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Banking Union's accountability system in practice: A health check-up to Europe's financial heart

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Abstract

The Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) form the Banking Union, which comprises EU authorities (ECB and SRB) and national authorities (NCAs and NRAs) with vast powers. Although crucial for its legitimacy, the Banking Union's accountability is flawed, and not for the (stereo)typical reasons: accountability is a visible concept in SSM and SRM regulations, and political, administrative and judicial bodies are knowledgeable, engaged and thorough. Rather, this article posits that the SSM and SRM work very well because the legislature focused on practical details such as information flows, planning and continuity and coordination, while there has been no comparable effort to ensure the functioning of accountability tools. The result is a "system" characterised by limited access to crucial information, lack of continuity, and uncoordinated functioning. Changing this should not be hard but requires replacing blanket criticism and stereotypical views with greater attention to detail.

1 | BANKING UNION, THE EUROPEAN PROJECT … AND THE SIGNIFICANCE OF BANKING UNION ACCOUNTABILITY

Finance has become the linchpin of European integration, for better or worse. For the better, the global financial crisis (2007–08) and its uniquely European sovereign debt aftermath (2010–13) resulted in a reinforced framework for prudential regulation through a comprehensive and harmonised set of European rules (the Single

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Rulebook),[1] a mechanism for bank supervision for the Eurozone and other Member States willing to join (the Single Supervisory Mechanism, or SSM),[2] and a parallel mechanism for bank resolution (the Single Resolution Mechanism, or SRM)[3] which together with the European Deposit Insurance Scheme (EDIS)[4] form the Banking Union (BU). The EU Banking Union has been described as the most recent "grand bargain" of European integration consisting of such four elements. This project has been echoed by its projected sibling, the Capital Markets Union (CMU), and has been accompanied by a framework for financial stability, including the European Stability Mechanism (ESM).

For worse, though, the signs of compromises and half-baked solutions are visible across the whole architecture. The SSM and SRM are only partly centralised systems as a matter of design, because the Treaty basis did not make it possible, or prudent, to fully allocate supervisory or crisis-management powers to European supervisors.[5] None of them are structures initially conceived for the EU, but for the Eurozone. And pooling resources is a sore spot for some Member States, so much so that ESM, the key piece of the framework for financial stability, is outside the formal confines of EU Law,[6] and EDIS, the piece that prompted the BU project in the first place, as the means to sever the link between bank and sovereign insolvency remains (ironically) the only one not to have been adopted. Reconciling the need to move forward as a block, while accommodating each Member's reservations, has required a degree of legal brinkmanship that makes the framework fascinating for lawyers and academics, but often quite incomprehensible for even the educated citizen.

The Banking Union's challenges have an impact far beyond its borders. For instance, the Commission's "Green New Deal"[7] will be a Brussels sprout if it is limited to the niche market of "green" bonds without adjusting bank prudential rules to account for climate-related risk across the board.[8] FinTech will fail to revolutionise EU finance if the strategy is concentrated on the promising but small FinTech companies without an adjustment of rules on bank supervision and crisis management to the roles of large financial institutions and giant BigTech companies.[9] The measures to deal with the COVID-19 crisis include a public funding strategy, involving the Commission and the European Investment Bank (EIB),[10] but the "muscle" of commercial banks must be enlisted for any strategy to be credible, which, in turn, will pose pressing questions about those banks' solvency and the strategies to deal with non-performing loans (NPLs), or to bolster banks' capital and liquidity in times of crisis (especially if they involve

[1]See https://eba.europa.eu/regulation-and-policy/single-rulebook.

[2]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.

[3]Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a single resolution mechanism and a single resolution fund and amending Regulation (EU) No 1093/2010.

[4]For the whole Banking Union ensemble, as it was originally envisaged, see EC Communication, *A Roadmap towards a Banking Union* (2012); Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, *European Commission Completing Europe's Economic and Monetary Union* (Five Presidents Report, 2015).

[5]Article 127 (6) TFEU, which was the basis for the SSM, states that: 'The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, *confer specific tasks* upon the European Central Bank *concerning policies relating to the prudential supervision of credit institutions* and other financial institutions with the exception of insurance undertakings'.

[6]ESM Treaty signed on 2 February 2012. T/ESM 2012-LT/en 1. The fact that the ESM is not subject to EU Law was stated in Judgment of 27 November 2012, case C-370/12 *Pringle*, EU:C:2012:756, and reiterated in Judgment of 20 September 2016, cases C-8/15 P to C-10/15 P Ledra Advertising v. Commission and ECB, EU:C:2016:701. It remains also true, however, that Member States must in any event respect EU law when they exercise their competences.

[7]EC, *The European Green Deal*, Brussels (2019).

[8]This is reflected in the EC, *Action Plan: Financing Sustainable Growth* Brussels (2018). See the recent ECB Guide on climate-related and environmental risks Supervisory expectations relating to risk management and disclosure (1 November 2020).

[9]Notably, in the EC, *FinTech Action Plan: For a More Competitive and Innovative European Financial Sector* (2018), there is not a single mention to the role of Big Technology companies and there is one single mention to bank 'prudential' rules, referred to the deductibility of software investment from bank capital. The Report by the Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), *30 Recommendations on Regulation, Innovation and Finance* (2019), was more explicit on acknowledging the diversity of actors to ensure a level playing field, and the more recent Consultation on a new digital finance strategy for Europe / FinTech action plan 3 April 2020–26 June 2020 explicitly asks what is the expectation that non-financial companies will gain significant market share in different financial services in the following years, while question 9 asks about areas where the principle 'same activity creating the same risks should be regulated in the same way' is not respected.

[10]See 'Recovery Plan for Europe', available at: https://ec.europa.eu/info/strategy/recovery-plan-europe_en. See also https://www.consilium.europa.eu/en/policies/eu-recovery-plan/.

public funding).[11] Finally, in its decision of 5 May 2020 the German Federal Constitutional Court (GFCC)[12] said that the ECB's Public Sector Purchase Programme (PSPP),[13] and the Court of Justice (CJEU) ruling validating it,[14] were ultra vires acts beyond their respective mandates[15] partly because they failed to duly weigh PSPP effects 'on the balance sheets of commercial banks'.[16] This follows in the footsteps of its 2019 SSM judgment,[17] which held that SSM was constitutional provided it was interpreted restrictively, and that the diminished level of legitimacy was balanced by enhanced democratic accountability. This falls on top of cases like *Silvio Berlusconi/Fininvest v Banca d'Italia*,[18] or the recent *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*,[19] which are shaping issues such as composite procedures, or the reviewability of soft law,[20] which are key for the EU's constitutional structure for years to come.

One decade ago, some might have predicted that the fate of the EU would hang in the balance, just not in banks' balance sheets. And yet, since finance sits at the crossroads of crucial policies, and banking lies at the heart of finance, bridging the gap between markets and States, with the benefit of hindsight there was some inevitability to the central role of banking's and banks' supervision for the European project. The question is how to move the Banking Union a step forward.

One answer lies, to our minds, squarely on the "accountability" of Banking Union mechanisms (the ones set up so far, and thus the SSM and SRM),[21] to ensure full legitimacy and to avoid any undesirable democratic deficit, bearing in mind that independence and accountability should not be seen as antithetical but as mutually reinforcing conceptual building blocks of any credible supervisory and resolution mechanism. However, to support this claim, "accountability" needs to be rendered more precise and operational. In Section 2 we illustrate its challenges and lay out our plan of analysis. Then, following a relatively accepted classification which differentiates

[11] 'The banking sector has a key role to play in dealing with the effects of the COVID-19 outbreak, by maintaining the flow of credit to the economy'; *Coordinated Economic Response to the COVID-19 Outbreak* (EC, Brussels, 2020), 6. See also EC Communication *Tackling Non-performing Loans in the Aftermath of the COVID-19 Pandemic* (Brussels, 16.12.2020). COM(2020) 822 final. For a recent assessment, see D. Ramos and M. Lamandini, 'Non-performing Loans—New Risks and Policies?—What Factors Drive the Performance of National Asset Management Companies?' EGOV Directorate-General for Internal Policies PE PE 645.734 (March 2021).

