLV Bank* and Case T-282/18, *Bernis*). A prior case where a violation of the right to be heard was invoked was dismissed as manifestly inadmissible (Case T-14/17, *Landesbank Baden Württemberg*).

4.2.2. Judicial accountability

The decisions taken by the SRB are reviewable by EU courts. Since the creation of the SRM, there has been a constant increase in litigation. In practice, actions for annulment brought by credit institutions against SRB decisions defining *ex ante* contributions to the SRF seem to be one of the most common instances of such litigation (for many, Cases T-376/16, *Oberösterreichische Landesbank*; T-661/16, *Credito Fondiario*; T-14/17, *Landesbank Baden Württemberg*; and T-42/17, *VR-Bank Rhein-Sieg*).

4.2.3. Political accountability

The political accountability mechanisms established for the SRB, concerning duties of reporting and explanation to the EP and the Council (articles 45 and 46 SRMR), are similar to to those of the ECB in the SSM. Similar, too, is the EP's veto power over the appointment and dismissal of the four full-time members of the SRB, as well as the Chair and Vice-Chair. By contrast, the SRB's obligation to participate in exchanges of views with national parliaments and provide written answers to their questions is somewhat more prescriptively framed, in recognition of the fact that resolution of credit institutions may have significant consequences for Member States (Fromage and Ibrido 2019: 82-83, 84-85).

Compared to the SSM, the SRB appears to interact with a slightly lower frequency with the European Parliament (two to six times per year), but more intensively with the Council and the Eurogroup. It has also responded to 12 written questions from MEPs, a much lower number than in the case of the SSM (Fromage and Ibrido 2019: 83-84; SRB Annual Reports 2015-2019; https://srb.europa.eu/en/content/european-co-operation). The SRB Chair has likewise appeared on several occasions before national parliaments, including a committee of inquiry of the Spanish

Parliament into the resolution of Banco Popular, and has provided seven written answers, all to questions from the German Bundestag (Fromage and Ibrido 2019: 85; Fromage 2019: 9; https://srb.europa.eu/en/content/european-co-operation).

In contrast to the SSM, there has been no detailed empirical research on how these accountability arrangements have worked in practice, so it is more difficult to assess their effectiveness.

4.2.4. External review

As in the case of the SSM, the European Court of Auditors produces occasional reports on the SRM. Its first report on the SRM (ECA 2017) was highly critical, and made a significant contribution to European public debate about the Board's performance. The report also seems to have had a productive impact on the SRB itself, which according to one recent assessment "acknowledged most of the shortcomings exposed by the auditors, accepted most of the ECA's recommendations and constructively described its past actions and ongoing plans to address them (Veron 2019: 10, 13; cf. also Lannoo 2019: 16; Lastra et al. 2019: 13, 23-24). Unlike the SSM, the SRB has not signed a formal MoU with the ECA on access to confidential documents, but has made available data on individual banks in anonymised form, including resolution plans, which the ECA considers sufficient to carry out extensive audit work and draw conclusions with confidence from it (ECA 2017: 14-15).

As in the case of the SSM, the European Ombudsman has a general mandate to launch inquiries into instances of maladministration and performs a crucial role in ensuring the accountability of EU authorities through informal means. This mandate extends to the exercise of power by EU authorities within the Banking Union (Türk 2019). In the specific domain of the SRM, the European Ombudsman has launched inquiries to scrutinize the delays of the SRB in taking a decision on whether creditors and shareholders of the *Banco Popular* should be receive compensation. After a preliminary decision not to do so, and making itself publicly available to hear affected creditors and stakeholders, the SRB received over 23.000 individual comments, many of which came from individual citizens. In light of that exceptional burden in terms of sheer number of comments received, the European Ombudsman considered that the delay of the SRB in coming to a definitive decision did not constitute maladministration (European Ombudsman's Decision in Cases 1141/2019/SRS, 1417/2019/SRS and 1015/2019/SRS).

