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Reflections on Euro Area banking supervision: context, transparency, review and culture

A contribution to the conversation on the SSM after three years

Paper for the Conference **The European Banking Union and its relationship with the law: reflections three years on**, London (UK), 23 October 2017

1. *Introduction*

Three years after the commencement of prudential supervision by the European Central Bank (ECB) and the National Competent Authorities (NCAs) in the context of the Single Supervisory Mechanism (SSM), banking union is far from complete. The European Commission is right to keep insisting on adoption of a European Deposit Insurance Scheme (EDIS)[1], and on a common backstop for such a scheme and for the Single Resolution Fund (SRF)[2]. The Single Rulebook needs amending and, in this author's view, a stretch further than proposed[3], and discussed[4], thus far. Yet, the SSM and its younger counterpart, the Single Resolution Mechanism (SRM), are functioning, and the first cases on banking union reach the Court of Justice of the EU (CJEU)[5]. This paper will not identify progress to date or enumerate the success that has been

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[1] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015) 586 final, 2015/0270 (COD), 24 November 2015. Further on the EDIS proposal, see the Commission's retracting on its original proposals in paragraph 3 of its *Communication on completing the Banking Union*, COM(2017) 592 final, 11 October 2017, at: http://ec.europa.eu/finance/docs/law/171011-communication-banking-union_en.pdf. See, most recenly, the Opinion adopted by the Committee on Constitutional Affairs for the Committee on Economic and Monetary Affairs of the European Parliament on 29 March 2017, at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-592.152+03+DOC+PDF+V0//EN&language=EN.

[2] President Jean-Claude Juncker's State of the Union Address 2017, at: https://ec.europa.eu/commission/state-union-2017_en. See, also, President Juncker's State of the Union Address 2017 - Proposals for the future of Europe that can be implemented on the basis of the Lisbon Treaty, and his Letter of Intent to European Parliament President Antonio Tajani and Prime Minister Jüri Rajas of Estonia which holds the rotating Council Presidency, at: https://ec.europa.eu/commission/sites/beta-political/files/letter-of-intent-2017_en.pdf.

[3] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012, Brussels, 23.11.2016, COM(2016) 850 final, at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0850:FIN; and Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, Brussels, 23.11.2016 COM(2016) 854 final, at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-854-F1-EN-MAIN.PDF.

[4] For the current state of affairs, see: http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-financial-services/file-crr-amending-capital-requirements.

[5] See the list of banking union-related cases that Federico Della Negra and I regularly update at the website of the European Banking Institute: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

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achieved by the ECB in setting up a continent-wide system of prudential supervision of high standards in cooperation with national authorities in a very brief time-span. Nor will it engage in a discussion of the other main leg of the banking union thus far, the Single Resolution Board (SRB)'s resolution powers or the many cases against the SRB pending before the CJEU[6]. This paper focuses on selected institutional law issues around banking union. Context, transparency, review and culture are my points of focus. The expected strengthening of Economic and Monetary Union (EMU)[7] and ad hoc impressions of the SSM's operation, also as an alternate member of the Administrative Board of Review[8], provide inspiration for the following observations, intended as a contribution to the on-going conversation on the SSM.

2. *Context*

a) Cascade regulation

The Single Rulebook, and the actual prudential standards applied <on the ground> on the basis of national legislation, regulations and circulars, are the result of a cascade of regulation that often starts at the global level and works its way down to the workplace. Generic standards that are officially non-binding to third parties emanate from the Financial Stability Board (FSB) and the Basle Committee on Banking Supervision (BCBS) and translate into EU rules, either regulations or directives, that are 'filled in' by implementing regulations (regulatory technical standards (RTS) under Article 290 TFEU and implementing technical standards (ITS) under Article 291 TFEU), and by Guidelines, Recommendations and Opinions of the European

[6] Some 90 cases concern Decision SRB/EES/2017/08 of 7 June 2017 establishing the resolution scheme in respect of *Banco Popular Español S.A.*, and similar issues concerning the resolution of *Banco Popular*. See, by way of example, Case T-478/17 (*Mutualidad de la Abogacía and Hermandad Nacional de Arquitectos Superiores y Químicos* v *SRB*), OJ C 318/18, 25 September 2017. There are also proceedings pending on this resolution against the ECB and the Commission.

[7] See the Commission's deepening package in respect of the EMU of 6 December 2017, at: https://ec.europa.eu/info/publications/economy-finance/completing-europes-economic-and-monetary-union-policy-package_en. The Commission's Communication Further Steps Towards Completing Europe's Economic and Monetary Union: A Roadmap, COM(2017) 821 final, at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0821&from=EN.

[8] It goes without saying that the observations in this paper and in my presentation are personal and do not reflect the views of the ABoR, of the ECB or of the SSM.

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Banking Authority (EBA) and/or the ECB[9]. Such EU standards sometimes need[10], and often are, further elaborated in national legislation, with secondary national law (ministerial decrees; supervisory authority norms) providing detail, and circulars[11] and practices and (reporting) forms[12] filling in the last dots. While the trend has clearly been towards Europeanisation, and harmonisation[13], of regulation and supervisory practices, the current state of affairs is still characterised by this 'cascade' regulation.

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There is the issue of identity of the norms (are the global standards accurately translated into domestic law and supervisory practices?) and the coincidence between the global and the local (are there, even slight, differences between the approach taken by the FSB or the BCBS and the continental and national regulators, whether through a conscious decision to deviate or by adopting an interpretation that others do not follow?). There is, also, the issue of local standards and practices 'filled in' by reference to the global standards sometimes without

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[9] A fine example of the complexity of cascade regulation was recently given, in respect of insurance supervision, by Professor J. Borgesius in *Het Verzekerings-Archief*, No. 2 – 2017: *Tien jaar verzekeringsrecht in de Wet op het financieel toezicht* (Ten years of insurance law in the Financial Supervision Act). Complaining about the lack of clarity of the Dutch Financial Supervision Act (*Wet financieel toezicht*, *Wft*), the author attributes its opacity to the 'layeredness' of the law. He notes that, beyond the statute itself, one needs to take into account a large number of statutory instruments and regulations issued by the Minister of Finance and the supervisory authorities. According to the author, the lack of clarity of the *Wft* is further due to the filling in of open statutory norms by the supervisors through a multitude of interpretations, best practices and Q&As (on-line answers to Frequently Asked Questions) to clarify the application of rules (i.e., 'pseudo-law' or 'soft law'); to its countless definitions, long and complex provisions, references in provisions to other provisions and to EU legislation; to its fragmented legislative history; and to the uncertainty whether a provision originates in EU law (and, if so, which EU legal act precisely) and must therefore be interpreted in a manner that conforms to the directive from which the provision derives. Moreover, in respect of EU legislation, directly effective delegated and implementing regulations apply (which, contrary to directives, cannot be implemented in the national statute), as well as dozens of guidelines of the European Supervisory Authorities.

[10] When directives are concerned.