[12] 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[13] Decision of the Governing Council of the European Central Bank of 22 January 2015 on an expanded asset purchase programme (ECB/2015/10) and Decision of the European Central Bank of 4 March 2015 (Decision [EU] 2015/774) on a secondary markets public sector asset purchase programme, as amended by Decision of the European Central Bank of 5 November 2015 (Decision [EU] 2015/2101).

[14] Case C-493/17 *Weiss and Others*, EU:C:2018:1000.

[15] 2 BvR 859/15, BverfG decision of 5 May 2020 at 133, 135–138, 141, 143, among others.

[16] Ibid. at 58, 59, 83, 120, among others.

[17] 2 BvR 1685/14, 2 BvR 2631/14 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514.

[18] Case C-219/17, *Silvio Berlusconi/Fininvest v Banca d'Italia*, EU:C:2018:1023.

[19] Judgment of 15 July 2021, case C-911/19, *FBF v. ACPR*, ECLI:EU:C:2021:599.

[20] See Section 5.

[21] G. Kuile, L. Wissink and W. Bovenschen 'Tailor-made Accountability within the Single Supervisory Mechanism', (2015) 52 *Common Market Law Review*, 155. The literature on SSM and SRM accountability is increasingly large; compare at least, M. Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy and Governance* (OUP, 2020); and several contributions in F. Amtenbrink and C. Herrmann (eds.), *The EU Law of Economic and Monetary Union* (OUP, 2020); A. Maricut-Akbik, 'Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament', (2020) *JCMS*, 1; R. Smits, 'Accountability of the European Central Bank', (2019) *Ars Aequi*; D. Fromage, R. Ibrido, 'Accountability and Democratic Oversight in the European Banking Union', in G. Lo Schiavo (eds.), *The European Banking Union and the Role of Law* (Edward Elgar, 2019), 66–86; P. Leino-Sandberg, 'Public Access to ECB Documents: Are Accountability, Independence and Effectiveness an Impossible Trinity?' in *Building Bridges: Central Banking Law in an Interconnected World: ECB Legal Conference 2019* (Frankfurt am Main: ECB, 2019), 195–219; R. Smits, 'The ECB and the Rule of Law', in *Building Bridges: Central Banking Law in an Interconnected World: ECB Legal Conference 2019*, (Frankfurt am Main: ECB, 2019), 350–383; D. Fromage, 'Guaranteeing the ECB's Democratic Accountability in the Post-Banking Union Era: An Ever More Difficult Task?' (2019) 26 *Maastricht Journal of European and Comparative Law*, 48; F. Amtenbrink, 'The European Central Bank's Intricate Independence versus Accountability Conundrum in the Post-crisis Governance Framework', (2019) 26 *Maastricht Journal of European and Comparative Law*, 165; P. Nicolaides, 'Accountability of the ECB's Single Supervisory Mechanism: Evolving and Responsive', *CERiM Online Paper Series*, 10/2018; N. Fraccaroli, A. Giovannini and J.-F. Jamet, 'The Evolution of the ECB's Accountability Practices during the Crisis', (2018) 5 *ECB Economic Bulletin*; F. Amtenbrink and M. 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', (2017) *ADEMU* (Working Paper Series, 2017/081); C. Zilioli, 'The Independence of the European Central Bank and its New Supervisory Competences', in D. Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press, 2016), 176. This is part of a wider, and less recent, strand of literature on the accountability of financial supervisors: compare R. Lastra and H. Shams, 'Public Accountability in the Financial Sector', in R. Lastra and C. Goodhart (eds.), *Regulating Financial Services and Markets in the XXIst Century* (Oxford: Hart

between mechanisms of "political accountability", where control is vested in bodies with democratic legitimacy, such as the European Parliament and the Council, or national parliaments, mechanisms of "administrative accountability", where control is exercised by the European Court of Auditors (ECA), the European Banking Authority (EBA) and the European Ombudsman, and mechanisms of legal accountability, where control is exercised by European courts, such as the Court of Justice of the European Union (CJEU) or the General Court, or by national courts, but to some extent also by internal boards of review, such as the Administrative Board of Review (ABoR) at the ECB and the Appeal Panel at the SRB (AP) which sit, with differences (between themselves), at the cusp between "administrative accountability" and "legal accountability", we discuss practical aspects of political accountability (Section 3), administrative accountability (Section 4) and legal-judicial accountability (Section 5) and finally reach some conclusions (Section 6).

2 | MAPPING THE BANKING UNION'S ACCOUNTABILITY FRAMEWORK

2.1 | Epistemological premises

Ensuring accountability for the SSM and SRM is, perhaps, politically perceived as less relevant and less urgent than achieving some form of pan-European risk sharing (via common deposit insurance and NPLs management), but it is nonetheless crucial for the long-term credibility and legitimacy of the Banking Union and of all Union policies relying on a sound, integrated banking architecture. Yet, it also poses important challenges.

The first set of challenges is conceptual. "Accountability" is used in different areas of social science,[22] including psychology, sociology, economics and law, and in different senses. Thus, it is important to clarify what we mean by it. "Accountability" is often used as a "virtue", or evaluative standard, to assess the behaviour of public organisations, but also as a "device", or descriptive term, to define the institutional arrangements by which an agent is monitored by another.[23] In this article, we adopt this second, narrower version, building on the Basel Committee on Banking Supervision's description of accountability arrangements (bifurcated into "internal" and "external" accountability).[24] A related conceptual difficulty is about the logic inspiring accountability tools. "Accountability" is often framed as "principal—agent delegation".[25] However, this does not capture a universe of arrangements involving multiple "principals"; even less so the EU arrangements, where the principal is not necessarily the "legislative" (Parliament or Council) but also the "executive" (Commission). Furthermore, the delegated tasks may originally belong to the Member States,[26] as it happens with the SSM/SRM. Thus, it is better to use a more flexible understanding of accountability as a 'relationship between an actor and a forum' where the actor must provide an explanation of his actions and be subject to questions and discussion, followed by a "judgment".[27]

Publishing, 2001), 165–188; F. Amtenbrink and R. Lastra, 'Securing Democratic Accountability of Financial Regulatory Agencies—A Theoretical Framework', in R.V. De Mulder (ed.), *Mitigating Risk in the Context of Safety and Security—How Relevant is a Rational Approach?* (OMV, 2008); R.J. Dijkstra, 'Accountability of Financial Supervisory Agencies: An Incentive Approach', (2010) 11 *Journal of Banking Regulation*, 115. The seminal work in this context is E. Hüpkes, M. Quintyn and M.W. Taylor, 'The Accountability of Financial Sector Supervisors: Principles and Practice', (2005) *IMF Working Paper WP/05/51*. Accountability of the ECB for SSM-related tasks cannot be determined by simple transposition of the principles and practice of monetary policy: on this compare at least F. Amtenbrink, *The Democratic Accountability of Central Banks. A Comparative Study of the European Central Bank* (Oxford: Hart Publishing, 1999); J. de Haan and S.C.W. Eijfinger, 'The Democratic Accountability of the European Central Bank: A Comment on Two Fairy Tales', (2000) 38 *Journal of Common Market Studies*, 393; C. Zilioli and M. Selmayr, 'The European Central Bank: An Independent Specialised Organisation of Community Law', (2000) 37 *Common Market Law Review*, 591; F. Amtenbrink and K. van Duin, 'The European Central Bank before the European Parliament: Theory and Practice after Ten Years of Monetary Dialogue', (2009) 34 *European Law Review*, 561.

[22]R.D. Behn, *Rethinking Democratic Accountability* (Washington, DC: Brookings Institution Press, 2001); D. Curtin, P. Mair and Y. Papadopoulos, *Accountability and European Governance* (Routledge, 2013).

[23]M. Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', (2010) 33 *West European Politics*, 947–948. From the same author, see also the longer paper M. Bovens, 'Analysing and Assessing Public Accountability. A Conceptual Framework', (2006) *EUROGOV*.

[24]BCBS, 'Report on the impact and accountability of banking supervision', (July 2015), at 2 and 25–34.