4.3. Accountability problems

4.3.1. Conflicting definitions of "significance" in overlapping regulatory frameworks (SSM/SRM/State Aid)

Not all SIs (Significant Institutions) under the SSM are deemed to meet the SRB's public interest criteria for resolution at the European level. At the same time, moreover, in some cases where the SRB has concluded that there was no European public interest in resolution, the Commission allowed national state aid on financial stability grounds (systemic importance to the national/regional economy) – e.g. Banco Populare di Vicenza and Veneto Banca (Iglesias-Rodriguez 2019). The differences between these assessments of individual banks by the ECB/SSM and the SRB are not problematic, because they have a different basis: *ex ante* determination of structural significance of an institution in its market environment for prudential supervision on the one hand vs. *ad hoc* contextual decision on circumstances of individual cases on the other (Binder 2019). But the differences between SRB and Commission decisions on systemic importance and public interest in resolution and state aid are problematic, by contrast, and raise questions about whether resolution decisions are being influenced by the adequacy of the Single Resolution Fund and/or by political concerns about the consequences of bailing-in small retail investors, especially under conditions of possible mis-selling (Iglesias-

Rodríguez 2019; Binder 2019; Lamandini and Ramos Muñoz 2019; Silva Morais 2019; Lastra et al. 2019: 19-20). The SRB has published a document outlining the principles used in its Public Interest Assessments (PIAs), but this does not address the discrepancy with the Commission's state aid criteria (SRB 2019).

4.3.2. Balancing transparency with confidentiality and professional secrecy

The recent Hypo Vorarlberg case shows the SRB pleading that its statements of reasons on decisions concerning the *ex ante* contributions of credit institutions do not need to be intelligible to those credit institutions, but only to the NRAs to which the decisions are formally addressed. The CJEU rejected that reasoning. However, one question raised by the SRB was not addressed: namely, how the requirement for the SRB to provide reasons for its decisions, which is an important instrument of transparency, is to be reconciled with the need to protect the business secrets of other credit institutions. Indeed, the fees that each credit institution need to pay into the SRF depend on the aggregate risk profile of all other credit institutions under the SRB's remit.

The publication by the SRB of redacted, non-confidential versions of resolution decisions and supporting documents, including valuation reports on Banco Popular,[8] may be considered as a partial solution to the broader problem. The SRB also publishes redacted, non-confidential summaries of the decisions of its Appeal Panel.[9]

4.3.3. Administrative procedural rights/due process

One important aspect of administrative due process within the SRM concerns the *ex ante* contributions that credit institutions must pay into the Single Resolution Fund. The EU courts have already clarified that judicial review should be carried out against the decisions taken by the SRB defining the amounts that each credit institution must pay, and not against the measures that NRAs take to prepare those decisions, such as the collection of data on the risk profile of each bank (Case C-414/18 Iccrea Banca). To the extent that the EU courts have the jurisdiction to review both the final decisions of the SRB and the preparatory acts of national authorities, judicial review in the SRM mirrors that of ECB decisions in the SSM which are based on national preparatory acts of NCAs, as the Court of Justice clarified in *Berlusconi and Fininvest*.

Beyond these issues, finally, there are also other questions of administrative due process about how the SRB ensures fair and equal treatment of banks in establishing Minimum Requirements for own funds and Eligible Liabilities (MRELs), and how it ensures fair treatment of different categories of bank creditors under different resolution decisions. The latter have already proved highly salient because, despite the commitment in the SRM Regulation to the No Creditor Worse Off (NCWO) principle, resolution involves a different hierarchy of claims than in national insolvency procedures (e.g. 8% own capital is bailed-in first, while derivatives gain priority on financial stability grounds) (Lamandini and Ramos Muñoz 2019).

[8] https://srb.europa.eu/en/content/banco-popular.

[9] https://srb.europa.eu/en/content/cases.

