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32 Political and Legal Accountability in the European Banking Union

A First Assessment

Menelaos Markakis[*]

32.1 Introduction

This chapter looks at political and legal accountability in the European Banking Union. It is structured as follows. The discussion begins with a sketch of the constitutional structure and administrative machinery in the area of Banking Union. The focus then shifts to the concept of accountability, in an attempt to explain key concepts that will be used in this paper. This is followed by analysis of political accountability in the Single Supervisory Mechanism and the Single Resolution Mechanism, which are the main building blocks of the Banking Union thus far. The paper examines the respective roles of the European Parliament, Council, Eurogroup and national parliaments in holding the Banking Union actors accountable for the exercise of their duties. The penultimate section of the chapter concerns internal administrative review of supervisory measures and resolution actions, which is carried out by the Administrative Board of Review and the Appeal Panel respectively, as well as review by the Court of Justice of the European Union and national courts. The final section of the chapter glimpses briefly the vexed issue of the European Central Bank's legitimacy in exercising supervisory tasks over banks in the Euro area (and potentially beyond).

32.2 A Sketch of the Constitutional Structure and Administrative Machinery

There are many aspects of the EU where the foundations are widely known. This cannot be taken for granted in relation to the present paper, which concerns the European Banking

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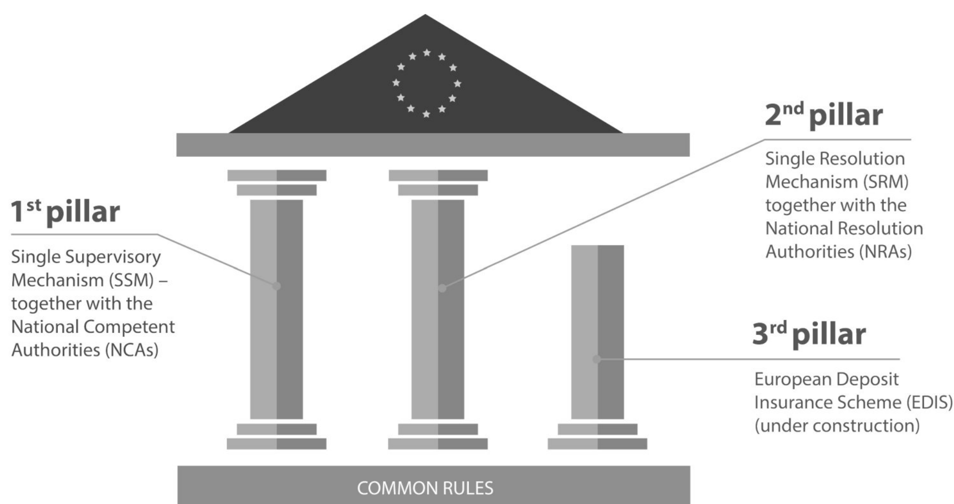
Union (EBU). The Banking Union is often described as the most ambitious project in the EU since the introduction of the single currency. The prevailing view holds that it ought to have three main building blocks, of which only two are currently in place: the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). The "key rationale" for transferring supervisory and resolution powers to the EU level "is to strengthen an unbiased, neutral approach to bank oversight and resolution, thus mitigating forbearance and moral hazard, and to break the fatal link between sovereigns and their banks".[1] The EBU's architecture is as follows.

Figure 32.1 Banking Union



Source: Single Resolution Board, *2015 Annual Report*, Luxembourg, Publications Office of the European Union, 2016, p. 8 (image cropped).

On the one hand, *the Single Supervisory Mechanism Regulation* (or 'SSM Regulation'), which was adopted on the basis of Article 127(6) TFEU, has conferred specific supervisory tasks on the European Central Bank (ECB).[2] The latter is now responsible for the supervision of 129 "significant" banks or cross-border groups that are established in Euro area Member

1 J. Gordon & W.-G. Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take', *Columbia Law Review*, Vol. 115, No. 5, 2015, p. 1306.

2 Council Reg. (EU) 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 2013 L 287/63 (SSM Reg.), Arts. 4 & 6(4)-(5).

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States.[3] These tasks are listed and explicated in the SSM Regulation[4] and are carried out by the Supervisory Board, which is an internal body of the ECB.[5] The Union legislator helpfully explains that:

> As a first step towards a banking union, a single supervisory mechanism should ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned, and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations.[6]

Supervisory tasks not conferred on the ECB shall remain with the national authorities ("national competent authorities" or NCAs).[7] The national supervisory authorities shall be responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of the ECB's supervisory tasks, including, in particular, the on-going day-to-day assessment of a credit institution's situation and related on-site verifications.[8] The ECB may further require, by means of instructions, that they use their powers under national law, where the SSM Regulation does not confer such powers on the ECB.[9] The national authorities shall further remain competent to supervise "less significant" banks or branches,[10] which number over 3,000. However, it should be noted that the banks supervised by the ECB account for "85 per cent of Euro area banking assets".[11]

The framework for the cooperation between the ECB and NCAs is laid down in the SSM Framework Regulation.[12] Notably, the SSM Framework Regulation provides that a Joint Supervisory Team (JST) shall be established for the supervision of each significant supervised entity or significant supervised group in participating Member States. Each JST shall be composed of staff members from the ECB and from the NCAs, working under

3 European Central Bank, 'List of Supervised Entities', 31 March 2016, www.bankingsupervision.europa.eu/ecb/pub/pdf/list_of_supervised_entities_20160331.en.pdf?c2fa759934255ee02916aec1b8255201.
4 SSM Reg., Arts. 4, 5 & 9-18.
5 Id., Art. 26(1).
6 Id., recital 12.
7 Id., recital 28 & fifth subpara. of Art. 1.
8 Id., para. 37 and Art. 6(2)-(3).
9 Id., third subpara. of Art. 9(1).
10 Id., Art. 6(6).
11 B. Haar, 'Organizing Regional Systems: The EU Example', *in* N. Moloney, E. Ferran & J. Payne (Eds.), *The Oxford Handbook of Financial Regulation*, Oxford, Oxford University Press, 2015, p. 170.
12 Reg. (EU) 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, OJ 2014 L 141/1.