[25]K. Strom 'Delegation and Accountability in Parliamentary Democracies', (2000) 37 *European Journal of Political Research*, 261; E. Fisher 'The European Union in the Age of Accountability', (2004) 24 *Oxford Journal of Legal Studies*, 495.

[26]D. Curtin 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account', (2007) 13 *European Law Journal*, at 525, 527–528.

The second set of challenges is teleological, or finalistic, because some normative criteria are needed to differentiate between "robust" and "weak" accountability arrangements. This, in turn, depends on the goals pursued by said accountability. Here some authors distinguish between a "democratic" perspective, where the goal is to make the institution answerable to the people, and its democratically elected bodies, a "checks-and-balances" perspective, where the goal is to limit the power of institutions, and a "learning" perspective, where the goal is to facilitate learning by the institution, through a process that forces it to discuss its decisions and its mistakes.[28]

Each of the above perspectives is sound and must be used to assess the robustness of accountability arrangements but is also complementary to the others. And the order of the questions also matters. If one asks first what robust democratic accountability arrangements should look like (in general), and then analyses how to adapt them for central banks and financial supervisors, the frame may adapt less to their peculiarities than if one begins instead by asking what is a "good" central bank/financial supervisor and how accountability can help its mission.[29] This can also affect the related issue of the optimal level of "transparency", which depends on whether it is seen as a good in itself, or as the "efficient level of information" that helps the authority to execute its mandate.[30]

From our standpoint, the current travails of the Banking Union are related to its perceived lack of *democratic* and *constitutional* accountability. Thus, these will be the criteria driving our evaluation, i.e., the "variables to be optimised". The intrinsic function of a central bank or financial authority plays a decisive role, as part of the legal (including constitutional) constraints that determine how much and what kind of accountability is possible.

Once our goal is to assess whether the Banking Union is insufficiently accountable from a political/democratic and constitutional standpoint, a third, legal challenge emerges, since even if some accountability arrangements may be better in theory, they still need to be compatible with the basic laws that apply to each authority. In this particular field, it is important to bear in mind that the single concept of Banking Union acts as an umbrella for different, and complex, legal arrangements. First, both mechanisms (SSM and SRM) are based on a logic of *composite* administration, which comprises central (ECB/SRB) and national authorities (NCAs/NRAs) and compound proceedings, which raise doubts over their respective responsibilities[31] and the best way to make them accountable. Second, each central authority is very different; the ECB is a Treaty *institution*, with a strongly independent Bundesbank-like constitutional status,[32] while the SRB is an EU *agency*, with a legal status shrouded in uncertainty, to such an extent that even the question of whether the agency can decide or act in a discretionary manner lacks a clear answer.[33] This raises important doubts. One is whether the ECB can be "subject to" the scrutiny of another "institution", or body, beyond the express language of the Treaties.[34] Another is about the scrutiny of SRB decisions if it is unclear whether those decisions actually "belong" to it (or to the Commission, or ECB).[35] Third, the Treaty basis of each mechanism is different. The SSM is grounded on Article 127 TFEU. This provision concentrates on the ECB as an institution and

[27]Bovens uses the term 'social relationship' for this series of elements. See M. Bovens 'Analysing and Assessing Public Accountability. A Conceptual Framework', n. 20 above.

[28]M. Bovens 'Analysing and Assessing Public Accountability', n. 20 above.

[29]See e.g., J. De Haan; S.C.W. Eijffinger, 'The Democratic Accountability of the European Central Bank: A Comment on Two Fairy-Tales', (2000) 38 *JCMS* 393, who discuss accountability from different perspectives, but frame the debate starting with arguments on 'independence', and conclude by asking themselves 'what is a good central bank'. Compare with W.H. Buiter 'Alice in Euroland', (1999) 37 *Journal of Common Market Studies*, 181, whose departing point is that democratic accountability is something good in itself and argues that the ECB lacks democratic accountability.

[30]See O. Issing 'Communication, Transparency, Accountability: Monetary Policy in the Twenty-First Century', (2005) 87 *Federal Reserve Bank of St. Louis Review*, 65, who also uses central banks' function to frame the debate on what is an 'efficient level of information'. Compare with D. Curtin 'Accountable Independence of the European Central Bank: Seeing the Logics of Transparency', (2017) 37 *European Law Journal*, 28, who criticises the 'transparency as communication' view of the ECB (which seems also present in Issing's view).

[31]Note, e.g., the diverging constructions between Case T-122/15 *Landeskreditbank Baden-Würtenberg v. ECB*, EU:T:2017:337 (and its appeal in Case C-450/17 P, EU:C:2019:372) and in 2 BvR 1685/14, 2 BvR 2631/14, 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514 as to the respective distribution of competences.

[32]Article 127 *et seq*., TFEU.

[33]Case C- 9/56 *Meroni v. High Authority* EU:C:1958:7, and Case C-270/12 *UK v Parliament and Council* (*ESMA—Short selling*), EU:C:2014:18.

[34]Some argue that the 'vagueness' of ECB/SSM goals is an obstacle to accountability (Amtenbrink and Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area...?,' see n. 18) while others point that this view is grounded on a principal-agent concept of accountability, which is inadequate for independent institutions, J. Zeitlin and F. Brito Bastos 'SSM and the SRB Accountability at European Level: Room for Improvements?', (2020) EGOV Directorate-General for Internal Policies PE 645.747.

its monetary mandate. Its section (6), a secondary provision, allows the conferral on the ECB of 'specific tasks concerning policies related to prudential supervision' following a special procedure, involving Council unanimity. The SRM is based on Article 114 TFEU, the Single Market provision, which contemplates a different (co-decision) procedure. This raises questions over whether such a differentiated Treaty basis and procedure should have any bearing on the nature of accountability tools (e.g., whether the Council and Parliament should enjoy different importance), goal (e.g., whether accountability arrangements should ensure that ECB tasks fit within the "monetary" mandate or further the Single Market) and intensity (e.g., more deferential to the ECB, as a "constitutional" Treaty institution, and less so to the SRB, an "agency" based on secondary legislation).

Bearing in mind all these challenges, the goal of this article is to (i) use the "accountability as tool" approach to describe the different arrangements that seek to render SSM and SRM accountable; and (ii) use the finalistic perspective, its different goals (primarily the democratic and constitutional) and their complementarities for a critical assessment of those arrangements; while (iii) bearing in mind the legal/constitutional limitations. Thus, our research question is *whether the existing Banking Union tools meet the definition of a robust democratic and constitutional accountability framework, and/or should be improved, in light of existing legal constraints*.

2.2 | Our methodological approach

Banking Union accountability reviews show agreement and nuances. The European Commission assessed SSM accountability practice as "overall effective",[36] a finding supported by authors who highlight that SSM/SRM have become more responsive.[37] Yet, while information requirements and hearings can remove information asymmetries, some point at shortcomings, such as a lack of "performance benchmarks", "expert review" or "regulatory audit", the 'relative vagueness of the SSM's objectives', or the Parliament's inability to impose penalties on the ECB, because the Treaty basis (Art. 127(6) TFEU) puts the Council in charge.[38] One difficulty is that the assessment is a bit general due to the difficulty in reconciling the broader goals of an accountability system with the reality of the legal framework. Our research question acknowledged the need for the right balance to reach the most desirable equilibrium.

That question in turn helps us highlight three key ideas. One is the importance of a *practical* approach. If our goal is not only to highlight the tensions between what is theoretically desirable and what is legally workable but also to find solutions, it is relevant to identify spots where there is sufficient leeway to work out practical arrangements that can fill accountability gaps in a way that is legally sound. Indeed, recent research has used this approach to show that, e.g., the institutions of the Federal Reserve's independence are not the result of the "law on the books", but of the crystallisation of decades-long practical arrangements.[39]

A second idea is that, rather than assessing the effectiveness of each accountability tool separately, we should try to examine the joint operation of these tools as a "system". Federal Reserve's robust practice arose from relatively meagre tools. The Banking Union's problem is the opposite: accountability provisions have a number of recognisable tools, but it is not possible to figure out how those tools may work as a "single accountability system" (SAM).[40]

This is exposed through our third idea, which requires a mental exercise. First, we concentrate on the features of SSM/SRM that ensure their *practical success*. Then, we try to determine whether they are matched by similar

[35]The bank's supervisor (ECB-NCA) determines that it is 'failing or likely to fail' (FOLTF). The SRB-NRA determines that the bank must be resolved. However, since its decision arguably entails discretion, it is 'endorsed' by the European Commission (art 18 (7)), while the Council may 'object' to it (Art. 18 (7) paras. 2–3). A case before the General Court (case T-570/17 *Algebris and others v. European Commission*) is based on this.