5. POSSIBILITIES FOR IMPROVEMENT

5.1. General approach

Dynamic, forward-looking rather than backward-looking principal-agent accountability is more appropriate for independent bodies like the ECB/SSM and the SRB, operating in technically complex, rapidly evolving environments under conditions of high uncertainty, where parliaments and other political authorities have very limited sanctioning powers. The preferred accountability approach should therefore be to build on the internal review and quality assurance processes of the institutions themselves, requesting the ECB and SRB to make the findings of its internal bodies publicly available (subject to constraints on professional secrecy). The EP, the Council, and national parliaments could then use these findings to scrutinize the operations and effectiveness of the SSM and the SRB, and to stimulate public debate about them. The CJEU and the European Ombudsman could likewise use the findings of such bodies, including the ECB Administrative Board of Review (ABoR) and the SRB Appeal Panel, to review the procedural fairness, justification, and consistency of their decisions, provided that these are made publicly available in suitably redacted form to avoid compromising the business confidentiality of the applicants.

5.2. The limits of other proposed solutions

5.2.1. Increased reliance on confidential provision of information and documents to the EP through *in camera* briefings and secure reading rooms

One solution that we were asked to consider is increased provision of confidential information and documents to the EP through *in camera* briefings and secure reading rooms. Given the lack of parliamentary sanctioning powers, provision of information under such circumstances cannot be expected to lead to consequences for the bodies in question, while secrecy and confidentiality also mean that this information cannot be used to stimulate parliamentary and public debate. Hence this approach cannot be expected to contribute significantly to either the political accountability or the public legitimacy of these bodies. Further grounds for scepticism about the potential effectiveness of this approach may be drawn from comparative experience with sharing of secret intelligence information with legislative oversight committees (Curtin 2014: 28; Curtin 2017: 38), which in the US case has been described as creating "the appearance, but not the reality that Congress checks executive power" (Clark 2012: 14). Also relevant here is experience with the EP's access to confidential documents on the Transatlantic Trade and Investment Partnership (TTIP) negotiations, which does not appear to have enhanced either the latter's legitimacy or their public acceptance (Young 2017: ch. 5).

5.2.2. Publication of a formal, quantified framework of indicators and metrics for monitoring and assessing SSM/SRB performance

Given the breadth and multiplicity of the SSM's objectives, together with the complexity and fast-moving environment in which it operates, this principal-agent approach to accountability proposed by the ECA (2016) and other commentators (e.g. Amtenbrink and Markakis 2019; Nicolaides 2019) is unlikely to be effective, in our view. It could even prove counter-productive, by presenting an over-simplified picture of the SSM's operations, which could in some cases be harmful to financial stability by provoking adverse market reactions. The SRB publishes a regularly updated set of Key Performance Indicators (SRB 2019a: Annex 8), but these are almost entirely output-based (e.g. the number of bank resolution plans completed), and thus provide little insight into the Board's effectiveness in achieving its broader objectives (maintaining financial stability while protecting public finances from bearing the costs of bank failures). Nor do MEPs refer to these KPIs in written questions to the SRB.

5.3. The way forward

5.3.1. The SSM

a. Dynamic accountability in the SSM as a tool for political scrutiny

Such dynamic accountability could be pursued through a combination of external and internal review of the SSM's operations, drawing on the work of the European Court of Auditors (ECA) and the SSM's own Supervisory Quality Assurance (SQA) Division.

As already noted, the ECA produces occasional reports on the operations of the SSM (2016, 2018), which highlight weaknesses in the organization and operation of these bodies, and make detailed recommendations for improvements. Interviews with senior officials of ECB Banking Supervision indicate that these recommendations, which may be considered as a form of external peer review, are taken very seriously, and have resulted in changes in the organization and practices of the SSM. As a result of the 2019 MoU with the ECB, future ECA reports can be expected to provide deeper and more reliable insights into the operations of the SSM, based on but not divulging confidential information, which can in turn be used as a tool for ongoing scrutiny and political accountability by the EP, the Council, and national parliaments. But such reports are necessarily intermittent rather than continuous, and provide a backward-looking snapshot, even if they also include forward-looking recommendations for improvement.