[11] For a random recent example, see: *Circulaire NBB_2017_27* of 12 October 2017: *Circulaire betreffende de verwachtingen van de Bank inzake de kwaliteit van de gerapporteerde prudentiële en financiële gegevens/Circulaire relative aux attentes de la Banque en matière de qualité des données prudentielles et financières communiquées*, at: https://www.nbb.be/doc/cp/nl/2017/20171012_nbb_2017_27.pdf.

[12] Sometimes, reporting forms are contained in EU secondary, or tertiary, legislation. See ECB Regulation (EU) 2017/1538 of 25 August 2017 amending Regulation (EU) 2015/534 on reporting of supervisory financial information (ECB/2017/25) OJ L 240/1, 19 September 2017.

[13] The ECB has already vigorously addressed 'Options and Discretions' (OND) in its on-going campaign to unify Euro Area prudential rules. See Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4), OJ L 78/60, 24 March 2016; Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9), OJ L 101/156, 13 April 2017; Recommendation of the ECB of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/10), OJ C 120/2, 13 April 2017, and the ECB Guide on options and discretions available in Union law, at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ecb_guide_options_discretions.en.pdf.

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proper grounds in the applicable law, which may leave legal and compliance departments of the supervised entities baffled how to respond to the appurtenant supervisory requests.

While supervision is clearly trending in the proper direction, in the Euro Area, towards harmonisation and convergence, in practice, the cascade effect is still felt. It cannot be <outlawed> if we cherish global cooperation and value working towards a world-wide level playing field for financial sector operators, but it may be limited by an effort of consistent reduction of the ambiguity that results from the multiple sources of prudential (and conduct-of-business) supervision.

b) Strengthening the Single Rulebook

A first step would be for the Commission to be much bolder in harmonising prudential law. Relying to a large extent on national law is not going to work in the long run. The main elements of the Single Rulebook are the Capital Requirements Regulation[14] and the Capital Requirements Directive IV[15], with the latter implemented in 19 national pieces of legislation[16]. The convergence drive undertaken by the EBA for the Union at large, and by the ECB for the Euro Area, helps to effectively harmonise standards but more is needed. Short of an overhaul of CRD IV to adopt its contents in a regulation[17] – for which additional powers may be needed at EU level[18] – first steps may be undertaken already. Allow me to mention a few elements:

1. Options and discretions (ONDs) should be limited to the bare minimum, and become subject to supervisory, not legislative discretion;

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[14] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, *corrigenda* in OJ L 321/6, 30 November 2013.

[15] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338, 27 June 2013; *corrigendum* in OJ L 208/73, 2 August 2013, and *addendum* in L 60/69, 28 February 2014.

[16] Of course, into 28 pieces of national legislation as they concern EU law. The focus being on the Euro Area, the figure of nineteen is mentioned. The Euro Area States are: Belgium, Germany, Estonia, Ireland, Greece, Spain, Estonia, Germany, France, Ireland, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Luxembourg, Austria, the Netherlands, Portugal, Slovenia, Slovakia and Finland.

[17] For a proposal to adopt a European Banking Act, see Matthias Lehmann, *Single Supervisory Mechanism Without Regulatory Harmonisation? Introducing a European Banking Act and a 'CRR Light' for Smaller Institutions*, European Banking Institute Working Paper Series 2017 - no. 3, at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2912166.

[18] The scope for adopting regulations is considered limited by Karl-Philipp Wojcik [reference to ZIFO conference Amsterdam, 14 June 2017 or later publication]

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2. A further harmonisation of the scope of prudential supervision by aligning the definitions of 'credit institution' seems worthwhile to explore[19];
3. Europe-wide specifics on Fit & Proper (FAP) assessments should replace the current wide disparity between supervisors insisting on prior vetting of candidate board members and those content to intervene *ex post* only, and between supervisory authorities' approaches to FAP assessments and their embedment in procedural safeguards[20];
4. The adoption of bank holding company (BHC) regulation, to ensure that prudential supervision is aligned with economic reality and with actual command structures in banking groups[21] – an issue on which an important step in the right direction has already been taken by the Commission in its proposal for amending the CRR/CRDIV package[22];
5. Exploring whether the ECB 'power extensions' of 2016 and 2017, when the ECB, in the latter case with explicit support of the Commission, notified supervised entities of the assumption of supervision in respect of a number of hitherto national competences[23], can be included in EU legislation. In other words: can these specific national powers be included in the SSM Regulation[24] as explicit ECB competences?[25]

[19] See the EBA Report of 27 November 2014: *Report to the European Commission on the perimeter of credit institutions established in the Member States*, at: https://www.eba.europa.eu/documents/10180/534414/2014+11+27+-+EBA+Report+-+Credit+institutions.pdf.

[20] On this, see section 4.3.1 of Concetta Brescia Morra, René Smits, Andrea Magliari, *The Administrative Board of Review of the European Central Bank: Experience After 2 Years*, Eur Bus Org Law Rev (2017) 18:567–589; DOI 10.1007/s40804-017-0081-3.

[21] See section 4.3.2 of the co-authored publication mentioned in the previous footnote.

[22] Commission's Proposal for a Directive amending Directive 2013/36/EU, Explanatory Memorandum, p. 12. See http://ec.europa.eu/finance/bank/regcapital/crr-crd-review/index_en.htm. For a comparative legal perspective, see John Taylor and myself, *Bank Holding Company Regulation in Kenya, Nigeria and South Africa: A Comparative Inventory and a Call for Pan-African Regulation*, Journal of Banking Regulation, July 2017, pp. 1-36, available at: http://rdcu.be/uCnj., and at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881819.

[23] The ECB 'clarified' which "specific supervisory powers granted under national law which are not explicitly mentioned in Union law" nevertheless fall within the scope of the ECB's direct powers. See: *Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law*, letter SSM/2017/0140 of 31 March 2017, at: https://www.bankingsupervision.europa.eu/banking/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?abdf436e51b6ba34d4c53334f0197612. The letter sent out in the summer of 2016 is not separately available on the banking supervision website (https://www.bankingsupervision.europa.eu/banking/letterstobanks/html/index.en.html), but it is contained in Annex I to the 2017 letter.

[24] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29 October 2013.

[25] See the section on *Application of national law - supervisory competences under national law declared within the ECB's scope of powers* in my paper for the Conference *The New ECB in Comparative Perspectives*, held at the European University Institute, 19-20 September 2017: ***Competences and alignment in an emerging future*** *After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*, WP 2017/077, October 2017;

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c) EMU strengthening

Strengthening of EMU and reconstituting the European Union are on the agenda. Commission President Jean-Claude Juncker[26] and French President Emmanuel Macron[27] both sketched a horizon of changes to strengthen the Union[28]. The Commission's package of proposals for the deepening of Europe's EMU includes a proposal to transform the European Stability Mechanism (ESM) into a European Monetary Fund (EMF)[29], within the framework of Union law[30]. In this context, it will also be important to ensure an efficient decision-making process that will allow for a swift deployment of the backstop, in last-resort situations. This should make banking union more resilient.