[36]Commission Report on the SSM, SWD (2017) 336 final and Commission Staff Working Document accompanying the Report. This was a mandatory review of SSM Regulation under its Article 32.

[37]Nicolaides, 'Accountability of the ECB's Single Supervisory Mechanism…', see n. 18, 3.

[38]Nicolaides, 'Accountability of the ECB's…', at 3, 25–27; Amtenbrink and Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area..?', see n. 18.

[39]P. Conti-Brown, *The Power and Independence of the Federal Reserve*, (Princeton University Press, 2016); also Philip Conti-Brown, 'The Institutions of Federal Reserve Independence', (2015) 32 *Yale Journal on Regulation*, 5.

[40]Lamandini and Ramos; Ruiz *EMU & Dialogue*, see n. 1, 331.

features in the accountability system. The underpinning logic is that the features that make the system strong should be matched by equally strong checks.

In this light, we propose a *taxonomy* of practical categories that help to refine the assessment of the accountability system as follows:

- ***Information and expertise.*** Banking is complex and requires expert judgment, hence the role of specialised, independent bodies, and their information-gathering efforts.[41]

The question is whether accountability systems have the means to gather the requisite information and expertise.[42]

- ***Planning, continuity and deliverability.*** Finance may be volatile, but its *oversight* is patterned and regular, including (i) "cyclical" activities, e.g., the ECB's Supervisory Review and Evaluation Process (SREP),[43] or the SRB's Resolution Planning Cycle;[44] and (ii) "issue-specific" activities, where authorities outline their approach, gather industry (and public) views and communicate their expectations.[45] All this helps meet ambitious goals within tight deadlines.

The question is whether accountability fora can, or do, plan ahead, follow up on past inquiries and ensure that the mechanisms deliver on their promises. In this line, some authors point at the lack of "performance benchmarks".[46] Yet, benchmarks, if taken too literally, could jeopardise independence[47] or be simply incompatible with the nature of the forum (e.g., courts, which are reactive, and not proactive). Thus, we use more general ideas, such as "planning" (an agenda of accountability-related activities), "continuity" (past-present consistency and following up on inquiries) and "deliverability" (the ability to achieve an identifiable outcome, including a conclusion, even if it carries no sanction, within good timeframes).

- ***Coordination.*** The Banking Union is based on an extremely complex division of competences, both (i) vertically, between ECB and NCAs, and SRB and NRAs; and (ii) horizontally, between supervision and resolution authorities, also including the ECB Governing Council's "veto" role in supervision, and the Commission's in resolution. This complexity is managed through well-oiled coordination tools and information flows.

The question is whether this well-oiled system of horizontal and vertical coordination is matched by similar coordination processes to exercise accountability that helps the different fora gain a comprehensive picture.

This helps us propose a "scorecard" that takes into account the different categories of accountability, and the specific institutional features of SSM/SRM:

[41]See e.g., https://www.bankingsupervision.europa.eu/banking/statistics/html/index.en.html, or https://srb.europa.eu/en/data-collection.

[42]This would be in line with some authors' view that the lack of expert review (regulatory audit) is a major challenge. Nicolaides, 'Accountability of the ECB's Single Supervisory Mechanism…', see n. 18, 37.

[43]See ECB, 'The Supervisory Review and Evaluation Process', (2019), www.bankingsupervision.europa.eu/banking/srep/srep_2019/html/index.en.html (accessed 1 March 2021).

[44]See e.g., B. Jazbec 'Resolution planning cycle 2020: setting a course for financial stability', (7 May 2020), https://srb.europa.eu/en/node/981 (accessed 1 March 2021).

[45]See e.g. the ECB 'priorities', which currently include 'Risk Assessment' (with a Risk Map and Risk Drivers) and Non-performing Loans (NPLs) (having published a Guidance, a stocktake of national supervisory practices and legal frameworks, and a statement of supervisory expectations), https://www.bankingsupervision.europa.eu/banking/priorities/npl/html/index.en.html (accessed March 2021). For the SRB, there is a 'Policies' section, which includes Minimum Requirements on Own-Funds and Eligible Liabilities (MREL), Critical Functions, Public Interest Assessment, Brexit Expectations, and Expectations for Banks. See e.g., SRB, Minimum Requirement for own funds and Eligible Liabilities (MREL), https://srb.europa.eu/en/content/mrel (accessed March 2021).

[46]Nicolaides, 'Accountability of the ECB's Single Supervisory Mechanism…', see n. 18.

[47]Ibid., 11.

	Information & expertise	Planning, continuity & deliverability	Coordination
Political			
Administrative			
Legal			

3 | TAKING POLITICAL ACCOUNTABILITY SERIOUSLY

3.1 | Legal framework and key points

The legal basis for political/democratic accountability are the specific provisions in the SSM[48] and SRM regulations.[49] The recitals of the SSM regulation emphasise the relevance of political accountability of ECB's supervisory function towards democratically legitimate bodies, such as the European Parliament and the Council,[50] including regular reporting[51] (a function where national parliaments are also involved), and specific control through *ad hoc* committees in the case, e.g., of contraventions and maladministration.[52] The SRM, due to its different Treaty basis (Article 114 TFEU) and the SRB status as an agency, also includes accountability towards the European Commission, but otherwise the rules are similar in form to the SSM. The framework is completed by the "institutional" arrangements,[53] which include the Interinstitutional Agreements (IIAs) between the European Parliament with the ECB[54] and institution/agency Agreement between the European Parliament and the SRB,[55] and the Memorandum of Understanding (MoU) between the EU Council and the ECB.[56] These sources help us identify the following accountability "milestones": in first place, appointments and removals, in second place, hearings and dialogue, and finally, reports and answers to national parliaments.

Let us start with *appointments and removals*. Appointment procedures balance expertise and democratic accountability. The Chair and Vice-Chair of the ECB Supervisory Board and the full-time members of the SRB are chosen (i) through open selection, based on merit and experience;[57] (ii) with a proposal by the ECB (SSM) or the Commission (SRB); (iii) European Parliament approval; and (iv) Council adoption of the implementing decision by qualified majority (both Parliament and Council are kept informed of the selection process).[58] One difference is that,

[48]Arts. 19–21 SSM Regulation.
[49]Arts. 45–47 SRM Regulation.
[50]Recital (55) SSM Regulation. Article 10(2) TEU confirms that the Council is a democratically legitimised institution.
[51]Recital (56) SSM Regulation.
[52]Recital (57) SSM Regulation with reference to Article 226 TFEU.
[53]Referred to in Articles 20 (9) SSM Regulation, and 45 (8) SRM Regulation.
[54]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 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).
[55]Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism OJ L 339/58 24.12.2015.
[56]There are two other MoUs, i.e., Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), signed 11 December 2013; and between the SRB and the Commission (see https://srb.europa.eu/en/content/cooperation) but these are more focused on information exchange.
[57]Article 26 (3) SSM Regulation, article 56(4) SRM Regulation. The criteria show some differences, though. For the SSM, the Chair and Vice-Chair shall be chosen among 'individuals of recognised standing and experience in banking and financial matters and who are not members of the Governing Council' while the Vice-Chair shall be chosen from among the members of the Executive Board of the ECB. For the SRM, 'on the basis of merit, skills, knowledge of banking and financial matters, and of experience relevant to financial supervision, regulation as well as bank resolution' and 'on the basis of an open selection procedure, which shall respect the principles of gender balance, experience and qualification'.
[58]Article 26 (3) SSM Regulation, Article 46 (4) and (6) SRM Regulation.