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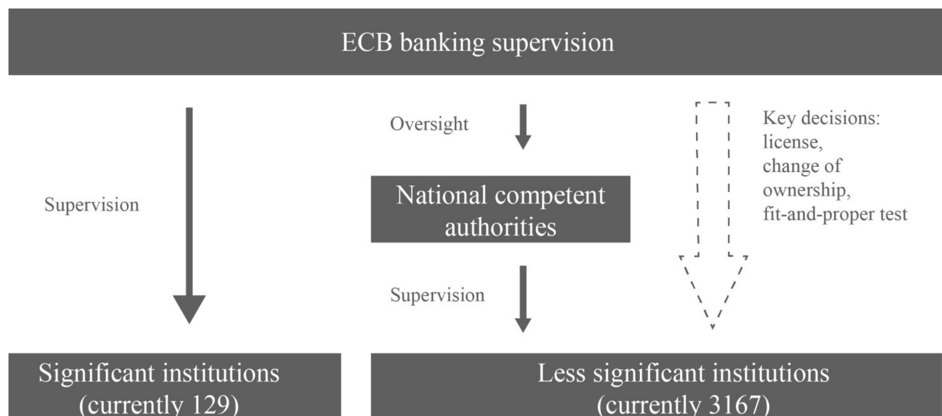
the coordination of a designated ECB staff member and one or more NCA sub-coordinators.[13]

Figure 32.2 ECB Banking Supervision



Source: D. Schoenmaker & N. Véron (Eds.), *European Banking Supervision: The First Eighteen Months*, Bruegel Blueprint Series, Vol. 25, Brussels, Bruegel, 2016, p. 9.

On the other hand, *the Single Resolution Mechanism Regulation* (or 'SRM Regulation'), which was adopted on the basis of Article 114 TFEU, leads to "centralisation of decision making in the field of resolution".[14] It was preceded by the Bank Recovery and Resolution Directive (BRRD), which harmonised the rules relating to the resolution of banks across the Union and provided for cooperation among national authorities when dealing with the failure of cross-border banks.[15] However, that Directive established minimum harmonisation rules and did not lead to centralisation of decision making in the field of resolution. It essentially provided for common resolution tools and resolution powers available for the national authorities of every Member State, but left discretion to national authorities in the application of the tools and in the use of national financing arrangements in support

13 Id., Arts. 3-6.
14 Reg. (EU) 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 2014 L 225/1 (SRM Reg.), recital 10.
15 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council, OJ 2014 L 173/190 (BRRD).

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of resolution procedures.[16] As such, the BRRD did not eliminate the risk that separate national authorities might take potentially inconsistent decisions with respect to the resolution of cross-border groups, which may affect the overall costs of resolution. Moreover, as it provided for national financing arrangements, it did not sufficiently reduce the dependence of banks on support from national budgets and did not completely prevent different approaches by Member States to the use of such financing arrangements.[17]

For those Member States that are participating in the Banking Union (which are, so far, only the Euro area states), "a centralised power of resolution is established and entrusted to the Single Resolution Board […] and to the national resolution authorities".[18] The Single Resolution Board (SRB or "the Board"), which is a new Union agency,[19] is now fully operational and has taken over responsibility from national resolution authorities for the resolution of "significant" entities or groups, entities and groups directly supervised by the ECB, as well as other cross-border groups.[20] The Union co-legislators helpfully explain that "[s]upervision and resolution are two complementary aspects of the establishment of the internal market for financial services whose application at the same level is regarded as mutually dependent".[21] Separate tasks are also conferred on the Council and Commission within this complex governance structure (see Figure 32.3). The resolution activities of the SRB are backed by the Single Resolution Fund (SRF or "the Fund"), which is financed by bank contributions.[22] These bank levies are collected at the national level and then pooled at the Union level pursuant to an Intergovernmental Agreement that was signed by 26 EU Member States (bar the United Kingdom and Sweden).[23]

The national resolution authorities (NRAs) shall assist the SRB in resolution planning and in the preparation and implementation of measures taken pursuant to the SRM Regulation.[24] They shall further exercise all resolution tasks in relation to "less significant" credit institutions, unless the resolution action requires the use of the SRF.[25] The SRB may also at any time 'step in their shoes' and decide to exercise directly all of the relevant powers under the SRM Regulation with regard to any of these entities or groups falling under the responsibility of the NRAs "where necessary to ensure the consistent application of high resolution standards".[26]

16 SRM Reg., recital 10.
17 Id., recital 10.
18 Id., recital 11.
19 Id., Art. 42(1).
20 Id., Arts. 2 and 7(2); Single Resolution Board, 'List of Other Cross-Border Groups', 6 June 2016, https://srb.europa.eu/sites/srbsite/files/annex_ii_list_of_other_cross_border_06062016.pdf.
21 SRM Reg., recitals 11 & 15-17.
22 Id., recital 19.
23 2014 Agreement on the transfer and mutualisation of contributions to the Single Resolution fund.
24 SRM Reg., recital 28, Arts. 29(1) and 31(1).
25 Id., Art. 7(3).
26 Id., Art. 7(4).

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The "main tool for cooperation" between the SRB and the NRAs is the Internal Resolution Team (IRT). "These enable the authorities to carry out resolution activities for banks under the SRB's direct responsibility". The functioning of these teams is explicated in the draft Cooperation Framework with the NRAs and in the Resolution Planning and Crisis Management Manuals, which were developed by the SRB.[27] In principle, there could have been one IRT for each bank falling within the SRB's remit, but the SRB has "bundled" more banks under a single IRT, "taking into account different rationales (e.g. geographical footprint, business model, ownership structure, size)".[28]

The third pillar of the Banking Union, viz. a European deposit insurance scheme (EDIS), is not yet in place. The European Commission had pledged in its 2016 Work Programme to present a proposal for "a European bank deposit scheme based on a reinsurance mechanism" by the end of 2015.[29] It made good on its promise on 24 November 2015.[30] It remains to be seen whether the Commission will be able to successfully pilot this proposal through the legislative process amidst strong resistance from Germany and a number of other countries. In the opinion of the International Monetary Fund,"[r]isk sharing, without risk reduction, may lead to moral hazard and unintended transfers, while risk reduction alone fails to address the need for a common backstop in a systemic crisis". As such, it proposes that the Member States and Union institutions "proceed simultaneously on both fronts".[31] Nevertheless, for the time being, there is no common deposit insurance scheme and no common fiscal backstop for the EDIS and the SRF.[32]

27 Single Resolution Board, *2015 Annual Report*, Luxembourg, Publications Office of the European Union, 2016, p. 14.

28 Id., p. 14 and n. 2.

29 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Commission Work Programme 2016: No Time for Business as Usual', 27 October 2015, http://ec.europa.eu/atwork/pdf/cwp_2016_en.pdf, p. 9.

30 European Commission, 'A Stronger Banking Union: New Measures to Reinforce Deposit Protection and Further Reduce Banking Risks', 24 November 2015, http://europa.eu/rapid/press-release_IP-15-6152_en.htm.

31 International Monetary Fund, 'Euro Area Policies: 2016 Article IV Consultation-Press Release; Staff Report; and Statement by the Executive Director for the Euro Area', Country Report No. 16/219, 8 July 2016, www.imf.org/external/pubs/cat/longres.aspx?sk=44067.0, para. 47.