In the same context of strengthening EMU, a renewed approach to Lender of Last Resort (LOLR) assistance, or Emergency Liquidity Assistance (ELA), is in order. As I did in the past and recently elsewhere, I plead for the Eurosystem's "erroneous interpretation" of its law[31] to be remedied, with direct ECB responsibility for ELA acknowledged, initially at least for the significant banks under its direct supervision[32]. Since the time of presenting this paper, high-level support for centralising ELA has finally materialised, in the person of ECB President Mario

at the ADEMU website: http://ademu-project.eu/publications/working-papers/; see: http://ademu-project.eu/wp-content/uploads/2017/12/0077-Competences-and-alignment-in-an-emerging-future.pdf.

[26] In his September 2017 STOU address, at: https://ec.europa.eu/commission/state-union-2017_en.

[27] *Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie, démocratique,* Paris, 26 September 2017, at: http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/.

[28] See Nicolas Véron's *instructive Europe's fourfold union: Updating the 2012 vision,* Bruegel Policy Contribution Issue n˚23 | September 2017, at: http://bruegel.org/wp-content/uploads/2017/09/PC-23-2017-fourfold-union-1.pdf.

[29] See: *Proposal for a Council Regulation on the establishment of the European Monetary Fund*, COM(2017) 827 final, 6 December 2017, at: http://eur-lex.europa.eu/resource.html?uri=cellar:050797ec-db5b-11e7-a506-01aa75ed71a1.0002.02/DOC_1&format=PDF; and the *Annex to the Proposal for a Council Regulation on the establishment of the European Monetary Fund*, COM(2017) 827 final, 6 December 2017, at: http://eur-lex.europa.eu/resource.html?uri=cellar:050797ec-db5b-11e7-a506-01aa75ed71a1.0002.02/DOC_2&format=PDF.

[30] See President Juncker's State of the Union Address 2017 - Proposals for the future of Europe that can be implemented on the basis of the Lisbon Treaty,

[31] Namely the auto-limitation of the ECB's own competences by relying on Article 14.4 ESCB Statute for ELA granted by National Central Banks (NCBs) in the purported exercise of a national competence.

[32] See my paper ***Competences and alignment in an emerging future*** *After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*, WP 2017/077, mentioned in footnote 25 above.

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Draghi during interventions at the European Parliament[33] and at a press conference[34]. Unfortunately, the erroneous legal approach seems to be followed where the ECB President considers legal change a prerequisite for ELA centralisation, an analysis I respectfully dispute.

3. *Transparency*

a) Generally

With the SSM, new means of accountability have been introduced. Articles 20 (European Parliament, Council, Commission and Euro Group) and 21 (national parliaments) and the relevant additional documents (interinstitutional agreement[35], MoU[36]) of the SSM Regulation heralded a new level of reporting, interaction and feedback for the ECB. The extent to which such accountability stretches may become clear when reading the letter[37] from Supervisory Board Chair Danièle Nouy to European Parliament President Antonio Tajani on the draft addendum to the ECB Guidance to banks on non-performing loans (NPLs)[38].

[33] "The ELA policy should be changed and I personally have argued several times for a centralisation of ELA. This is a remnant from a past time, but to change it we ought to have the agreement of all the members of the governing council, namely all countries in fact. They have to decide that they would abandon this remnant of national sovereignty in monetary policy, because that is what it is." See the Transcript of ECON Committee hearing, Monetary dialogue with Mario Draghi, President of the ECB, 26 February 2018, at: https://www.ecb.europa.eu/pub/pdf/annex/ecb.sp180226_1_transcript.en.pdf?417780fc4802bedec405eb034836a701.

[34] "My view – which by the way we had this experience, we had other experiences – where the conclusion can't be other than – ELA should be centralised. Basically, it should be given through a process where the Governing Council participates and discusses and, in the end, decides. This is not possible legally now so it's an evolution of the system that at present time I judge unsatisfactory and needs to be changed." See, Mario Draghi, Vítor Constâncio: Introductory statement to the press conference (with Q&A), 8 March 2018, at: https://www.ecb.europa.eu/press/pressconf/2018/html/ecb.is180308.en.html.

[35] Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU), OJ L 320/1, 30 November 2013.

[36] Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), at: https://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf.

[37] Letter from Danièle Nouy, Chair of the Supervisory Board, to Mr Tajani, President of the European Parliament, regarding the draft addendum to the ECB Guidance to banks on non-performing loans, at: https://www.ecb.europa.eu/pub/pdf/other/ecb.mepletter171013_tajani_dn.en.pdf?d638aa08cb32692aa638c6908113c6ba.

[38] *Addendum to the ECB Guidance to banks on nonperforming loans: Prudential provisioning backstop for non-performing exposures*, at: https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl2/ssm.npl_addendum_draft_201710.en.pdf.

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Some would argue that as long as the principal cannot change the conduct of the agent, or the composition of its organs, true accountability is absent[39]. Yet, in the area of prudential supervision, the legislator can change supervisory law far more easily (even though through unanimity in the Council only and without consent by the European Parliament[40]) than on the monetary front, where full treaty change would be needed to steer the independent central bank into a different direction.

Yet, the impression exists that a lot could be gained by increased transparency in the area of prudential supervision[41]. Transparency makes visible the contribution made to the purposes of banking union. These encompass the safety and soundness of credit institutions, the stability of the financial system and the unity and integrity of the internal market, and include the protection of depositors[42].

Allow me to explore a few specific instances of institutional/legal transparency and of economic/societal transparency here.

b) Memoranda of Understanding

With the internal market programme of the 1980s culminating in the single market deadline of 31 December 1992 for a system of mutual recognition and home State control, Memoranda of Understanding (MoUs) became an instrument to organize practical cooperation between home and host State supervisors. MoUs are used widely among authorities to provide the framework for day-to-day cooperation across the financial sector, and beyond. Ever since, in

[39] See Fabian Amtenbrink and Menelaos Markakis, *Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism,* WP 2017/081, at: http://ademu-project.eu/wp-content/uploads/2018/01/0081-Towards-a-meaningful-prudential-supervision-in-the-euro-area.pdf.

[40] The consent requirement for the European Parliament was introduced in the provision on the ECB's potential prudential tasks in the Maastricht Treaty but, regrettably, removed in the Lisbon Treaty: compare Article 105(6) EC Treaty with Article 127(6) TFEU.

[41] See, also, the European Parliament's call to the ECB in paragraph 15 of its *Resolution of 15 February 2017 on Banking Union – Annual Report 2016* (2016/2247(INI)): "Reiterates the need to ensure higher transparency on the full set of supervisory practices, in particular in the SREP cycle; asks the ECB to publish performance indicators and metrics in order to demonstrate supervisory effectiveness and enhance its external accountability; reiterates its call for more transparency with regard to Pillar 2 decisions and justifications; calls on the ECB to publish Joint Supervisory Standards;" at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0041+0+DOC+PDF+V0//EN.

[42] See, Article 1 of, and recitals 30 and 65 to, the SSM Regulation. Other recitals reiterate the safety and soundness of credit institutions (17, 25, 26) and financial stability (2 and 27), while also mentioning the functioning of the internal market (2, 3, 12 and 30), which is also mentioned in Article 1, and emphasising the need for "supervision of the highest quality, unfettered by other, non-prudential considerations" (12 and 83).