In addition to well-developed review and quality assurance processes within the front-line units of the SSM (Joint Supervisory Teams, On-Site Inspection Missions) and Horizontal Services (ECB 2018: 84-85), ECB Banking Supervision also has an active Supervisory Quality Assurance (SQA) Division (ECB 2018: 47-8), now attached to the SSM Secretariat. The SQA Division sees itself as a "second line of defence" for quality assurance within the SSM, after the divisions engaged in vertical oversight of the frontline units (DGs MS I and II for JSTs) and the ECB's horizontal services (DG MS IV). It conducts regular advisory reviews addressing thematic issues across JSTs and ECB horizontal services, such as the conduct of Supervisory Review and Evaluation Processes (SREPs) and On-Site Inspections (OSIs). It also conducts assurance reviews to check the execution by the teams of tasks vis-à-vis the manuals and regulations or the framework of delegation to NCAs, such as certain fit and proper decisions. SQA reviews combine horizontal data analysis, benchmarking, surveys, and interviews, based on samples stratified according to criteria relevant to the specific investigation. The emphasis in these reviews is on identifying blind spots in the work of the frontline units, and pushing them to justify why specific areas may have been neglected or given lower priority in SREPs and OSIs of individual banks. Their aim is explicitly to contribute simultaneously to improvements in the supervision of individual banks and to systematic improvements in the SSM's horizontal services. SQA reviews focus not only on identifying problems, but also on helping to develop solutions, in contrast to a classic internal audit. Their reports on JSTs are anonymised, and the identity of the interviewees remains confidential, even to their immediate supervisors, in order to ensure the full cooperation of the front-line official and the candour of the information provided. SQA reviews conclude with "proposals for improvement", which are consensually agreed with the ECB business areas. SQA has become increasingly involved in helping these units to implement its improvement proposals through customized training activities, e.g. for instructing JSTs on how to do a good challenge to a bank's recovery plan (an issue flagged by the ECA

in its 2018 report on ECB bank crisis management). The SQA's activities are thus explicitly forward-looking, aimed at contributing to continuous improvement in the SSM's operations and effectiveness.[10]

While the SQA's thematic reviews in their current form are too detailed and contain too much confidential information to be shared directly with the EP and the Council, it should nonethless be possible to produce a periodic synthesis of recently completed reviews, which could be made public, especially since the information about individual banks is already anonymised. Such synthetic reports would arguably provide a more informative and more useful guide for parliamentarians – as well as judges – about what the SSM is doing to ensure the effectiveness, consistency, and fairness of Eurozone banking supervision than a decontextualized battery of quantitative performance indicators.

b. Improving administrative and judicial accountability

A key issue concerning the ABoR's transparency is the fact that its opinions are not public. One could argue in this regard that, generally speaking, the decisions of appeal bodies of an administrative nature are not public in the Member States either. Moreover, the ABoR is an internal body of the ECB, and the ECB's decisions are normally not public (Smits 2019: 363-365). Lastly, there are self-evident reasons concerning business secrecy that emerge in the ABoR's proceedings and which credit institutions have a right not to see disclosed. None of these three arguments is especially convincing. The fact that administrative appeal procedures are not public in the Member States does not make it any less desirable that they should be. The fact that the ECB's decisions are not public also does not mean that they should not be made public to the extent possible. As an EU institution, the ECB is also bound by the requirement of constituting an open administration as set out in Article 298 TFEU. There may be confidential information at stake in the ECB's decision-making processes, but that should not prevent the ECB from being as transparent as possible where this would not compromise such confidentiality. Lastly, the fact that some of the aspects of ABoR procedures are protected business secrets, or could provoke market reactions with adverse implications for financial stability, would only suggest that those secrets would need to be redacted out of its published opinions. Indeed, EU courts must routinely deliver judgments in cases where sensitive business secrets, information pertaining to public security, or information relating to individuals' private and family life are state. Those rulings remain public, though omitting the relevant confidential information. Following previous recommendations by the European Commission and a member of the ABoR itself, we believe that it would be useful for the ECB to publish "summaries of ABoR decisions…with due observance of confidentiality rules", if not redacted versions of the full decisions, once the time for lodging a judicial appeal has elapsed, as well as periodic synthetic overviews of its cases (European Commission 2017: 5; Smits 2019: 145-9).