32 Id., paras. 46-48.

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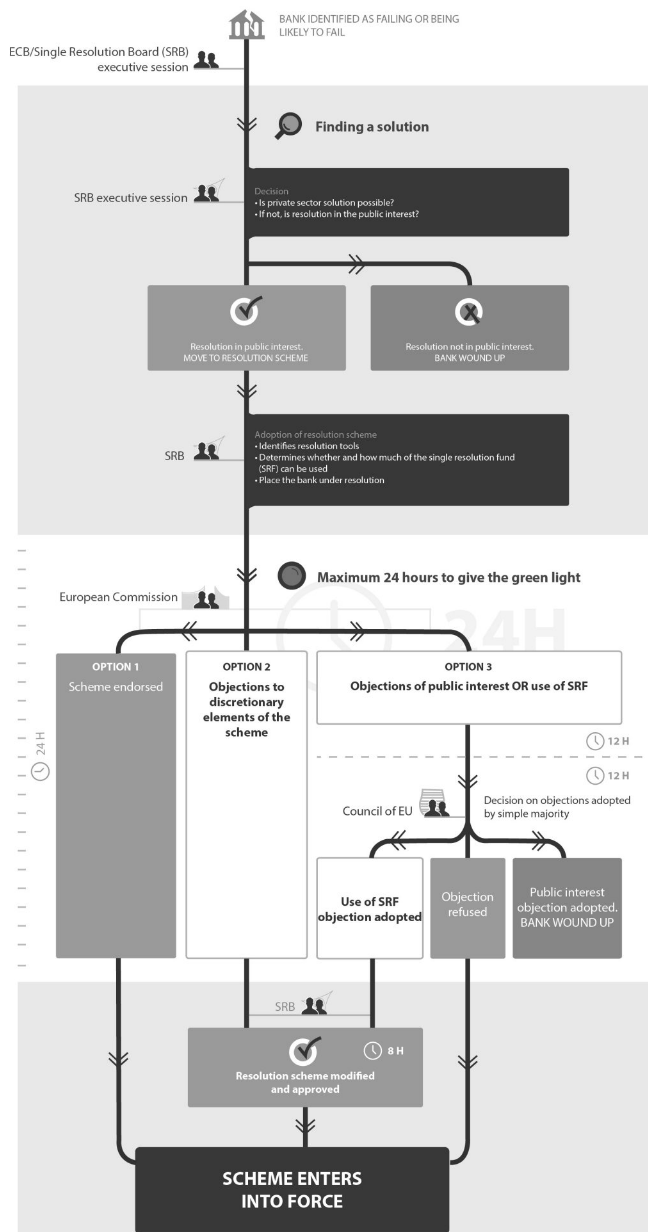
Figure 32.3 The Single Resolution Mechanism: Resolving Failing Banks



Source: Council of the European Union General Secretariat, 2015, www.consilium.europa.eu/en/infographics/info-graphics-srm/ (head and bottom of infographics were cropped to fit page).

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32.3 Accountability: A Conceptual Framework

I was asked time and again in the conferences where this paper was presented about what was meant by 'accountability' in this context, hence the need to clarify its meaning from the outset. Among others, Ruth Grant and Robert Keohane define accountability as the right of some actors "to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met".[33] This definition implies that some actors have oversight and enforcement capabilities *vis-à-vis* other actors. In what follows we will be using this as a working definition to assess the powers granted to the EU institutions and bodies in the EBU governance framework.

This article will primarily focus on political and legal accountability. When discussing accountability to political forums (that is, political accountability), we will be focusing on the following three elements of accountability: information; debate; and consequence. These are of course inter-related.[34] When discussing legal accountability, we will be focusing on the respective roles of the Administrative Board of Review, Appeal Panel, Court of Justice of the European Union (CJEU) and national courts in reviewing supervisory measures or resolution actions. This is not to say that these are the only two forms that accountability could take in this context, but exigencies of space preclude detailed analysis of this. Further, we will not be focusing on the role of the European Banking Authority (EBA), which has the power to address a *binding* decision to the ECB in "emergency situations" or to settle a disagreement between competent authorities.

Accountability mechanisms within the framework of the SSM and the SRM are important, because supervisory measures and resolution actions could potentially have a massive impact on public finances, the credit institution concerned, its customers and employees, and the markets in the Member State concerned.[35] Moreover, it is readily admitted by the Union legislator that "[t]he conferral of supervisory tasks implies a significant responsibility for the ECB to safeguard financial stability in the Union, and to use its supervisory powers in the most effective and proportionate way".[36] "Any shift of supervisory powers from the Member State to the Union level should be balanced by

33 R. Grant and R. Keohane, 'Accountability and Abuses of Power in World Politics', *American Political Science Review*, Vol. 99, No. 1, 2005, p. 29.
34 D. Curtin, 'Democratic Accountability of EU Executive Power: A Reform Agenda for Parliaments', *in* F. Fabbrini, E. Hirsch Ballin & H. Somsen (Eds.), *What Form of Government for the European Union and the Eurozone?*, Oxford, Hart Publishing, 2015, p. 183.
35 SSM Reg., recital 56; SRM Reg., recital 43.
36 SSM Reg., recital 55.

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appropriate transparency and accountability requirements".[37] And the same holds true for the resolution tasks conferred on the SRB in the SRM Regulation.[38]

The Union legislators' take on accountability in the SSM and the SRM is predicated on the assumption that both the European and national parliaments have a role to play in holding the EBU actors accountable for the exercise of their duties. The involvement of national parliaments is justified on the ground that the acts or omissions of the EBU actors have an impact on the national level, as explained above. However, there is no assumption on part of the Union legislators (or the present author) that national parliaments should be granted the exact same powers as the European Parliament in this context. The 'strategy' of the European Commission in the area of Economic and Monetary Union (EMU) is explained in the following passage:

> Any work on democratic legitimacy as a cornerstone of a genuine EMU needs to be based on two basic principles. First, in multilevel governance systems, accountability should be ensured at that level where the respective executive decision is taken, whilst taking due account of the level where the decision has an impact. Second, in developing EMU as in European integration generally, the level of democratic legitimacy always needs to remain commensurate with the degree of transfer of sovereignty from Member States to the European level.[39]

32.4 Political Accountability in the SSM and the SRM

32.4.1 *The Respective Roles of the European Parliament, the Council and the Eurogroup*

The accountability and transparency requirements set out in the SSM and the SRM Regulations are fairly similar. That being said, there are a few differences between the two instruments. These two instruments are supplemented by an Interinstitutional Agreement between the European Parliament and the ECB,[40] which is "a *novum* in the relations between

37 SSM Reg., recital 55.

38 SRM Reg., recital 42.

39 Communication from the Commission, 'A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate', Brussels, 30 November 2012, http://ec.europa.eu/archives/commission_2010-2014/president/news/archives/2012/11/pdf/blueprint_en.pdf, p. 35.