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the 1990s, MoUs became *en vogue*, I have wondered why these semi-statutory instruments were kept confidential. Where they establish supervisory cooperation affecting third parties, such as the banks supervised, new entrants to the banking market and customers whose business is affected by the way supervision is organized, MoUs should, in my view, be publicly accessible. The public and the oversight bodies of supervisors (auditors, parliament, government) should be able to read what practical arrangements have been made and assess their functioning.

Keeping MoUs confidential is at variance with the demands of public accountability and transparency. There may be valid reasons to keep (certain parts of) MoUs from the public eye – for instance when confidential means of communication are specified or personal privacy or business secrets are at stake. That should not prevent the existence and the contents of MoUs to be publicly available, of interest to parties as diverse as MEPs, national government ministers, European Commissioners, banks and their clients and researchers.

An example of a transparent supervisory authority is the *Finantsinspektsioon* (the Estonian Financial Supervisory Authority), whose website[43] contains a list of MoUs most of which are accessible on-line, even those relating to the supervision of specific financial groups, although a number of such institution-specific MoUs are only mentioned and not published. The MoUs in the context of the SSM are not included on this NCA site. Neither have I been able to find a systematic overview of such MoUs on the ECB website. What the ECB does publish are occasional MoUs, such as the understanding with the SRB[44] and the recent MoU with the Office of Financial Research (OFR)[45], the US agency supporting the American equivalent of the European Systemic Risk Board (ESRB), the Financial Stability Oversight Council (FSOC)[46].

[43] See: https://www.fi.ee/index.php?id=2574.
[44] Memorandum of Understanding between the Single Resolution Board and the European Central Bank in respect of cooperation and information exchange, 22 December 2015, at: https://srb.europa.eu/sites/srbsite/files/en_mou_ecb_srb_cooperation_information_exchange_f_sign_.pdf.
[45] Memorandum of Understanding concerning Consultation, Cooperation and the Exchange of Information, n 30 May 2017, at: https://www.ecb.europa.eu/pub/pdf/other/MoU_ECB-OFR_concerning_consultation_cooperation_and_exchange_of_information_201705.pdf?07efa4b5171670e76d67191239869afe.
[46] The OFR is a US government agency instituted by the Dodd-Frank Act. Its website states that it is "to promote financial stability by looking across the financial system to measure and analyze risks, perform essential research, and collect and standardize financial data and to assist the [FSOC]"; see: https://www.financialresearch.gov/about/.

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In a speech in May 2017, ECB Executive Board Member and Supervisory Board Vice-Chair Sabine Lautenschläger mentioned MoUs with authorities in and outside of the EU, without specifying their number or contents[47]. Julie Dickson, as a Member of the Supervisory Board, reported the existence of an MoU on systemic branches from outside the Euro Area in a presentation[48] in Mauritius earlier in 2017. More, and yet still only partial, transparency was provided by Ignazio Angeloni in April 2015[49]. The Supervisory Board member recalled:

"Traditionally cross-border cooperation has been codified, on a purely voluntary basis, in Memoranda of Understanding, or MoUs. Over the years, MoUs have piled up on a variety of issues (information exchanges, coordinated interventions, crisis management, etc.), typically on a bilateral basis, with little or no overall vision or control."

Not only was there no vision or control, the proliferation of MoUs apparently even confused the supervisors, as Angeloni continued:

"It is difficult even to understand how many of these MoUs exist, let alone make overall sense of them. Evidently, MoUs agreed between authorities that are now in the SSM have lost their purpose: a welcome simplification in itself. But there remain, according to our tentative counting, around 40 MoUs between SSM and non-SSM EU authorities, as well as around 170 MoUs between authorities of the SSM and third countries."

He indicated the ECB has taken over the MoUs between Euro Area States with some 80 third countries, a daunting task[50], indeed. However, the outside world is left guessing which third countries, what changes and which outcome this exercise produced.

My invitation to the ECB is to make the work undertaken on MoU restructuring public and show the myriad connections between authorities. Let the outside world then judge whether there is 'overall vision or control' (Angeloni's words characterizing the lack of both when the

[47] *European banking supervision, global cooperation and challenges for banks*, presentation before the International Banking Federation on 18 May 2017, at: https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170518_slides.en.pdf.

[48] Julie Dickson, *Session III: International and European Experience on Regulation, Supervision, and Resolution of CrossBorder Banks*, Mauritius, 2 February 2017, at: https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/se170202_slides.en.pdf.

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

[50] In Angeloni's own words: "As you can imagine, compiling a census of this "universe" requires a lot of work: mapping the existence of agreements, analysing their contents and developing contacts with the counterparties. Our next step is to define the ECB's own cooperation agreements, as coherently as possible across counterparties. To this aim, the ECB is working on a standard template to be negotiated with non-SSM partners, leveraging on national experience, but reflecting the new European imprint of the SSM."

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ECB faced the MoU landscape upon taking over in November 2014) and be able to assess the arrangements in operation below the surface of legislative acts and, as yet, below the radar.

A good example may be ESMA's list of MoUs on its website[51]. Worryingly, though, this list fails to reproduce an ESMA-ECB MoU on exchange of information announced in a press release[52] but itself not published. According to the press release, this MoU also contains

> "a template MoU to be used between national authorities responsible for markets in financial instruments and the ECB. This template MoU provides for a common framework for cooperation and may be agreed and complemented bilaterally, on a voluntary basis for the performance, respectively, of the tasks under the SSM Regulation and those under MIFID".

Again, I fail to find this template that apparently governs relationships between national market conduct authorities and the ECB.

What one does find at the ECB's website is the multilateral MoU on financial stability of 2008, a document[53] that miserably failed[54] to produce effect when the crisis broke. It is of interest to historians, marking the sharp contrast to where we stand now, with the SSM.

Respectfully, I submit that the ECB can do better than this, and provide transparency, perhaps as a prelude to ultimately encompassing the MoUs in an overall text of a different legal nature. As an institutional lawyer, I am not confident that secret MoUs are the appropriate means to codify coordination arrangements that affect third parties[55] and must interest principals and oversight bodies[56].

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[51] At: https://www.esma.europa.eu/databases-library/esma-library/mou.

[52] *ESMA, national securities regulators and ECB to exchange information*, 8 February 2016, at: https://www.esma.europa.eu/press-news/esma-news/esma-national-securities-regulators-and-ecb-exchange-information.

[53] MEMORANDUM OF UNDERSTANDING ON COOPERATION BETWEEN THE FINANCIAL SUPERVISORY AUTHORITIES, CENTRAL BANKS AND FINANCE MINISTRIES OF THE EUROPEAN UNION ON CROSS-BORDER FINANCIAL STABILITY, 1 June 2008, at: https://www.ecb.europa.eu/pub/pdf/other/mou-financialstability2008en.pdf.