for the SRB, not only Chair and Vice-Chair but also the other four full-time members are appointed following this procedure.[59] MoU/IIAs provide more detail of the process, which is summarised in the following table:

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

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

The publicly available minutes are scant in detail. Nonetheless, evidence suggests that the European Parliament's role is not marginal. The SSM appointment processes concerning first Yves Mersch as Vice-Chair of the ECB Supervisory Board (including an opening statement, a hearing[60] tabled for 60 minutes[61] and a vote in committee)[62] and then Frank Elderson as ECB Executive Board member and as Vice-Chair of the Supervisory Board provide a good example of the European Parliament's involvement. In turn, the latest SRM appointment process for the Vice-Chair and two Board members included an exchange of views with the candidates tabled for around 40 minutes.[63] The reports, although favourable, deplored the fact that all the candidates were men;[64] and the votes, although clearly

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

[60]Appointment hearing of Yves Mersch, Member of the Executive Board of the ECB, at ECB, 'Appointment hearing as Vice-Chair of the ECB Supervisory Board' (accessed 4 September 2019), https://www.bankingsupervision.europa.eu/press/speeches/date/2019/html/ssm.sp190904_1~ac3792f821.en.html (accessed March 2021). See also ECON Rapporteur: Roberto Gualtieri, 'Report on the proposal of the European Central Bank for the appointment of the Vice-Chair of the Supervisory Board of the European Central Bank', (2019), https://op.europa.eu/en/publication-detail/-/publication/d376d418-e031-11e9-9c4e-01aa75ed71a1/language-en?_portal2012documentDetail_WAR_portal2012portlet_source=114545437 (accessed 1 March 2021).

[61]ECON, 'Agenda for the Meeting Wednesday 4 September 2019, 9.00–13.00 and 14.30–18.30, Thursday 5 September 2019, 9.00–12.30' https://www.europarl.europa.eu/doceo/document/ECON-OJ-2019-09-04-1_EN.html (accessed March 2021).

[62]The vote in Committee, although clearly favourable, was not a mere formality (35 votes in favour, 14 against, 4 abstentions). See ECON, 'Agenda for the Meeting…', n. 57 above. For the latest available minutes see https://www.europarl.europa.eu/committees/en/econ/meetings/minutes (accessed 1 March 2021).

[63]ECON, 'Newsletter January 2020', https://www.europarl.europa.eu/cmsdata/195260/ECON_newsletter_22-23_January_2020_original.pdf.

[64]See Report on the proposal for the appointment of a member of the Single Resolution Board (N9–0005/2020–C9–0009/2020–2020/0902(NLE)), letter B.

favourable, showed some differences in voting patterns, showing more widespread support for some candidates than for others.[65]

Regarding the second accountability "milestones", *hearings and dialogue*, they consist of mechanisms for dialogue with, and control over, the ECB and the SRB.[66] They comprise (i) annual reports; (ii) questions;[67] (iii) meetings and exchanges,[68] including confidential ones behind closed doors with the Chair and Vice-Chair of the competent EP Committee; and (iv) investigations.

The contents of the annual reports are slightly different for each authority, but the ECB delivers the same SSM report to Council and Parliament. Questions and hearings before the European parliament are regulated similarly for the SSM and SRM,[69] while Eurogroup meetings are confidential.

Item	MoU Council-ECB	IIA Parliament-ECB	IIA Parliament-SRB
Report	(i) Addressed at EP, Council, Commission, and Eurogroup, (ii) published in ECB website, (iii) draft confidential version sent earlier to EP, Council and Eurogroup, (iv) Report discussed with Eurogroup and with EP in public		(i) Addressed at EP, national parliaments, Council, Commission and ECA, (ii) published in SRB website, (iii) draft confidential version sent to Parliament, (iv) report discussed in public with EP
Report (II). Contents	Execution of tasks and cooperation[70] Structure and staffing Code of conduct Budgetary issues[71] Breaches by credit institutions Legal instruments adopted by ECB		Execution of tasks and cooperation[72] Structure and staffing Code of conduct Budgetary issues[73] Use of Fund[74]
Hearing and discussions	Two public hearings a year Ad hoc hearings by invitation, confidential	Two public hearings a year Ad hoc hearings by invitation. Special confidential meetings must be justified. MEPs covered by confidentiality duties. No meeting minutes, nor public statement.	
Questions	ECB reply orally or in writing to Eurogroup questions	ECB/SRB to reply in writing to EP questions. Specific section of EP-ECB website for Q&A.	

[65]See ECON, 'Minutes of the Meeting of 22 January 2020, 9:00–12:30 and 15:00–18:30, and 23 January 2020, 9:00–12:30', (January 2020), https://www.europarl.europa.eu/doceo/document/ECON-PV-2020-01-22-1_EN.pdf (accessed March 2021).

[66]Art 20 SSM Regulation; art 45 SRM Regulation. In addition to being both accountable to the Parliament and Council, the ECB is also accountable to the euro Group (art 20 and recital (55) SSM Regulation), and the SRB to the Commission (art 45 SRM Regulation).

[67]Art 141 Rules of Procedure of the European Parliament.

[68]For an updated and insightful analysis, compare now Adina Maricut-Akbik, 'Contesting the European Central Bank…', see n. 18, at 1–16.

[69]IIA Parliament-SRB no. I.2, IIA Parliament-SRB no. I.2. For the questions, see also Rule 141 of the European Parliament Rules of Procedure.

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

[71]This includes the method of calculation and amount of supervisory fees, and the budget for supervisory tasks.

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

[73]This includes the amounts of administrative contributions and the implementation of budget.

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

In addition, the IIAs contemplate a Code of Conduct and Investigations (only the EP conducts these), which are compared in the following table.

Item	IIA Parliament-ECB	IIA Parliament-SRB
Access to information	ECB to provide EP committee with "comprehensive and meaningful record" to enable understanding of discussions. In case of winding up, *ex post* disclosure of non-confidential information of credit institution. Supervisory fees and explanation published in website. Website publication of guide to supervisory practices. EP to apply safeguards and classification procedures depending on level of sensitivity of confidential information and seek ECB consent before disclosing third parties.	SRB to provide EP committee with "comprehensive and meaningful record" to enable understanding of discussions. In case of resolution: information to be disclosed *ex post* (including balance sheet, losses borne by bail-in creditors, amount/sources of resolution funding, and sale proceeds). Website publication of guide to resolution practices. EP to apply safeguards and classification procedures for confidential SRB information and consult SRB to assess access requests under Regulation 1049/2001 on Access to Documents.
Investigations	Principle of sincere cooperation by ECB. Same protection as Committees of Inquiry, same confidentiality as confidential meetings. Non-disclosure if there is a public or private interest recognised in ECB/2004/3 Decision on Access to documents.	Principle of sincere cooperation by SRB. Same protection as Committees of Inquiry, same confidentiality as confidential meetings. Balancing right of access to documents with public/private interests under Regulation 1049/2001 on Access to Documents.
Code of Conduct	Information to EP committee before adoption. ECB to inform EP on Code's implementation (upon request) and need for updates. Minimum content: conflicts of interest and separation of monetary and supervisory functions.	Information to EP committee before adoption. SRB to inform EP on Code's implementation (upon request) and need for updates. Minimum content: independence of SRB Chair, Vice-Chair and full-time Board members; performance of tasks under principles of public accountability and operational independence and conflicts of interest of NRAs.

The main difference is the somehow differentiated treatment of confidentiality and access to information between Decision ECB/2004/3 and Regulation 1049/2001 (the former being in several instances more restrictive than the latter, a matter however still unsettled and currently under review by the CJEU in pending cases concerning access to documents pertaining to the supervisory file in the Banco Popular Español resolution).[75]

Lastly, the third accountability "milestone" refers to *reports and answers to national parliaments*. The rules include accountability provisions involving national parliaments,[76] where the SSM and SRM frameworks are aligned in spirit but not in intensity. The mechanisms contemplated by the provisions include (i) the submission of the report to the European Parliament and also to national parliaments, with the possibility of these making observations; (ii) the possibility of national parliaments asking questions of the ECB or the SRB regarding the performance of their tasks or functions; (iii) the possibility of an invitation to the Chair (together with a representative of the national authority) to

[75]See, for example, cases T-827/17 *Aeris Invest v. ECB*, T-442/18 Aeris Invest v. ECB, or T-62/18 *Aeris Invest v. SRB* and T-514/18 Del Valle Ruiz v. SRB, T-16/19 Activos e Inversiones Monterroso v SRB.