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

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the EP and the ECB",[41] and a Memorandum of Understanding between the Council and the ECB.[42] They are further supplemented by the recent Agreement between the European Parliament and the SRB.[43]

The SSM Regulation provides that the ECB shall be accountable to the European Parliament and the Council for the implementation of this Regulation.[44] The SRM Regulation provides that the SRB shall be accountable to the European Parliament, the Council, and the Commission.[45] Both the ECB and the SRB shall submit a *report* on the execution of their tasks and shall *present that report in public* to the European Parliament.[46] The ECB shall further present that report in public to *the Eurogroup* in the presence of representatives from non-Euro area participating Member States (if any),[47] whereas the SRB shall present that report in public to *the Council*.[48] The structure of "Euro Group+" is new.[49] Moreover, it should be noted that, by rendering the Eurogroup (or "Euro Group+") an accountability holder for the ECB in the context of SSM, the SSM Regulation utilises what is often regarded as merely an "informal body" with no power to adopt legally-binding decisions under the Lisbon Treaty.[50]

Moreover, the Chair of the Supervisory Board of the ECB and the Chair of the SRB may be *heard* on the execution of their tasks *by the Eurogroup* in the presence of representatives from non-Euro area participating Member States and *the Council* respectively.[51] Furthermore, at the request of the European Parliament, the Chair of the Supervisory Board and the Chair of the SRB shall participate in a *hearing* on the performance of their respective tasks *by the competent committee of the European Parliament*.[52]

41 J.-V. Louis, 'Democracy and the European Central Bank. Some Comments on Independence and Accountability', *in* G. Garzón Clariana (Ed.), *Democracy in the New Economic Governance of the European Union*, Madrid, Marcial Pons, 2015, p. 141.

42 Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation of procedures related to the Single Supervisory Mechanism (SSM).

43 Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism, OJ 2015 L 339/58.

44 SSM Reg., Art. 20(1).

45 SRM Reg., Art. 45(1).

46 SSM Reg., Art. 20(2)-(3); SRM Reg., Art. 45(2)-(3).

47 SSM Reg., Art. 20(3).

48 SRM Reg., Art. 45(3).

49 Louis, *supra*, p. 143.

50 www.consilium.europa.eu/en/council-eu/eurogroup/how-the-eurogroup-works/; Order of the General Court of 16 October 2014 in Case T-327/13, *Konstantinos Mallis and Elli Konstantinou Mali v. European Commission and European Central Bank*, EU:T:2014:909; P. Craig & M. Markakis, 'The Euro Area, its Regulation and Impact on Non-Euro Member States', *in* P. Koutrakos & J. Snell (Eds.), *Research Handbook on the Law of the EU's Internal Market*, Edward Elgar, 2017.

51 SSM Reg., Art. 20(4); SRM Reg., Art. 45(5).

52 SSM Reg., Art. 20(5); SRM Reg., Art. 45(4).

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The SSM and the SRM Regulations further provide that the ECB and the SRB shall *reply orally or in writing to questions put to them* by the European Parliament and the Council, or, in the case of the ECB, the Eurogroup.[53] Upon request, the Chair of the Supervisory Board and the Chair of the SRB shall hold *confidential oral discussions* behind closed doors with the Chair and Vice-Chairs of the competent committee of the European Parliament concerning their tasks when such discussions are required for the exercise of the European Parliament's powers under the TFEU.[54] Both the ECB and the SRB are put under an obligation to cooperate with the European Parliament during any investigations carried out by the latter pursuant to Article 226 TFEU.[55]

An institutional novelty of the SSM and the SRM is that the European Parliament's *approval* is required for the appointment of the Chair and the Vice-Chair of the Supervisory Board and for the appointment of the Chair, Vice-Chair and four full-time members of the SRB. These officials are nominated by the ECB and the Commission respectively, and are formally appointed by the Council by means of an implementing decision.[56]

More specifically, the Interinstitutional Agreement between the European Parliament (EP or "Parliament") and the ECB provides that the latter institution shall provide the Parliament with the shortlist of candidates for the position of the Chair of the Supervisory Board.[57] It shall further provide that shortlist of candidates to the Council.[58] The competent EP committee may submit questions to the ECB relating to the selection criteria and the shortlist of candidates. The ECB shall then submit its proposals for the Chair and the Vice-Chair to the Parliament together with written explanations of the underlying reasons. A public hearing of the proposed Chair and Vice-Chair of the Supervisory Board shall be held in the competent EP committee. The Parliament shall reach its final decision through a vote in the competent committee and in plenary. If the proposal is not approved, the ECB may decide either to draw on the pool of candidates that applied originally for the position or to re-initiate the selection process.

It should further be noted that the Parliament's approval is also required for the removal of the Chair or Vice-Chair of the Supervisory Board from office.[59] The EP's approval is also required for the removal of the Chair, the Vice-Chair or a full-time member of the SRB from office.[60]

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53 SSM Reg., Art. 20(6); SRM Reg., Art. 45(6).

54 SSM Reg., Art. 20(8); SRM Reg., Art. 45(7).

55 SSM Reg., Art. 20(9); SRM Reg., Art. 45(8).

56 SSM Reg., Art. 26(3); SRM Reg., Art. 56(6).

57 Interinstitutional Agreement between the European Parliament and the European Central Bank, *supra*, Section II, pp. 4-5.

58 Memorandum of Understanding between the Council of the European Union and the European Central Bank, *supra*, Section II.(4), p. 4.

59 SSM Reg., Art. 26(4).

60 SRM Reg., Art. 56(9).

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It should further be noted that, in sharp contrast to the role of the EP in the Banking Union, the Council has some decision-making powers of its own within the framework of the SRM (see Figure 32.3 above). More specifically, the Council may object to the resolution scheme on the ground that the resolution action is not necessary in the public interest. It may also approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.[61] Furthermore, on application by a Member State, the Council may, acting unanimously, decide that the use of the Fund shall be considered to be compatible with the internal market, if such a decision is justified by exceptional circumstances.[62]

There are two ways that the role of the Council might be conceptualised in terms of democracy and decision making. The positive argument would be framed as follows. According to the Treaty schema, the national ministers sitting in Council represent the Member States and are themselves democratically accountable to their national parliaments and citizens.[63] As such, the involvement of the Council injects an element of democratic accountability into the SRM decision-making process. This is all the more important given the impact that such decisions can have on the national level. There is, however, a more negative view, which would take the following form. Accountability "may depend for its effectiveness on a measure of externality and autonomy".[64] "It obviously becomes hard for those who have taken part in policy-making or in a decision to censure or blame the decision-maker."[65] The Council could only credibly scrutinise the actions of the Board and the Commission *ex post facto* in those areas where it was not involved or not empowered with a veto. Otherwise, why did it not just block the proposed resolution action in the first place?

32.4.2 *The Role of National Parliaments*

National parliaments have an important role to play in the EBU. First, they shall hold national supervisory and resolution authorities to account for their actions in this area, in accordance with national law, when these authorities are competent to act pursuant to the EBU framework. Second, they are accorded a role in holding the Supervisory Board and the SRB accountable for the performance of their respective tasks. More specifically, the ECB and the SRB shall *forward the report* on the performance of their respective tasks to

61 SRM Reg., Art.18(7)-(8).
62 SRM Reg., Art. 19(10).
63 Art. 10(2) TEU.
64 C. Harlow, *Accountability in the European Union*, Oxford, Oxford University Press, 2002, p. 106 & Chapter 1.
65 Id., p. 106.