[54] Allow me to reproduce what Angeloni had to say on this text, using an exculpatory understatement in his assessment of its effects: "A landmark was the 2008 Memorandum of Understanding on cooperation between financial supervisory authorities, central banks and finance ministries of the European Union on cross-border financial stability. It was signed by the 114 authorities with competence on resolution in the 27 EU Member States. The text was made public to signal the EU's preparedness for potential banking crises. Unfortunately, it did not prove very helpful during the recent crisis."

[55] Such as banks and their clients.

[56] Such as the European Parliament, national parliaments, national governments, the European Commission, the European Court of Auditors (ECA) and its national counterparts.

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c) Banking Supervision Manual: an 'audit gap'?

In the Staff document supporting its recent SSM Review Report[57], while "calling for the ECB's accountability [to be] assessed holistically in light of all accountability arrangements to which it is subject", the Commission mentions what the European Court of Auditors (ECA) referred to as an 'audit gap'[58], a concern that is shared by the European Parliament[59]. The ECB itself disputes that such an 'audit gap' exists[60].

The ECA's report on the SSM notes the different approach to supervisory transparency when it comes to supervision manuals: fully public in the US, not in the United Kingdom and partially only within the Euro Area[61]. In its replies, the ECB seems to take a somewhat defensive approach when it comes to transparency, noting that it is sufficiently open[62]. Is it not rather for those outside the authority to assess whether there is sufficient openness than for the public authority itself, naturally always respecting the need for confidentiality on sensitive data and planned supervisory instruments? As I cannot oversee the sensitivity of the Supervision Manual, I do not judge on whether it should be made public and restrict myself to remark that the reasoning for not doing so seems not yet to be fully convincing.

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[57] Commission Staff Working Document Accompanying the document *Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013*, {COM(2017) 591 final}, Brussels, 11.10.2017, SWD(2017) 336 final, available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/single-supervisory-mechanism_en.

[58] Special Report of the European Court of Auditors ECA 2016/29 *Single Supervisory Mechanism – Good Start but Further Improvements Needed*, at: http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=39744.

[59] *European Parliament Resolution of 15 February 2017 on Banking Union – Annual Report 2016* (2016/2247(INI)), paragraph 23 whereof reads as follows: "Shares the opinion of the ECA that an audit gap has emerged since the establishment of the SSM; is concerned that owing to limitations imposed by the ECB on the ECA's access to documents, important areas are left unaudited; urges the ECB to fully cooperate with the ECA to enable it to exercise its mandate and thereby enhance accountability;"

[60] See, the ECB's reply to the ECA, on page 128 of the ECA Report. The ECB also notes that "there is no lack of cooperation, but a different interpretation of the remit of the audit" between the ECA and itself (page 129).

[61] "The ECB has taken a selective approach (i.e. short sections only) to disclosure of the SSM Supervisory Manual, which defines the processes and the methodology behind the SREP for the supervision of credit institutions and the procedures for cooperation both within the SSM and with other authorities. In other jurisdictions the approach to publication varies. For example, in the United States supervision manuals are published on the official website of the supervisory authorities, but the Prudential Regulation Authority at the Bank of England does not publish its internal manual." (paragraph 94 of the ECA SSM Special Report)

[62] Referring to Guides and the SREP Methodology Booklet, the ECB notes: "These documents outlining the ECB's policy stances and practices are of more relevance for credit institutions than the internal Supervisory Manual. (…) In addition, the ECB uses other communication tools (workshops with banks, speeches, supervisory dialogue with the JSTs, press releases, conferences, calls with CEOs) to inform the supervised entities about the ECB's supervisory approaches. In conclusion, the ECB is of the opinion that the information disclosed to supervised entities is sufficient for a proper understanding of SSM supervision." (page 126 of the ECA SSM Special Report).

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d) Privacy statements

On the widely-discussed issue of privacy, much in attention with the prospect of the General Data Protection Regulation[63] applicable as of May 2018, one may wonder at the absence of dedicated and systematic publication of the privacy statements used in the context of the SSM. I have been able to find several such statements on the website of the Belgian and French NCAs[64] and on the ECB's dedicated banking supervision[65] website[66].

e) Supervisory data

In the past, academic writing has suggested that European supervisors provide more data on banks. I recall a *Bruegel* study that made this criticism[67] and am not aware of major changes in this area since then. I am not the expert to make specific suggestions on this. Yet, it is striking that there have been calls for more transparency. The ECB seems to have been responsive, with the organization of a *Supervisory reporting conference* which "introduce[d] the publication of new banking data to enhance supervision transparency."[68]

f) ABoR and judicial protection

An issue that, as a lawyer, I am an expert on, is the transparency of ABoR Opinions. The current situation is perfectly clear. As ABoR functions as an element in the decision-making process of the SSM, as graphically depicted on the ECB's Banking Supervision website (see the representation below), its Opinions are not considered fit for publication.

[63] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 119/1, 4 May 2016.
[64] *Licensing ECB Privacy Statement, at:* https://www.nbb.be/doc/cp/eng/2015/ecb_privacy_statement.pdf; *Qualifying Holdings ECB Privacy Statement, at:* https://www.nbb.be/doc/cp/fr/2015/nbb_2015_qualifying_holdings.pdf; *FAP Procedure ECB Privacy Statement, at:* https://acpr.banque-france.fr/sites/default/files/fit-and-proper-privacy-statement-gb.pdf.
[65] Privacy statement for the breach reporting mechanism (BRM), at: https://www.bankingsupervision.europa.eu/banking/breach/form/shared/pdf/BRM_privacy_statement.pdf.
[66] See *Specific privacy statement for public consultations*, at: https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/specific_privacy_statement_public_consultations.en.pdf.
[67] Topher Gandrud, Mark Hallerberg and Nicolas Véron, *The European Union remains a laggard on banking supervisory transparency*, 10 May 2016, at: http://bruegel.org/2016/05/the-european-union-remains-a-laggard-on-banking-supervisory-transparency/.
[68] *Supervisory reporting conference*, 28 November 2016, at: https://www.bankingsupervision.europa.eu/press/conferences/sup_rep_conf/html/index.en.html.

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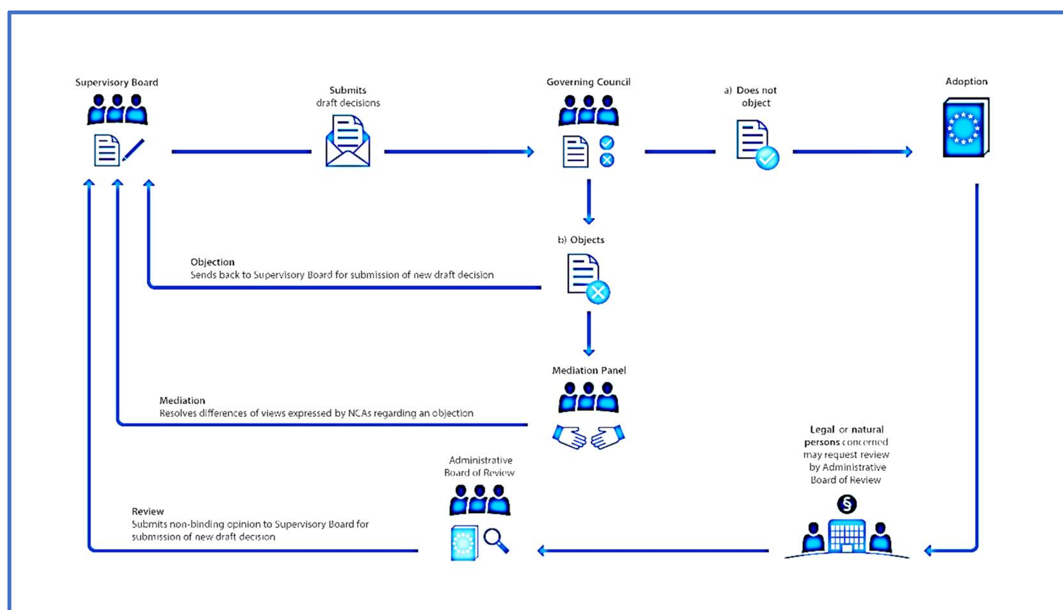