[76]See Article 21 SSM Regulation, art 46 SRM Regulation.

participate in an exchange of views; and (iv) the possibility of other accountability mechanisms for national authorities (NCAs and NRAs).

Some differences are subtle, e.g., whereas the SRB submits its report to national parliaments, the ECB *forwards* them the report it sends to the EU bodies.[77] Others are less so. The SRB shall reply to (i) the observations concerning the report; and (ii) the specific questions being asked, while the ECB has no such duty.[78] Furthermore, the SRB Chair 'is obliged to follow' the invitation of the national parliaments, while there is no comparable requirement for the Chair of the ECB Supervisory Board.[79]

3.2 | Applying our taxonomy to the Banking Union's accountability before the European Parliament

Rules alone cannot help us visualise the exercise of accountability through, e.g., the contents of the exchanges,[80] and it is necessary to look at practice. Some analyses in the context of the monetary dialogue have focused on the frequency of exchanges, pointing at the increase of interactions as evidence that ECB's accountability has improved.[81] Others have focused on MEPs questions and hearings to point at the ECB's frequent use of confidentiality as a "trump card",[82] or stress the Parliament's inability to impose negative consequences on the ECB as a reason for suboptimal accountability.[83] There seems to be consensus that too many questions fall outside the ECB competence.[84] None so far (to our knowledge) has analysed the SRM.

Some of our findings are coincident with previous analysis, some are more nuanced, and some, while agreeing on the observations, offer different explanations, and thus suggest different avenues for improvement. For our diagnosis we will use the taxonomy of specific accountability challenges for the SSM/SRM outlined in the previous section.

Starting with *information and expertise*, the first item in our taxonomy offers mixed results. When it comes to the EP ECON hearings, evidence belies the facile stereotype of uninformed and disengaged politicians. Publicly available information for the SSM,[85] and the SRM,[86] shows careful preparation, including, for each hearing: (i) several briefing papers drafted by experts;[87] (ii) a briefing note by EP staff, summarising experts' views, and adding other relevant

[77]Compare Article 21 (1) and Recital (56) SSM Regulation with art 45 (2) SRM Regulation.

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

[79]Compare Article 21 (3) SSM Regulation with 46 (3) SRM Regulation.

[80]The contents of the information exchanged are only detailed for the Annual Report, and it is unclear what would be the consequences if an authority turns down a request for information (Rule 141 European Parliament Rules of Procedure). Unlikely as it may be, it determines the perception of each institution's bargaining power, and the decision to, e.g., press ahead if an answer is ambiguous.

[81]Fraccaroli et al., 'The Evolution of the ECB's Accountability Practices…', see n. 18.

[82]For a comprehensive review, with an analysis of MEPs questions and follow-up hearings is that by Maricut-Akbik, 'Contesting the European Central Bank…', op. cit. n. 18 above, at 1–16, who expressly indicates her disagreement with Fraccaroli et al.

[83]Amtenbrink and Markakis, 'Towards a meaningful Prudential Supervision Dialogue in the Euro Area..?', see n. 18 above, 3–23.

[84]Maricut-Akbik, 'Contesting the European Central Bank…', see n. 18 above, 13; Amtenbrink and Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area..?', see n. 18 above.

[85]See ECON, https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union (accessed 23 September 2020).

[86]See ECON, https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union?tabCode=bank-resolution (accessed 23 September 2020).

[87]In the interest of full disclosure, we were commissioned one such briefing papers in 2020, which provided a basis for this article. When we express an opinion about briefing papers it should be read as referring to those provided by other experts. These briefing papers, even if not necessarily expressly mentioned by the MEPs in their questions, do inform the preparation of the hearing and of the debate.

topics;[88] and (iii) a lively debate where many MEPs showed an acquaintance with the relevant issues. This view is strengthened if one looks at ECON's Banking Union Annual Reports.[89]

Thus, *the problem is not knowledgeability, or availability of expertise, but access to information, since all the expertise in the world cannot match the specificity of the data available to ECB and SRB. The ECB Supervisory Board has the 'internal' Supervisory Dashboard Pilot, i.e., a management toolkit used to govern the supervisory tasks conferred upon the ECB. Without access to comparably relevant information it is not possible for the Parliament to assess whether the authority is achieving its objectives*.[90]

Furthermore, the flow of information seems to rely on the initiative of individual MEPs,[91] blurring the institutional role of Parliament/ECON as a whole. This, absent a particular issue that stirs controversy and dominates the debate, places ECON as a passive recipient of information. The Annual Report's contents are set in the rules at a very general level, which means that the ECB and SRB can calibrate the detail and granularity of information they disclose, and there is no concrete way to make them more responsive to MEPs concerns.[92] An Annual Report's helicopter view, based on aggregate high-level results can hardly fulfil any meaningful accountability role. As for individual MEPs, the SSM/SRM Chairs can allege confidentiality issues when requests become very specific, a point noted in relation to the SSM,[93] which also happens for SRM.[94]

The roadblock between what is theoretically desirable and what is legally feasible is the *confidentiality* of the information. Since reports and to answers MEPs are public in principle, there is a strong deterrent for ECB/SRB to be more specific and candid if this jeopardises inspections, price formation or commercial interests.[95] *In our view, this gap may be bridged through the more imaginative use of the provisions regulating the possibility of ad hoc, on-request confidential meetings with the Committee Chair and Vice-Chair*.[96] These provisions could be the basis for a *programme* of regular and thematically structured *confidential* checks and controls over ECB/SRB activities, *involving: (i) periodic confidential exchanges of documents and information; (ii) closed doors (follow-up) meetings and (iii) where necessary, on site fact-finding visits*. This structured access would reconcile confidentiality with the principle of openness and cooperation, as embedded in the IIAs (e.g., Art. 2 of the EP/SSM IIA), and should also comprise internal documents, upon request, e.g., internal guidelines, policy options, NPL strategies, etc., provided they are not classified (e.g., documents dealing with the situation of a specific bank). To ensure water-tight confidentiality, the blueprint is already there, with the safeguards in the MoU between ECA and ECB for highly confidential documents and information,[97] or the similarly selective access by European courts under Article 104 of their Rules of Procedure, or by the SRB Appeal Panel in several cases.[98]

Such an active role should, in our view, not be restricted to the Chair and Vice-Chair of ECON. Accountability as a relationship of an actor with a "forum" does not sit well with a 1–2 persons audience. Thus, the role should be extended

[88]The hearings with available transcript comprise hearings of 12 December 2019, and 4 September 2019, for the SSM, and the 22 July 2019 for the SRM (see nn. 81, 82 above).

[89]See e.g., for a comprehensive and enlightening summary of the 2015–18 reports, J. Deslandes, C. Dias, M. Magnus and R. Segall, 'European Parliament's Banking Union reports in 2015–2018', (2019) *ECON* PE 634.372.

[90]Nicolaides, 'Accountability of the ECB's Single Supervisory Mechanism…', see n. 18 above, 37, quoting Transparency International, 'Two Sides of the Same Coin? Independence and Accountability of the European Central Bank' (2017), 7, http://transparency.eu/resource/two-sides-of-the-same-coin-independence-and-accountability-of-the-european-central-bank (accessed 1 March 2021).

[91]To cite a non-ECB example, the SRB responses to letter Z-38/2019 and its follow-up by MEP Giegold on resolution planning were very detailed, and the point has been touched upon during ECON hearings. However, despite the issue's fundamental importance, there was no institutional action to reflect the Committee's position.

[92]Although a draft confidential report is sent to the Parliament in advance the short time lag between the confidential and public versions leaves no room for amendments that may address particular concerns in more detail.