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the national parliaments of the participating Member States.[66] National parliaments may address to the ECB or the SRB their *reasoned observations on that report*.[67] They may further submit *observations or questions* to the ECB or the SRB in respect of their tasks.[68]

There is a discrepancy between the two Regulations in relation to these questions or observations that may be addressed to the ECB or the SRB by national parliaments. As regards the SSM, the ECB *may* reply to such questions or observations.[69] As regards the SRM, the SRB is *obliged* to reply in writing to such questions or observations.[70]

Last, the national parliament of a participating Member State may invite the Chair (or a member) of the Supervisory Board or the Chair of the SRB to participate in an *exchange of views* in relation to supervision or resolution of entities in that Member State together with a representative of the national supervisory or resolution authority.[71] Again, the SRM Regulation explicitly provides that the Chair of the SRB is *obliged* to follow such invitation, whereas there is no such obligation laid down in the SSM Regulation.

32.5 Judicial Review of Supervisory Measures and Resolution Actions

The discussion thus far has focused on political accountability in the Banking Union. The focus now shifts to legal accountability in the SSM and the SRM. The principal default line is between internal administrative review and (*ex ante* or *ex post*) judicial review. These will now be discussed in turn.

32.5.1 Internal Administrative Review

The proliferation of bodies set up for the purposes of carrying out internal administrative review of the acts of the EU agencies or bodies is in relative terms undertheorised.[72] The SSM Regulation provides that the ECB shall establish an *Administrative Board of Review* for the purposes of carrying out an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred on it in the SSM Regulation.[73] The scope of this review shall pertain to the procedural and substantive conformity of these

66 SSM Reg., first subpara. of Art. 21(1); SRM Reg., Arts. 45(2) & 46(2).
67 SSM Reg., second subpara. of Art. 21(1); SRM Reg., Art. 46(2).
68 SSM Reg., Art. 21(2); SRM Reg., Art. 46(1).
69 SSM Reg., recital 56.
70 SRM Reg., Art. 46(1).
71 SSM Reg., Art. 21(3); SRM Reg., Art. 46(3).
72 P. Chirulli and L. De Lucia, 'Specialised Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies', *European Law Review*, Vol. 40, No. 6, 2015, p. 832. *See, however*, M. Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford, Oxford University Press, 2016.
73 SSM Reg., Art. 24(1).

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decisions with the SSM Regulation.[74] The Administrative Board of Review is composed of five individuals, and it shall decide on the basis of a majority of at least three of them.[75]

Any natural or legal person may request a review of a decision of the ECB under this Regulation which is addressed to that person, or is of direct and individual concern to that person.[76] Any request for review shall be lodged with the ECB within one month of the date of notification of the decision to the person requesting the review, or, in the absence thereof, of the day on which it came to the knowledge of the latter as the case may be.[77] The Administrative Board of Review shall express an opinion and remit the case to the Supervisory Board, in order for it to prepare a new draft decision. The latter is *not* bound to follow the opinion of the Administrative Board of Review. Accordingly, the new draft decision may abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision. The new draft decision shall be deemed adopted unless the Governing Council objects within a maximum period of ten working days.[78] A request for review against this new decision of the Governing Council shall not be admissible.[79]

A request for review shall not have suspensory effect, though the Governing Council may, on a proposal by the Administrative Board of Review, suspend the application of the contested decision.[80] This internal administrative review is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties.[81]

As regards the SRM, the SRM Regulation provides that the Board shall establish an *Appeal Panel* for the purposes of deciding on appeals submitted in accordance with this Regulation.[82] This body, too, shall be composed of five individuals, and shall decide on the basis of a majority of at least three of its five members.[83] Standing is again limited to those natural or legal persons, including resolution authorities, which are either the addressees of the impugned decision or are directly and individually concerned by it.[84]

However, there are some important differences between the two bodies. First, the Administrative Board of Review can review *all* the decisions taken by the ECB in the exercise of the powers conferred on it in the SSM Regulation, whereas the Appeal Panel can only review a decision adopted pursuant to one of the SRM provisions listed in Article 85(3) of the SRM Regulation. Second, the time limit for lodging an appeal is different.

74 Id., Art. 24(1).
75 Id., Art. 24(2)-(3).
76 Id., Art. 24(5).
77 Id., Art. 24(6).
78 Id., Art. 24(7).
79 Id., second indent of Art. 24(5).
80 Id., Art. 24(8).
81 Id., Art. 24(11).
82 SRM Reg., Art. 85(1).
83 Id., Art. 85(2) and (4).
84 Id., Art. 85(3).

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Natural or legal persons have one month to submit a request for review pursuant to the SSM Regulation, whereas the time limit for lodging an appeal pursuant to the SRM Regulation is six weeks.[85] Third, the SRB shall be *bound* by the decision of the Appeal Panel,[86] whereas we have seen that the opinion of the Administrative Board of Review is not binding.[87]

32.5.2 *Review by the CJEU and National Courts*

The SSM Regulation only contains a provision on *ex ante* judicial review in the case of on-site inspections.[88] This cannot be taken to mean that (*ex post*) judicial review is excluded, and the recitals to the preamble of the SSM Regulation indeed reiterate the Treaty schema. Accordingly, there is a division of labour between national and EU courts, which reflects the division of competence between the ECB and national supervisory authorities in the SSM. More specifically, pursuant to Article 263 TFEU, the CJEU is to review the legality of acts of the ECB, other than recommendations and opinions, intended to produce legal effects *vis-à-vis* third parties.[89] Moreover, in accordance with Article 340 TFEU, the ECB shall make good any damage caused by it or its servants in the performance of their duties.[90] This should be without prejudice to the liability of national competent authorities to make good any damage caused by them or their servants in the performance of their duties in accordance with national legislation.[91] The SSM Regulation does not mention Article 265 TFEU challenges, but it is surely the case that one can bring such a challenge before the CJEU against a failure to act, provided that the relevant requirements are met.

If the impugned supervisory measure was adopted by a national supervisory authority, then the national courts of that Member State have jurisdiction to review the legality of that act. The same holds true for actions for damages or a challenge brought against a failure to act. If in doubt on the interpretation and/or validity of EU legal measures, the national court seized of the dispute may send an Article 267 TFEU preliminary reference to the CJEU.

As regards the SRM, if the impugned resolution action was taken by the SRB, then the action will be brought before the CJEU. More specifically, the SRM Regulation provides that an Article 263 TFEU challenge may be brought against a decision taken by the Appeal

85 SSM Reg., Art. 24(6); SRM Reg., second subpara. of Art. 85(3).
86 SRM Reg., Art. 85(8).
87 SSM Reg., Art. 24(7).
88 Id., Art. 13.
89 Id., recital 60.
90 Id., recital 61.
91 Id., recital 61.