ABoR proceedings are confidential unless the Governing Council authorizes the ECB President to make the outcome of proceedings public[69]: a cumbersome procedure that does not allow the ABoR Chair, or an Alternate Member, to divulge specifics. Moreover, ABoR members are bound by professional secrecy as laid down in Article 37 of the ESCB Statute[70]. Recently, calls for more transparency have come from the Commission in its SSM Review Report[71]:

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

The supporting staff document[72] goes one step further by including the following sentence in its section on what it refers to as the "internal recourse mechanism":

"It is considered important that the ECB strikes the right balance when labelling documents as confidential, so as to thereby avoid any undue restrictions to the right of information of parties concerned by its decisions."

[69] Article 22(2) of Decision ECB/2014/16 of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (2014/360/EU), OJ L 175/47, 14 June 2014 (ABoR Decision).
[70] Article 22(1) ABoR Decision.
[71] *Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/201*3, {SWD(2017) 336 final}, Brussels, 11.10.2017, COM(2017) 591 final, page 5, at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0591&from=EN.
[72] See pages 14-15 of the Staff Working Document on what it refers to as the "internal recourse mechanism". Document SWD(2017) 336 final, available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/single-supervisory-mechanism_en.

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I couldn't agree more. After all, how are outsiders, principals[73] and those subject to prudential supervision itself, able to assess the functioning of the review mechanism, and appreciate its usefulness, if most of what ABoR does is not visible? So, what can be done, under present rules, or under new ones?

Let me begin my saying what ABoR already does. We made a commitment to present our work in fora and publications. Our Chair did so before a joint academic and practitioners' audience after one year[74], our Vice-Chair did likewise after two years[75], and together with her and Andrea Magliari, I co-authored an article on the first two years[76], which will appear in Dutch with an addendum on the third year[77]. Also, on the Banking Supervision website, ABoR's Chairman explained how the review panel is functioning[78]. The same site informs applicants on the low costs of coming before ABoR[79]. The Court does its part, too. In a landmark[80]

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[73] The Commission notes that "Overall, it appears that the Supervisory Board does react in its decisions to the comments made by the ABoR, but it is not possible for the Commission to assess to what extent such adjustments correspond to the substantial recommendations by ABoR and to what extent these recommendations are adequate." Document SWD(2017) 336 final.

[74] Jean-Paul Redouin, *The Administrative Board of Review – challenges and tasks after 1 year of the SSM*, EBI/ECB workshop: challenges for banks in a changing regulatory environment, Frankfurt am Main, 28 January 2016, at: http://www.ebi-europa.eu/wp-content/uploads/2016/12/20160128-Presentation-Dr-Jean-Paul-Redouin.pdf.

[75] Concetta Brescia Morra, *The experience and case law of the Board of Review of the SSM*, at the conference Reflection on the design and implementation of the European Banking Union held on 16 September 2016 in Bologna, organized by the University of Bologna and the European Banking Institute (EBI), at: http://www.ebi-europa.eu/wp-content/uploads/2016/12/Brescia-Morra.pdf.

[76] Concetta Brescia Morra, René Smits, Andrea Magliari, *The Administrative Board of Review of the European Central Bank: Experience After 2 Years*, Eur Bus Org Law Rev (2017) 18:567–589; DOI 10.1007/s40804-017-0081-3.

[77] Concetta Brescia Morra, René Smits, Andrea Magliari, *De* Administrative Board of Review *van de Europees Centrale Bank: de eerste ervaringen*, Tijdschrift voor Financieel Recht, 2018 no. 4.

[78] See: https://www.bankingsupervision.europa.eu/about/ssmexplained/html/abor.en.html.

[79] Fees are set at € 500 for natural persons and at € 5,000 for legal persons. See the *Guide to the costs of the review*, at: https://www.bankingsupervision.europa.eu/organisation/governance/shared/pdf/abor_cost_guide/guidecostsreview.en.pdf.

[80] This qualification is based on the General Court's finding that the prudential competences attributed to the ECB are exclusive EU competences, with the decentralised implementation of certain tasks delegated to NCAs, which hitherto were presumed to exercise a national competence. I elaborated on the judgment in my Paper for the Conference *The New ECB in Comparative Perspectives*, held at the European University Institute, 19-20 September 2017: ***Competences and alignment in an emerging future*** *After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*, soon available at the ADEMU website: http://ademu-project.eu/publications/working-papers/.

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judgment[81] of 16 May 2017, currently under appeal[82], the General Court found[83] that "in so far as the contested decision ruled in conformity with the proposal set out in the Administrative Board of Review's Opinion, it is an extension of that opinion and the explanations contained therein may be taken into account for the purpose of determining whether the contested decision contains a sufficient statement of reasons"[84]. Calling the second ECB decision, adopted after the ABoR's Opinion, "an extension" of ABoR's findings[85], may be a bold translation of the original French text[86]. Yet, it clearly makes the ABoR's input part of the process of adoption of the ECB's second decision and relies on ABoR's findings to assess the reasoning of the ECB in the second round. This approach of following the ABoR Opinion was repeated in the General Court's judgments in the cases by *Arkéa* against the ECB[87], in which the Court quotes[88] and endorses[89] the ABoR's opinion. This underscores the sensitive nature of revealing the ABoR's findings at an early stage.

What ABoR may do already is to provide a regular report of statistics, and not wait for the SSM Annual[90] report to do so, with considerable time-lag and with a single page devoted to administrative review. Interim accounts could be given, say, on a quarterly basis, of the number of review requests and ABoR Opinions adopted, as well as the latter's nature, i.e.

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[81] Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank vs. ECB*, judgment of 16 May 2017, ECLI:EU:T:2017:337.

[82] Case C-450/17 P, the appellant alleging that the General Court did not assess whether *L-Bank*, on the basis of the specific factual circumstances put forward by it, is to be classified as a less significant entity; reliance on only the English version of the SSM Regulation; inadequate reasoning by the ECB not identified by the Court; introduction of elements which are not the subject of the proceedings.

[83] Paragraph 127 of the *L-Bank* judgment.