[93]Maricut-Akbik, 'Contesting the European Central Bank…', n. 18 above, 11–12.

[94]ECON, Minutes for the EP ECON Public Hearing of 22 July 2019, https://www.europarl.europa.eu/cmsdata/186301/CRE_SRB_hearing_22092019_EN-original.pdf (accessed 1 March 2021, references to Deutsche Bank).

[95]Lamandini and Ramos *SSM/SRM Accountability*, n. 1 above.

[96]Articles 20(8) SSM Regulation; 45(7) of the SRM Regulation.

[97]Including secure IT systems, and ECB/SRB consultation for their treatment and retention ECA-ECB MoU, Section II no. 7, a–g.

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

to a part of the Chair and Vice-Chair staff, and a selected-yet-politically representative subgroup of five to seven members from the ECON's Banking Union Working Group. A strict literal reading of Article 20(8) SSM Regulation, 45(7) SRM Regulation and the relevant IIAs' implementing provisions could suggest that *all* confidential exchanges be mediated (solely) between the Chair and Vice-Chair of ECON Committee and the Chairs of the ECB's Supervisory Board and SRB. Yet, in our view, a finalistic reading, in light of the overarching principle of effective political accountability[99] militates in favour of a broader understanding of the modalities under which such exchanges can take place, *provided* they are controlled by the Chairs of ECON and authorised by SSM/SRB Chairs. *Such a structured cooperation could also authorise search and fact-finding visits. In our view, the results could be formalised in an annual Banking Union Working Group confidential report to the SSM and SRM, to help frame the dialogue on how to better coalesce legislative/regulatory and supervisory efforts.*[100]

Moving on to *planning, continuity and deliverability*. This category shows obvious shortcomings, some relatively easy to remedy. Whereas, MEPs questions are mostly relevant and informed, it is the ECON committee's "accountability strategy" (or lack thereof) that prevents a meaningful, in-depth control.[101] Let us zoom in on the EP hearing of 12 December 2019 with the SSM Chair. (i) Experts' briefing papers analysed the significant banks' "subdued profitability";[102] and (ii) EP staff's briefing note covered this, and also SSM 2020 supervisory priorities (balance sheet repair and strengthening future resilience) stress testing developments, updates on individual bank cases and supervisory issues and policies (e.g., money laundering or Brexit).[103]

This would make it extremely difficult to have a meaningful in-depth conversation under the best conditions, including a *long* hearing. Yet, (iii) the hearing's circa 90 minutes (9:11–10:37 AM) covered not only the above points, but a mind-boggling array of other issues.[104] There was no identifiable pattern in the sequence of questions, which seemed to depend on each MEP's preferences; even when an issue came up repeatedly (e.g., EDIS and sustainable finance) each MEP did not build on previous MEPs questions, and thus precious time was wasted on framing the issue. The SSM Chair's energy was spent in switching topics (showing remarkable mental agility) rather than delving deeper into each of them. To an observer, the impression was one of thoughtful individual views, but a frankly disjointed output due to lack of cooperation or strategy. The 2020 hearings were not chosen to exemplify our point in case someone would argue that they were not representative because the landscape was too dominated by the COVID crisis, but they actually show a similar pattern.[105] This impression is strengthened by other hearings that look like good academic seminars, not an accountability exercise.

The assessment of SRB/SRM[106] offers similarities, but also nuances. Again, hearings are prepared with: (i) briefing papers; (ii) (good) staff briefing notes; (iii) a hearing including a presentation by the SRB Chair; and

[99]Indeed, the EP's Rules of Procedure already enshrine this active role, including Rule 221 (procedure for consultation of confidential information in an *in camera* meeting by the *Committee*) and Rule 228 (procedure for fact-finding visits).

[100]Lamandini, Ramos *SSM/SRM Accountability*, n. 1 above.

[101]See C. Wyplosz 'The Panel of Monetary Experts and the Policy Dialogue', *Briefing Notes to the Committee for Economic and Monetary Affairs of the European Parliament*, (2005) for similar observations on the Monetary Dialogue.

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

[103]C. Dias, K. Grigaite and M. Magnus, 'Public Hearing with Andrea Enria, Chair of the ECB Supervisory Board', (2019), https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/624437/IPOL_BRI(2019)624437_EN.pdf, accessed March 2021.

[104]Among them, other individual bank cases, supervisory consistency, competition-state aid, withdrawal of banking licenses, fit-and-proper assessments, sovereign exposures' treatment, ESM approval contingencies, banks' mergers and balance sheet structure, small banks and proportionality, FinTech, arbitrage or sustainable finance. Committee on Economic and Monetary Affairs, 'Public Hearing with Andrea Enria Chair of the Supervisory Board of the ECB' (2019), https://www.europarl.europa.eu/cmsdata/195253/CRE_Public_hearing_SSM_EN_original.pdf (accessed 1 March 2021).

[105]The hearing of 5 May 2020 lasted 54 minutes (11:01–11:55) and covered the COVID-19 crisis, but also EDIS, CMU, NPLs and moratoria, the BVerfG ruling of 5 May 2020 and its impact on PEPP, restrictions on dividends distributions, early intervention measures on fragile banks, bank recovery plans. The hearing of 27 October 2020 lasted 64 minutes (13:46–14:50) and was more concentrated on NPLs, including their management, forbearance and payment moratoria, AMCs, etc., but this seems due to the growing concern about the matter than to a matter of design. The hearing also covered restrictions on dividends distribution, SSM internal reorganisation, the channelling of funds by banks to the real economy, bank customer protection, the FinCen scandal and money laundering, CMU, etc. See https://www.bankingsupervision.europa.eu/press/tvservices/hearings/html/index.en.html. There were no references to exchanges of previous hearings.

[106]See https://www.europarl.europa.eu/committees/en/econ/econ-policies/banking-union?tabCode=bank-resolution.

(iv) a time for MEPs questions and remarks. For the July 2019 hearing there were: (i) two staff notes on SRM features, oversight and accountability, and liquidity provision in resolution;[107] and (ii) one hearing-specific note, covering the SRB role and tasks, Annual Report, MREL implementation, an update on the Banco Popular case, the steps to complete the Banking Union (including EDIS and a post-resolution bank liquidity facility) the need for bank insolvency law harmonisation, or the EP's role as co-legislator for ESM-related modifications to the resolution framework;[108] (iii) the SRB Chair presented the SRB Annual Report, and discussed most of the above issues and some others;[109] and (iv) MEPs questions and remarks focused on perhaps too many topics,[110] but there was also less sense of drift, the exchange was more focused on resolution planning, liquidity-in-resolution, and SRB's inadequacy of resources, remarks were more succinct, and inquisitive, and the tone less deferential and more challenging. The 2020 hearings were more focused, although this was due to the COVID crisis, which was the pivotal issue.[111]

ECON's *Banking Union Annual Reports* confirm the impression that the problem is ECON's (and the Parliament's) willingness to "bite more than it can chew". Each report relates the EP's position with regard to *all* relevant Banking Union developments, of a regulatory, supervisory, resolution or institutional nature.[112] Even if the tone can be sharp, and the Parliament can make specific requests,[113] the issues are so many and so varied, that there is no way to insist upon them, or even keep track of them.[114] Predictably, each Report does not follow up much on the previous one and resembles a fashion catalogue where almost the whole collection is renewed annually.

Finally, moving onto the responses to MEPs letters, the evidence is mixed. Of the ECB's 500-something responses to MEPs letters[115] MEPs are (overwhelmingly) more concerned with monetary and economic issues (228 responses); than with domestic issues (84). Supervision, resolution and regulation come next (57) close to money and payments (54) and institutional issues (related to organisation, communication, interaction with third parties and fora, integrity or human resources) (52), leaving "unrelated" matters outside the ECB's purview (27).

[107]M. Magnus, C. Dias and J. Deslandes 'Single Resolution Mechanism: Main Features, Oversight and Accountability', (2019), https://www.europarl.europa.eu/RegData/etudes/BRIE/2014/528749/IPOL-ECON_NT(2014)528749_EN.pdf (accessed 1 March 2021); and J. Deslandes and M. Magnus 'Banking Union: Towards New Arrangements for the Provision of Liquidity in Resolution?', (2019), https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/624402/IPOL_BRI(2018)624402_EN.pdf (accessed 1 March 2021).