5.3.2. The SRB

a. Dynamic accountability in the SRB as a tool for political scrutiny

Applying the dynamic accountability approach developed above to the SRB is more challenging than for the SSM, because of the centrality to the SRB of *ad hoc* decisions about the resolution of individual credit institutions conducted under crisis conditions, as discussed earlier. But a similar forward-looking approach could be applied to the ongoing work of the SRB in determining and monitoring banks' Resolution Plans and MRELs, which presents many similarities to the supervisory activities of the SSM. According to the SRB's most recent Annual Report, the Board has established an internal auditing team,

[10] This account draws on information derived from an interview with officials of the SQA Division, Frankfurt, 29 January 2020. The interview was conducted prior to the commissioning of this briefing paper. The recommendations in this paper represent the views of the authors, not those of the interviewees or the ECB.

which through its reports and recommendations "helps the SRB to accomplish its objectives by bringing a systematic, disciplined approach to evaluating and improving the effectiveness of risk management, control and governance processes." The SRB has also developed a set of internal control standards (ICSs), which "specify the expectations and requirements…that would provide reasonable assurance on the achievement of the SRB's objectives", covering "mission and values, operations, resources and control activities, planning, reporting and communication, risk management and evaluation and audit processes" (SRB 2019: 46-47, 48). While these internal control standards and auditing function represent a much less innovative approach to quality assurance and continuous improvement than that developed by the SSM's SQA, which the SRB should consider emulating, they could nonetheless be used in similar fashion to develop a regular synthesis report on what the Board is doing to ensure the effectiveness, consistency and fairness of its resolution planning activities. Such synthesis reports in turn could be used by the EP, the Council, and national parliaments, as well as courts, as a forward-looking scrutiny and dynamic accountability tool. As in the case of the SSM, publication of the results of these internal reviews in synthetic and redacted form could be complemented by external reviews on the part of the ECA.

b. Addressing the mismatch between the SRM and Commission State Aid regimes

As regards the widely observed mismatch between the SRB's criteria for Public Interest Assessment criteria for EU resolution of failing banks, and the Commission's criteria for assessing the legitimacy of national state aid measures, one possible way forward would be for the EP to invite both institutions to a public hearing, and ask them to explain and clarify their positions and criteria. To the extent that such an exchange of views highlights differences in the applicable legal frameworks, this could serve as a basis for possible reforms.

5.4. Legal and administrative accountability issues whose resolution would require legislative reform

Unfortunately, some legal and administrative accountability issues raised by the complex governance of the Banking Union may only be definitively resolved through legislative reform. In the context of the SSM, it would be worth considering clarifying in the SSMR how to assign accountability for measures taken by NCAs that have been nonetheless prompted by ECB instructions. Another difficult issue concerns the mandate of the ECB to apply national law, which is without precedent in EU law. This is a question concerning "by what standards" the ECB should be held accountable. Shedding further light on the scope of that mandate, and more specifically on what counts as national law implementing a directive for the purposes of Article 4(3) SSMR, would be very useful to delimit the body of laws to which the ECB is subject and against which its actions must be judged. The experience of the ECB itself could be drawn upon to address these concerns.

The mandate of the ECB to apply national law also raises difficult issues from the point of view of administrative review. Recent judgments (such as Joined Cases T-133/16 to T-136/16 *Crédit Agricole*) have shown that the EU courts are willing to recognize the significance of this novel mandate, and to open an exception to the view they have held for sixty years that EU courts have no jurisdiction to interpret or apply national law (Case 1/58, *Stork*). The ABoR already interprets the conditions for a credit institution to initiate an administrative review – such as the requirements that that institution be "directly" and "individually" concerned and has an "interest" in the proceedings – in harmony with the equivalent conditions for individuals to bring actions for annulment against an EU act to the CJEU under Article 263 TFEU. Indeed, Article 24(1) SSMR only states that the ABoR has a competence to review whether the ECB's supervisory decisions are "procedurally and substantively" in conformity with the SSMR. Given that the mandate to apply national law concerns the ECB as such, of which both the

ABoR and the Supervisory Board are internal bodies, it would be logical to consider that the ABoR already enjoys the power to check the conformity of the ECB's decisions with national law – but if such is the case, for the sake of coherence between administrative and judicial review, transparency and clarity, that should best be spelled out explicitly.