[84] In French: "*dans la mesure où la décision attaquée a statué dans un sens conforme à la proposition figurant dans l'avis de la commission administrative de réexamen, elle s'inscrit dans le prolongement dudit avis et les explications qui y figurent peuvent être prises en compte aux fins d'examiner le caractère suffisamment motivé de la décision attaquée*".

[85] Paragraph 31 of the *L-Bank* judgment.

[86] Which merely states: "*l'avis de la commission administrative de réexamen, dans le prolongement duquel s'inscrit la décision attaquée*".

[87] Judgments of 13 December 2017 in Case T-712/15 (*Crédit Mutuel Arkéa v European Central Bank*); ECLI:EU:T:2017:900, under appeal: Case C-152/18 P; and in Case T-52/16 (*Crédit Mutuel Arkéa v European Central Bank*), ECLI:EU:T:2017:902, under appeal: Case C-153/18 P.

[88] Paragraphs 9-11 of the judgment in Case T-712/15.

[89] Paragraphs 51; 70; 120; 130-131; 147-148; 157-158 of the judgment in Case T-712/15.

[90] See the ECB Annual Report on supervisory activities 2017, paragraph 5.3.3, at: https://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf?63a120afab30be18171c083089709229.

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proposing abrogating the ECB's decision, its confirmation[91] or its replacement with an amended decision; whether suspension of the decision has been sought, and granted (or not); the nature of the contested issue (e.g., significance, SREP[92], FAP[93], corporate governance, administrative sanctions).

Providing more, e.g., the names of the applicants, or of their legal representatives, their nationality or the Member State of origin of the case, is likely to amount to unjustified publishing of confidential information. Even just apportioning cases according to State of origin and its nature may lead an informed insider to accurately guess the actual review case.

As ABoR's reasoning plays a role in the subsequent adoption of the second ECB decision, as the Commission acknowledged in its SSM Review Report, and will be played out before the Court in Luxembourg, it might be wise to keep it confidential until judicial follow-up proceedings have started, if these are pursued by the applicant. This is not always the case and may not be identifiable for outside observers as the case description at the Curia website and in the Official Journal may, or may not, specify proceedings as <post-ABoR>.

What might be feasible, with due permission from the Governing Council[94], is to summarise the review case in the abstract: informing about the issues dealt with and the ABoR's reasoning and position on the ECB decision under review. This might be done once a case has been closed, and after the time for lodging an appeal before the Court has lapsed. This is two months after the second ECB decision.

In case of judicial appeal, one might also envisage the summary to appear on the ECB's website, as the ABoR's reasoning will play out at court in any case. Of course, this may imply

[91] "replaced with a decision of identical content", in the wording of Article 16(2) ABoR Decision which mentions these three options for ABoR's opinion to propose to the Supervisory Board. See, also, Article 24(7) SSM Regulation.

[92] SREP: Supervisory Review and Evaluation Process: Articles 104-107 CRD IV, and Article 4(1)(f) SSM Regulation. See: https://www.bankingsupervision.europa.eu/about/ssmexplained/html/srep.en.html, and the *SSM SREP Methodology Booklet* at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/srep_methodology_booklet_2016.en.pdf?486e2833820b13c740ffb49a0ee57672. The SREP booklet 2017 edition, to be applied in 2018, is at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep_methodology_booklet_2017.en.pdf?508ca0e386f9b91369820bc927863456.

[93] Fit And Proper assessments. See the ECB's *Guide to fit and proper assessments*, at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705.en.pdf.

[94] Based on Article 22(2) ABoR Decision or on an amendment to the ABoR Decision, a step which the Governing Council can take at any time.

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an advantage to one of the parties: the ECB if the ABoR endorsed its decision, or the appealing party when the ABoR found for him/her.

Beyond the parties and those interested (the banking industry; the supervisor's 'supervisors', i.e., parliaments, governments, auditors; the general public; and the specialist academic), abstracts may inform the General Court and be helpful to 'decipher' what sometimes are complex issues. The discussion on the options for more transparency will undoubtedly resume.

What I can contribute, personally, is helping to make banking union-related case law more accessible: this I do, together with Federico Della Negra, at the website of the European Banking Institute with a regularly updated overview of cases pending and decided[95]. The list indicates that it is based on public sources. Therefore, a case is identified as <post-ABoR> only when this information is in the public domain.

In the meantime, apart from the influence of the ABoR on Court proceedings, one may note the effect of administrative review on the authority subject to this independent second-look. As the Commission noted in its SSM Review Report[96], "the ECB maintains that ABoR opinions have had an influence in the ECB's supervisory practice broader than the individual cases to which they relate to." My own anecdotal evidence supports this statement; ABoR reviews have an effect beyond the case at hand and may lead to reconsideration of practices within the SSM.

g) Feedback mechanisms

Appropriate feedback mechanisms for banks, bank clients, and collectives for the common good seem needed for banking supervision to function properly and reach out to those it serves. A few words on this aspect are in order after the first three years.

The Banking Supervision website has a breach reporting mechanism (BRM)[97] section, as prescribed by Article 23 SSM Regulation. This 'whistle-blower' section[98] on the ECB's supervision should enable reporting to the ECB on experiences with supervision or with banks

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[95] See: *The Banking Union and Union Courts: overview of cases as at 11 March 2018 (public sources)*, at: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

[96] Page 5 of the SSM Review Report of 11 October 2017.

[97] See: https://www.bankingsupervision.europa.eu/banking/breach/html/index.en.html and https://www.bankingsupervision.europa.eu/banking/breach/form/shared/pdf/BRM_important_legal_information.pdf.

[98] See, also: https://www.bankingsupervision.europa.eu/about/ssmexplained/html/whistleblowers.en.html.

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that are relevant for the SSM authorities. Two types of reports are invited: concerning a breach of Union law by supervised entities or by competent authorities.

Examples of such reports might be: What goes on at a banking group which may not be within SSM powers but is nevertheless relevant to know? How does this authorised bank actually treat its clients, or what practices are prevalent at another entity (mis-selling of bail-in-able instruments or financing dodgy deals with criminal organisations in the private or public sphere)? Understandably, the site warns that NCAs should be contacted "if the breach relates to consumer protection or the implementation of anti-money laundering rules by supervised entities." Then, "[t]he ECB is not competent to investigate these breaches and does not provide any legal advice on these matters". Yet, it would seem in the ECB's interest to at least know of such practices and forward information to NCAs. Such breaches may be very relevant for the assessment of bank board members or key function holders as fit and proper.

Another issue that may be reported concerns interaction by a national authority with a supervised entity in a manner that might contradict the attribution of competences within the SSM. Thus, the ECB might hear about a local NCA imposing branch capital to be kept within its own jurisdiction in violation of the single market and single currency area principles, or about an NCA blocking a new entrant unto the banking market for spurious reasons by keeping its authorisation request from going to Frankfurt. This is not to say such that such practices occur in reality but to face the possibility that they *might* and confront the issue of how to become aware of this. After all, having the ECB as the guardian of the banking market's entrance only achieves its aim of "supervision of the highest quality unfettered by other, non-prudential considerations" if NCAs refrain from keeping their domestic banking markets shielded from newcomers or maverick operators that might disrupt the market in the interest of the customers and of the national economy without posing a threat to financial stability[99].