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Panel or, where there is no right of appeal to the Appeal Panel, by the Board.[92] This means that one is obliged to bring one's case before the Appeal Panel prior to bringing a challenge before the CJEU, if such an appeal to the Appeal Panel is available. Moreover, if the Board has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the CJEU in accordance with Article 265 TFEU.[93] Furthermore, the CJEU has, in accordance with Article 267 TFEU, competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of the institutions, bodies or agencies of the Union in the framework of the SRM.[94] In the case of non-contractual liability, an Article 340 TFEU challenge is available, and the Board shall make good any damage caused by it or its staff members in the performance of their duties.[95]

Enforcement of decisions imposing fines and periodic penalty payments may only be suspended by the CJEU.[96] However, the courts of the participating Member State concerned shall have jurisdiction over complaints that the enforcement is being carried out in an irregular manner.[97]

National judicial authorities are further competent, in accordance with national law, to review the legality of decisions adopted by the resolution authorities of the participating Member States in the exercise of the powers conferred on them in the SRM Regulation, as well as to determine their non-contractual liability.[98] The recitals in the preamble add that:

> Where a national resolution authority infringes the rules of the SRM by not using the powers conferred on it under national law to implement an instruction by the Board, the Member State concerned may be liable to make good any damage caused to individuals, including, where applicable, to the institution or group under resolution, or any creditor of any part of that entity or group in any Member State, in accordance with the relevant case-law.[99]

One may also bring a case before the national courts in case the national resolution authorities concerned failed to act. However, it should be noted that such cases would only rarely be brought before the national courts, because the SRB may, in exceptional circumstances, directly exercise all of the relevant powers and responsibilities conferred on it by

92 SRM Reg., Art. 86(1).
93 Id., Art. 86(3).
94 Id., recital 120.
95 Id., Art. 87(3).
96 Id., last subpara. of Art. 41(3).
97 Id., last subpara. of Art. 41(3).
98 Id., recital 120.
99 Id., recital 96.

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the SRM Regulation in relation to entities and groups that fall within the national resolution authority's sphere of competence.[100]

This sketch map of judicial review in the area of Banking Union risks overlooking the fact that there are very many limitations to legal accountability which either apply across the board (e.g., the requirements for standing for non-privileged applicants) or are specific to the EBU. To give one prominent example from the latter category, when the national resolution authorities are acting under national law transposing the BRRD, the limitations to judicial review that are built into that instrument apply to challenges brought before a national court against the actions of those authorities.

The BRRD requires that *ex ante* judicial approval of both crisis prevention and crisis management measures be "expeditious".[101] It further requires that *ex post* judicial review of crisis management measures be "expeditious".[102] Moreover, as regards errors of fact, Member States are put under an obligation to "ensure that [...] national courts use the complex economic assessments of the facts carried out by the resolution authority as a basis for their own assessment".[103] Given the broad discretion that is almost invariably granted by courts to authorities in this area, it is relatively safe to assume that, unless vitiated by a manifest error of assessment, the impugned decision would be allowed to stand.[104]

Furthermore, as regards interim relief, the BRRD provides that the lodging of an appeal against a crisis management measure "shall not entail any automatic suspension of the effects of the challenged decision".[105] It further adds that "the decision of the resolution authority shall be immediately enforceable and it shall give rise to a rebuttable presumption that a suspension of its enforcement would be against the public interest",[106] thereby further narrowing down the prospects of obtaining interim relief. What is more, the BRRD stipulates that "the annulment of a decision of a resolution authority shall not affect any subsequent administrative acts or transactions concluded by the resolution authority concerned which were based on the annulled decision".[107] This rule only applies "where [...] necessary to protect the interests of third parties acting in good faith", but it is only in very exceptional circumstances, if ever, that a third party acquiring assets from the institution under resolution would not be acting in good faith. If the third party was indeed acting in good faith,

100 Id., Art. 7(4).
101 BRRD, Art. 85(1).
102 Id., Art. 85(3).
103 Id., Art. 85(3).
104 Id., recital 89.
105 Id., Art. 85(4)(a).
106 Id., Art. 85(4)(b).
107 Id., second subpara. of Art. 85(4).

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"remedies for a wrongful decision or action by the resolution authorities shall be limited to compensation for the loss suffered by the applicant as a result of the decision or act".[108]

However, it should be noted that the administrative penalties and other administrative measures[109] imposed by the national authorities where the national provisions transposing the BRRD have not been complied with are neither "crisis prevention measures" nor "crisis management measures" within the meaning of the BRRD.[110] As such, the restrictions adumbrated above do not apply to legal challenges brought against such penalties.

32.6 Addendum: Should the ECB's Supervisory Tasks Be Conferred on a Separate Entity?

After my presentation, I was asked time and again (notably, by German participants) whether the supervisory tasks conferred on the ECB should perhaps be conferred on a separate entity. Surprisingly, I was not asked the same question about the Single Resolution Board, notwithstanding the fact that the SRM's governance framework is at least equally complex as the one of the SSM. My rather formalistic response was that the conferral of supervisory tasks on the ECB was the only transfer of such powers from the national to the EU level that could have been effectuated within the confines of the Lisbon Treaty (Art. 127(6) TFEU). I fully acknowledge that such a response does not placate the concerns of some of the conference participants, who were presumably worried that this conferral of tasks might give rise to conflicts of interest between the monetary and supervisory functions of the ECB or that it was not legitimate to grant such powers to the ECB because of, say, its degree of independence and insulation from democratic oversight. However, there might be cause for cautious optimism in this respect.

It will be recalled that the SSM Regulation provides that the ECB's supervisory tasks should be carried out "in full separation" from its monetary policy tasks, "in order to avoid conflicts of interests and to ensure that each function is exercised in accordance with the applicable objectives". This does not of course sever the inherent *factual* link between these two policy areas. The SSM Regulation adds that the Governing Council – which is the main decision-making body of the ECB – should operate in a completely differentiated manner as regards monetary and supervisory functions, and that this differentiation should at least include strictly separated meetings and agendas.[111] The SSM Regulation further provides for the organisational separation of the staff involved in carrying out supervisory

108 *See also* P. Craig & M. Markakis, '*Gauweiler* and the Legality of Outright Monetary Transactions', *European Law Review*, Vol. 41, No. 1, 2016, pp. 20-21.

109 BRRD, Arts. 110-114.

110 Id., Art. 2(1)(101)-(102).

111 SSM Reg., recital 65 and Art. 25(1)-(2) and (4).

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tasks from the staff involved in carrying out other tasks conferred on the ECB. These officials shall be subject to separate reporting lines.[112] The ECB shall adopt and make public any necessary internal rules, including rules regarding professional secrecy and information exchanges between the two functional areas.[113] Furthermore, "with a view to ensuring separation between monetary policy and supervisory tasks", the ECB shall create a mediation panel, which shall resolve differences of views expressed by the competent authorities concerned regarding an objection of the Governing Council to a draft decision by the Supervisory Board.[114] If anything, the concern among the participants of the FIDE Congress was that the two functions might have become *too* separate, to the extent that some people used the language of "old ECB" (for the monetary policy function) and "new ECB" (for the supervisory function).