In the domain of the SRM, recent case law has exposed some issues from the perspective of procedural protection in the SRB's administrative procedures. The fact that the General Court unequivocally considers that even with the NRA's preparatory support it is the SRB that enjoys an exclusive power to define ex ante contributions, and is therefore suable before EU courts (Case T-365/16 Portigon; Joined Cases T-377/16, T-645/16 and T-809/16 Hypo Vorarlberg), should also mean that the SRB is obliged to offer credit institutions the right to be heard before their *ex ante* contributions are determined. This would result not only from the Court of Justice's longstanding case law (e.g. Case 85/76, Hoffmann-La Roche), but also from the right to a good administration enshrined in Article 41 of the Charter of Fundamental Rights. Although that right applies even in the absence of explicit legislative provisions (Case C-344/05 P, DeBry), there would be merit in clarifying how exactly the right to be heard and other rights of good administration are to be exercised in the framework of the SRF.

One additional accountability issue concerns the fact that in some procedures determining the more detailed aspects of the resolution of credit institutions, the SRB may have to offer an opportunity to be heard to a vast number of stakeholders. As explained above, in the Banco Popular case, the SRB needed to handle more than 20.000 individual comments from the bank's creditors and shareholders, which rendered the procedure to decide whether to give compensation to them extremely lengthy. Drawing on this experience, it would be worth exploring how to process so many written comments in a more efficient manner.

6. MAIN RECOMMENDATIONS

By way of conclusion, we summarize our main recommendations, focusing on proposals that would advance the dynamic, forward-looking approach to political, administrative, and judicial accountability of the SSM and SRM advocated above, would enhance the effectiveness of scrutiny of these bodies by the European Parliament, and could be implemented within the existing legal framework.

1. Request the ECB to publish regular synthesis reports on recently completed internal reviews by its Supervisory Quality Assurance (SQA) Division, anonymised and redacted to remove confidential information, and use these as a tool for dynamic accountability and forward-looking scrutiny by the EP and the Council.
2. Request the SRB to publish regular synthesis reports on the work of its internal audit and control functions, anonymised and redacted to remove confidential information, and use these as a tool for dynamic accountability and forward-looking scrutiny by the EP and the Council.
3. Request the ECB to publish summaries and synthetic overviews of the decisions of its Administrative Board of Review (ABoR), with due observance of confidentiality rules, once the time for lodging a judicial appeal has elapsed.
4. Invite the SRB and the European Commission to a public hearing of the EP on the mismatch between the Public Interest Assessment criteria for EU resolution of failing banks and the Commission's criteria for assessing the legitimacy of national state aid measures.

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The paper distinguishes two contrasting models of accountability, one based on principal-agent relations, which is backward-looking, the other a dynamic and forward-looking model, which is more appropriate for independent bodies like the ECB/SSM and the SRB, operating in technically complex, rapidly evolving environments under conditions of high uncertainty, where parliaments and other political authorities have very limited sanctioning powers. It then goes on to review the nature and effectiveness of three main forms of accountability as applied to these institutions —administrative, judicial, and political — together with the contribution of external review bodies, such as the European Court of Auditors and the European Ombudsman, to their accountability at European level. Following the dynamic, forward-looking approach advocated above, the paper argues that the best way to improve the accountability of the SSM and the SRB, is to request the ECB/SSM and SRB to make the findings of their internal quality assurance and review bodies publicly available (subject to constraints on professional secrecy) and for the EP to use these findings to scrutinize and stimulate public debate about the operations and effectiveness of the two institutions.

This document was provided by the Economic Governance Support Unit at the request of the ECON Committee).

PE 645.747
IP/A/ECON-BU/IC/2020-052

Print ISBN 978-92-846-6538-9 | doi:10.2861/486399 | QA-01-20-258-EN-C
PDF ISBN 978-92-846-6537-2 | doi:10.2861/825768 | QA-01-20-258-EN-N