Whether the option to report breaches on-line[100] is sufficient for the ECB to get to know practices that may theoretically occur is something that cannot appreciated from the outside.

[99] Again, there is no implication that NCAs so act. The intention is to ensure the ECB would know of such practices if they *would* occur.
[100] On which the European Data Protection Supervisor has issued a report: Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Central Bank regarding the "Breach Reporting Mechanism (BRM)", Brussels, 3 November 2014 (2014-0871), at: https://edps.europa.eu/sites/edp/files/publication/14-12-08_breach_reporting_mechanism_ecb_en.pdf.

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The basic attitude exposed by the ECB is a welcoming one: "Reports on violations are an effective tool for bringing incidents of business misconduct to light."[101] Also, the Annual Report[102] extensively reports on the reported breaches, noting their numbers (89 in 2017, of which 61 breaches of relevant EU law), the issues they concerned (85% were on governance) and the follow-up actions taken, including interaction with the supervised entity (42%) or on-site inspections (11%).

4. *Concluding remarks*

The SSM operates in an institutional context that is fast changing, with the momentum towards EU and EA reform, the approach of Brexit, and technological changes (fintech, blockchain, artificial intelligence) the effects of which on banks and supervisors are still to be fully explored and realised.

This paper supports enhanced transparency in prudential supervision and regulatory change: a definitive move from directives to regulations; stronger powers for BHC oversight, aligning supervision to corporate reality; adoption of national provisions which the ECB now supervises (the Summer of 2016 and Spring of 2017 letters) as EU law into the realm of EU law proper. Recently, one of the 'intersection issues' that I discussed elsewhere[103], gained great prominence: the anti-money laundering and counter-terrorist financing (AML/CTF)

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[101] *One more step towards a better Europe: building banking supervision*, Opinion piece by Danièle Nouy, Chair of the Supervisory Board of the Single Supervisory Mechanism (SSM), published in various European newspapers on 30 September 2014. It contained the following passage: "The ECB will also establish a reporting mechanism in order to encourage and enable persons with knowledge of potential breaches of relevant EU law by banks to report such breaches to the ECB. Such reports on violations are an effective tool for bringing incidents of business misconduct to light."
See: https://www.bankingsupervision.europa.eu/press/interviews/date/2014/html/sn140930.en.html.

[102] *ECB Annual Report on supervisory activities 2017*, at https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/index.en.html.

[103] See the paragraph on *Conflicting, adjacent or overlapping competences* in the section on *Intersection issues between national and Union law: competences and application of national law* in ADEMU WP 2017/77 mentioned in footnote 25 above.

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competences[104]. These have specifically been reserved for national authorities[105] whilst the interaction with core prudential issues is crystal clear. Further alignment of AML/CTF provisions[106], possibly enactment of an AML/CTF Regulation, and the entrustment of enforcement to a EU-wide body, to cooperate closely with financial sector supervisors, is needed.

Congratulations are due to the ECB for fostering a supervisory culture and a joint approach to oversight within the community of EA supervisors. Establishing the SSM in such a brief period, and continuing work on its improvements, are huge successes, arrived at against the odds in very challenging times for the ECB when its *raison d'être* was called into question.

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Awareness of the cultural element of the European project is crucial. This goes beyond language capabilities (important as they are: we need a second language to speak in amongst all Europeans, taught from an early age on) and sensitivity to different traditions and practices. This even goes beyond common Europe-wide media, that will develop with expanded language capabilities of the Europeans and with technology and social media. Consciousness of the cultural element extends to being aware of what Emmanuel Macron[107] called '*les intraduisibles'*, the words that mean something different to different ears, that have

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[104] See the Statement by Danièle Nouy, chair of the Supervisory Board of the ECB, of 22 February 2018, at: https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180222.en.html, which deserves a full quote:

> When creating the SSM framework, EU Member States chose to keep the responsibility for combatting money laundering at the national level.
>
> Breaches of anti-money laundering can be symptomatic of more deeply rooted governance deficiencies within a bank but the ECB does not have the investigative powers to uncover such deficiencies. This is the task of national anti-money laundering authorities. Only when such breaches have been established by the relevant national authority can the ECB take these facts into consideration for the purposes of its own tasks.

[105] Recitals 28 and 29 of the preamble to the SSM Regulation.

[106] Currently the 4AMLD (Fourth AML Directive): Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141/73, 5 June 2015. Amendments by the 5AMLD are forthcoming: the trialogue on the amendments proposed is scheduled to result in adoption of the amending directive in April 2018. For the text of the amending directive; see: http://www.europarl.europa.eu/RegData/commissions/econ/inag/2017/12-20/CJ12_AG(2017)616577_EN.pdf.

[107] In his conversation with the audience after his speech unfolding ideas for a reconstitution (*refondement*) of Europe: *Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie, démocratique,* Paris, 26 September 2017, at: http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/ and http://www.elysee.fr/videos/initiative-pour-l-europe-discours-du-president-de-la-republique-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/.

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an extra connotation that the speaker, or other listeners, may not be aware of. An example is the moral connotation of the word ‘debt’ in German and Dutch, for which English and French use a different term: *Schuld*/*schuld* translates as *debt*/*dette* as well as *guilt*/*culpabilité*. Raising one’s awareness of these matters will enable better understanding and better, deeper results in the conversations with fellow Europeans. As an additional bonus, such awareness raises one’s self-reflection and self-knowledge, thus fulfilling the philosophical imperative of γνῶθι σεαυτόν[108].

When speaking of this cultural element a danger lurks: that of giving the impression that only Europe is at stake. Let me correct such possible wrong interpretation: always, European integration should be undertaken from a basic openness to the Other that, in principle, extends to all; all of humanity, all sentient beings[109]. Also when defending European interests in the world, or when protecting Europe, our basic frame of mind should be one of openness and connection. European integration should not be an inward looking matter for our own benefit only. Instead, it should align itself with global developments towards inclusion and connection, developments which, when properly appreciated and put to use by policy makers and citizens alike, may unleash a fire with vast beneficial powers[110]. As, at the time of the London conference at which this paper was presented, global commemorations took place of the birth of Bahá’u’lláh, the founder of the Bahá’í faith[111] that emphasises the unity of humankind and of all religions, at their core, it is appropriate to remember this preferred attitude.

René Smits 8 April 2018.

[108] Know thyself: invitation of the ancient Greek philosophers, notably Socrates as reported by Plato.

[109] In respect of the injunction of Article 13 TFEU (underlining added, RS): “In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”

[110] *Someday, after mastering the winds, the waves, the tides and gravity, we shall harness for God the energies of love, and then, for a second time in the history of the world, man will have discovered fire.* Teilhard de Chardin; see: https://en.wikiquote.org/wiki/Pierre_Teilhard_de_Chardin for the source of, and variations on, this quote.

[111] See: http://www.bahai.org/ and http://news.bahai.org/story/1209/.

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