This leaves the question of whether it would perhaps be more legitimate and/or more efficient and effective to confer such supervisory tasks on a separate institution or to "go even further in the internal separation of decision-making on monetary policy and on supervision", as is already envisaged in the SRM Regulation.[115] This is an institutional change that could perhaps be contemplated in the future. However, it should be noted that you cannot have your cake and eat it, as we say. At the point in time when the SSM was established, the EU Member States wanted to tap the ECB's credibility and experience, and utilise the Central Bank for the supervision of "significant" entities and cross-border groups. Notwithstanding the Treaty constraints explicated above, they could have not just set up a new institution that would have immediately enjoyed the same level of credibility, trustworthiness and expertise that the ECB had. Moreover, the 'synergies' between monetary policy making and prudential supervision of credit institutions should not be readily underestimated. Be that as it may, as pithily expressed by Eilís Ferran, it is true that "[i]f it were possible to start with a clean sheet not already criss-crossed by legal and political redlines, EBU would almost certainly look quite different from the structure that has actually emerged".[116]

The present author's concern is rather different: who is to blame if a bank supervised by the ECB fails because of, say, the high volume of non-performing loans on its balance sheet, and creditors and shareholders are 'bailed in' to recapitalise the bank or a bridge entity? Is it the ECB which failed to pick up on the issue? Is it the national authority which used to supervise the bank in the past because this could be said to be a "heritage problem"?

112 Id., recital 66 and second subpara. of Art. 25(2).

113 Id., Art. 25(3). *See* Dec. of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank, ECB/2014/39, recital 14 and Arts. 5-6.

114 SSM Reg., Art. 25(5) and recital 73.

115 Id., recital 85.

116 E. Ferran, 'European Banking Union: Imperfect, But It Can Work', *in* D. Busch and G. Ferrarini (Eds.), *European Banking Union*, Oxford, Oxford University Press, 2015, p. 87.

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Is it the SRB which decided that no other "early intervention" or private measures could have saved the bank and therefore sealed its fate? Is it the Commission and Council which chose not to object to the decision of the SRB? Or is there perhaps no one to blame at all, because the positive externalities of banking should be balanced, so the argument goes, against the risks to taxpayers and other stakeholders? The chain of responsibility can be difficult to trace and – to use the words of Carol Harlow – responsibility may "be dispersed and passed around the system".[117] What is more, given the broad mandate that is accorded to the ECB and the other EU financial 'watchdogs' (viz., the European Supervisory Authorities and the European Systemic Risk Board), it might prove very difficult to assess their performance. Nor is there a simple, straightforward yardstick with which to assess their respective performance.[118]

32.7 Conclusion

The preceding discussion has shown that the accountability and transparency requirements laid down in the SSM and SRM Regulations are fairly similar to the ones set out in the "six pack" and "two pack" of EU legislation. We have seen that the ECB and the SRB are put under an obligation to submit reports and present them in public to the European Parliament and to the Eurogroup or Council. These reports are also forwarded to national parliaments, which may address to the ECB or the SRB their reasoned observations on such reports. There are hearings, exchanges of views, questions put to the ECB/SRB by the parliaments, and confidential oral discussions. As such, the elements of information and debate are clearly there.

Moreover, we have seen that an institutional novelty of the SSM and the SRM is that the European Parliament's *approval* is required for the appointment of the Chair and the Vice-Chair of the Supervisory Board and for the appointment of the Chair, the Vice-Chair and the four full-time members of the SRB. In this connection, it will be recalled that as regards the monetary policy functions of the ECB, the European Parliament is merely *consulted* on the appointment of the President, the Vice-President and the other members of the Executive Board of the ECB.[119] The European Parliament has stressed that it considers these novel arrangements to constitute "an important precedent for an enhanced role of the EP in an EMU governance based on differentiation".[120] It has further called "for the

117 Harlow, *supra*, p. 184.

118 *See also* I. Angeloni, 'Rethinking Banking Supervision and the SSM Perspective', 23 April 2015, www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150423.en.html.

119 TFEU, second subpara. of Art. 283(2).

120 Committee on Constitutional Affairs, 'Report on Constitutional Problems of a Multitier Governance in the European Union', 15 November 2013, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0372+0+DOC+XML+V0//EN, para. 40.

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inclusion of Parliament in the appointment procedure of the President, Vice-President and other members of the Executive Board of the ECB in Article 283 TFEU, by requiring that it consents to the recommendations of the Council".[121] This would require a Treaty amendment.

A comparison with the revised EMU governance framework casts this institutional novelty in even more favourable light. More specifically, the European Parliament has no formal powers over the appointment of, say, the Managing Director of the European Stability Mechanism (ESM)[122] or the President of the Eurogroup,[123] whose role in EU economic governance is now heightened.[124] The ESM Treaty does not even mention the European Parliament. As regards national parliaments, the ESM Treaty provides that the Board of Governors shall make the annual report drawn up by the ESM Board of Auditors available to them.[125] But that is about all.

A comparison with the EMU governance framework further casts the powers conferred on national parliaments in the EBU in very favourable light. The ECB is also in charge of monetary policy making, and national parliaments are not accorded any role in holding the ECB accountable for its actions in that area. Deirdre Curtin rights notes that:

> While in the context of monetary policy there is no legal framework for scrutiny by national parliaments, the supervisory functions of the ECB do entail certain formal reporting obligations along with the opportunity to invite the chair or a member of the Supervisory Board to appear before a national parliament.[126]

The element of sanction is there too. An aspect that is often missing from the debate on the EBU is that the MEPs and national ministers could always agree to *change the legal framework* of the SSM and of the SRM. Given the legal basis that was used for the adoption of these instruments, this power formally lies with the Council, acting by means of regulations in accordance with a special legislative procedure and after consulting the European Parliament and the ECB, in the case of the SSM;[127] and with the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, in the case of the SRM.[128] This is a very bold instrument of political accountability, which stands in sharp contrast to the "quasi-constitutional status" of the legal and institutional arrangements pertaining to monetary policy.

121 Id., para. 75.
122 2012 Treaty establishing the European Stability Mechanism (ESM Treaty), Art. 7(1).
123 Protocol (No. 14) on the Euro Group, Art. 2.
124 Craig & Markakis, 'The Euro Area, its Regulation and Impact on Non-Euro Member States', *supra*.
125 ESM Treaty, Art. 30(5).
126 Curtin, *supra*, p. 185.
127 TFEU, Art. 127(6).
128 TFEU, Art. 114.

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These are enshrined in EU primary law and hence are much more difficult, if not impossible, to change.[129] However, the EU institutions endeavouring to change the legal framework of the SSM and the SRM would have to take the relevant Treaty constraints as well as other international standards into account.[130] They would further have to answer what it means for the ECB to be independent as a supervisor, what the legal basis is (primary or secondary EU law), and whether the meaning to be given to its independence in this context is any different from the one accorded to its independence as a monetary authority.[131]

With respect to the element of 'sanction', it should further be noted that the Parliament and Council have, as we have seen, a very important role to play in the process culminating in the removal of the SSM/SRM officials from office. Moreover, Ter Kuile, Wissink and Bovenschen helpfully explain that:

> …the absence of formal sanctions does not mean that there is no moment of 'taking the blame or putting matters right'. There can be other ways to ensure that the agent takes into account the principal's views, for example due to the indirect pressure that is felt when the agent has to explain what it has been doing or via informal coercion by the principal…[132]

As regards legal accountability in the Banking Union, it has rightly been noted that "a procedure before the ECJ is costly and burdensome",[133] and that litigants might sometimes need to bring proceedings before both the EU and national courts.[134] There is indeed "a complete system of remedies", but there are very many limitations to legal accountability, the bulk of which is built into the BRRD. The problems facing litigants are further aggravated by the complex division of competence between the EU and national authorities in

129 F. Amtenbrink & K. Van Duin, 'The European Central Bank before the European Parliament: Theory and Practice After Ten Years of Monetary Dialogue', *European Law Review*, Vol. 34, No. 4, 2009, pp. 566, 582-83; F. Amtenbrink, 'The Metamorphosis of European Economic and Monetary Union', *in* D. Chalmers & A. Arnull (Eds.), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, p. 729; J. De Haan & L. Gormley, 'The Democratic Deficit of the European Central Bank', *European Law Review*, Vol. 21, No. 2, 1996, p. 101.

130 Louis, *supra*, pp. 137-138.

131 *On the ECB's independence as a supervisor, see e.g.* Angeloni, *supra*; A. De Gregorio Merino, 'Institutional Report', *in* G. Bándi *et al.* (Eds.), *European Banking Union – Congress Proceedings Vol. 1*, Budapest, Wolters Kluwer, 2016; R. M. Lastra, 'Financial Institutions and Accountability Mechanisms', *in* P. Iglesias-Rodríguez (Ed.), *Building Responsive and Responsible Financial Regulators in the Aftermath of the Global Financial Crisis*, Cambridge, Intersentia, 2015; Louis, *supra*; T. Tridimas, 'General Report', *in* G. Bándi *et al.* (Eds.), *European Banking Union – Congress Proceedings Vol. 1*, Budapest, Wolters Kluwer, 2016.

132 G. Ter Kuile, L. Wissink & W. Bovenschen, 'Tailor-Made Accountability within the Single Supervisory Mechanism', *Common Market Law Review*, Vol. 52, No. 1, 2015, p. 174.

133 E. Wymeersch, 'The Single Supervisory Mechanism: Institutional Aspects', *in* D. Busch & G. Ferrarini (Eds.), *European Banking Union*, Oxford, Oxford University Press, 2015, p. 115.

134 T. Arons, 'Judicial Protection of Supervised Credit Institutions in the European Banking Union', *in* D. Busch & G. Ferrarini (Eds.), *European Banking Union*, Oxford, Oxford University Press, 2015, p. 473.

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the EBU's governance structures, as well as restrictive rules on standing[135] and access to information.[136]

As regards the rules on standing, the Lisbon category of regulatory act might be of some help to litigants, but they would still have to show that they were directly concerned by the contested act and that it did not entail implementing measures. The CJEU has given a fairly broad meaning to the concept of implementing act.[137] As regards access to documents, it should be noted that the exceptions to public access are couched in mandatory terms and that these exceptions could, if interpreted broadly, shield ECB/SRB documents from almost all public scrutiny.

Overall, the EU's Banking Union is an area of low citizen visibility, with limited input from the European and national parliaments and restrictive rules governing public access to documents. Effective democratic oversight over the activities of the various non-majoritarian institutions acting in this area is often traded against other legitimate ends, such as financial stability, the protection of sensitive information and the proper conduct of supervisory inspections. To be sure, these are policy areas which are often removed from majoritarian oversight at national level, or the degree of majoritarian oversight is circumscribed quite severely. Be that as it may, the EBU seems to rely more on its promise of output legitimacy, but some aspects of its design may jeopardise its effectiveness.[138] The roof has not been fully repaired yet.

One final thought: this chapter was written in a post-apocalyptic "Brexit" world. Rightly or wrongly, the EU's perceived "democratic deficit" was used by the Vote Leave campaign

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135 P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials*, 6th edn, Oxford, Oxford University Press, 2015, pp. 515-33; Harlow, *supra*, pp. 148-53.

136 Dec. 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents, OJ 2004 L 80/42, as amended by Dec. 2011/342/EU of the European Central Bank of 9 May 2011 amending Decision ECB/2004/3 on public access to European Central Bank documents, OJ 2011 L 158/37 & Dec. (EU) 2015/529 of the European Central Bank of 21 January 2015 amending Decision ECB/2004/3 on public access to European Central Bank documents, OJ 2015 L 84/64; Dec. (EU) 2015/811 of the European Central Bank of 27 March 2015 on public access to European Central Bank documents in the possession of the national competent authorities, OJ 2015 L 128/27; Dir. 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 2013 L 176/338, Art. 59(2); Dec. 2011/C 176/03 of the European Systemic Risk Board of 3 June 2011 on public access to European Systemic Risk Board documents, OJ 2011 C 176/3; SRM Reg., Art. 90(1); Reg. (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

137 Judgment of the Court (Grand Chamber) of 19 December 2013 in Case C-274/12 P, *Telefónica SA v. European Commission*, ECLI:EU:C:2013:852.

138 *See, e.g.*, D. Busch, 'Governance of the Single Resolution Mechanism', *in* D. Busch & G. Ferrarini (Eds.), *European Banking Union*, Oxford, Oxford University Press, 2015; Ferran, *supra*; Gordon & Ringe, *supra*; C. Odendahl, 'We Don't Need No Federation: What a Devolved Eurozone Should Look Like', Centre for European Reform, December 2015, www.cer.org.uk/publications/archive/report/2015/we-dont-need-no-federation-what-devolved-eurozone-should-look.

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as one of the main arguments as to why Britain should vote to leave the EU. This might or might not have been a fair accusation to mount against the EU (or indeed an overgeneralisation), but in politics perceptions matter. All this places added emphasis on the accountability and transparency of the EU institutions, bodies, offices and agencies.[139]

139 *On supervisory data transparency, see* C. Gandrud & M. Hallerberg, 'Does Banking Union Worsen the EU's Democratic Deficit? The Need for Greater Supervisory Data Transparency', *Common Market Law Review*, Vol. 53, No. 4, 2015, p. 769; C. Gandrud, M. Hallerberg & N. Véron, 'The European Union Remains a Laggard on Banking Supervisory Transparency', 10 May 2016, http://bruegel.org/2016/05/the-european-union-remains-a-laggard-on-banking-supervisory-transparency/.