[108]J. Deslandes, C. Dias, M. Magnus and R. Segall, 'Public hearing with Elke König, Chair of the Single Resolution Board', (2019), https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/634370/IPOL_BRI(2019)634370_EN.pdf (accessed 1 March 2021).

[109]Resolution plans, impediments to resolvability and MREL, and further steps (including the document on expectations for banks) as well as reforms, such as deeper capital markets to make MREL placement possible, domestic insolvency laws harmonisation, liquidity in resolution or resolution of CCPs. Deslandes et al., 'Public hearing with Elke König…', see n. 100 above.

[110]These included operational (in)efficiencies pointed in the ECA report (e.g., staffing or data), gaps in resolution planning, SRF resources, ESM reform, software expenditures' deductibility from capital, liquidity-in-resolution tools, banks' asymmetrical treatment, resolution planning, Brexit risks, early warnings, shadow banking, TLAC/MREL, or proportionality.

[111]The May 2020 (10:05–11:01) hearing included references to the COVID crisis, NPLs, the BVerfG ruling, the MREL cycle, state aid and precautionary recapitalisation, US–EU comparisons, or SRF contributions (generally with reference to the COVID crisis). The 27 October 2020 hearing covered COVID-19, holistic solutions to NPLs (AMCs, resolution backstop (including SRF)), the impact of the General Court annulment of decisions on SRF contributions, MREL targets and flexibility under BRRD I and BRRD II, Commission proposals for banks' crisis management, CCPs and their resolution, expectations for banks, financial markets infrastructures (FMIs), NPLs and AMCs. No mention of previous commitments or meetings was made. See https://www.europarl.europa.eu/committees/pl/hearings-and-exchanges-of-views-/product-details/20130131CPU60222002001.

[112]For example, the Banking Union—Annual Report 2019 (2019/2130(INI)) 26.2.2020 (Rapporteur: Pedro Marques) refers to (on supervision) bank resilience and profitability, sustainable finance, sovereign risk, Brexit, gender balance, Capital Markets Union, market risk, NPLs and customers' rights, mis-selling, proportionality and diversity, internal models, FinTech, shadow banking, money laundering, credit rating agencies, and (on resolution) resolution plans and MREL, harmonisation of national insolvency laws, state aid, early intervention, Italian cases, ESM reform, and several other issues on deposit insurance.

[113]See Deslandes et al., 'European Parliament's Banking Union…', see n. 84 above.

[114]If one looks at the Banking Union—annual report (2018/2100(INI)) 3.12.2018 (Rapporteur: Torvalds) touches upon a similar number of issues, some also discussed in the 2019 report (with such a high number, it would be impossible not to). However, there is no continuity between reports, no cross-references (from 2019 to 2018, or 2018 to 2017), no keeping track of issues from one report to another, etc.

[115]On the ECB site, https://www.ecb.europa.eu/pub/pub/intco/html/index.en.html information is more detailed than on the EP's site, https://www.europarl.europa.eu/committees/en/econ/econ-policies/financial-services. We analyse the 503 responses to MEPs questions on the ECB's site from 2004 to 2020. Compare the 337 questions in 283 letters between 2013 and 2018 documented in the excellent work by Maricut-Akbik, 'Contesting the European Central Bank…', n. 18 above, 16. Her analysis is based on a shorter timespan but distinguishes between questions, ours covers a longer time period, but focuses on the *responses* to the letters, and the main issue in each letter. Our analyses are broadly coincident.

This is a generous classification, which includes as "supervision/resolution/regulation" issues pertaining to individual banks (which could have been classified as "domestic"[116]) or where the ECB had no competences (e.g., CCPs,[117] or banks before the Banking Union[118]), which could fall into "unrelated". The number of responses to letters on bank regulation, supervision, resolution and deposit insurance (generically, Regulatory issues) *after* the Banking Union was in place, i.e., in 2014–20 (23[119]) concerns the years 2014–17, but plummets after 2017 (there is no response that can be primarily ascribed to these issues). That number of responses *after* the Banking Union was in place is close to the number of responses to letters on supervisory issues *before* the Banking Union was in place (19) and the ECB had no competences.[120] Thus, one can hardly say that the level of relevance of the new competences have been matched by the level of attention by MEPS.

Item	Monetary policy[121] & economy	Domestic[122]	Supervision, resolution, regulation[123]	Money, Payments[124]	Institutional issues, integrity[125]	Unrelated[126]
No. letters	228	84	57	54	52	27

The correspondence available with the SRB is much less abundant. Of a total of 11 responses to MEPs available in the SRB's site,[127] five relate to resolution cases (four to Banco Popular (BP)), two on access to documents (resolution decision and valuation reports[128]), and three other matters, i.e., the timing of the resolution, and whether action could have been adopted earlier,[129] the decision to not do an ex post definitive valuation,[130]and the sequence of events leading to ABLV FOLTF assessment, and liquidation under domestic insolvency laws.[131] The next group are a series of (3) responses to letters by MEP Giegold,[132] on the details of resolution planning and resolvability assessments. Then, there are two responses on other matters.

Item	Banco Popular. Access to documents	Banco Popular-Other &ABLV	Resolution planning	Other
No. letters	2	3	3	3

[116]E.g., five responses to letters by MEP Melo and other Portuguese MEPs on Banif (June–July 2017)
[117]Response to letter by MEP Pervenche Berès of 11/01/17.
[118]Responses to letters by MEPs Melo, Borghezio, Teixeira, Chountis, etc, between 2010 and 2013.
[119]To give more context, 23 is also the number of responses to questions on banknotes and coins.
[120]If only we reclassified the group of (5) responses to letters by Portuguese MEPs about an individual institution (Banif) as a 'Domestic' issue, there would be *more* responses to questions on the Banking Union *before* it was in place, than after.
[121]Includes issues concerning: (i) monetary policy-EMU and unconventional policy (82); and (ii) programs (PSPP, APP, CSPP, ABSP, etc) (53), operations (46), economic/financial assessment and policy (39) and other issues.
[122]Includes adjustment programmes (38), and issues pertaining to individual countries or institutions, unless the issue is framed as 'Supervisory', e.g., 'letter concerning a less significant institution'.
[123]Includes instances where the ECB did not have supervisory competences (e.g., prior to SSM) but provided an answer, and also questions on specific institutions framed in a broader context.
[124]Includes payment services and systems (15), cash and banknotes (27), and electronic money (10).
[125]Includes participation in international fora and interactions with third parties, communication policy, integrity and transparency, as well as those concerning the ECB's new building, staff, or internal organisation (resources, voting, etc.).
[126]Includes market conduct (consumer and investor protection), tax evasion, or points where ECB does not comment. Aspects where the ECB alleges confidentiality (typically related to individual institutions) are classified amongst 'Supervision & Resolution'.
[127]See SRB, 'Correspondence with the European Parliament', https://srb.europa.eu/en/public-register-of-documents/193 (accessed 1 March 2021); SRB, 'Addressed Questions', https://srb.europa.eu/en/content/european-co-operation (accessed 1 March 2021).
[128]Question for written answer Z-069/2017 to the SRB Chair—MEP Ernest Urtasun; Reply to request for written answer to the SRB Chair—Mr Tremon i Balcells Ref. ARES (2017)/3,617,257.
[129]Question for written answer Z-072/2017 to the SRB Chair—Marco Zanni.
[130]Question for written answer Z-073/2018.
[131]Question for written answer Z-025/2018.
[132]Reply to the request dated 29 March 2016 for further information to the Chair of the SRB, Ms Elke König; Reply to written question Z-0382019 by MEP Sven Giegold; Follow-up reply to written question Z-0382019 by MEP Sven Giegold.

Thus, any diagnosis has to make sense of this evidence: (i) interaction between MEPs and ECB has increased with time; (ii) while MEPs ask relevant and informed questions, hearings themselves are disorganised and crowded with too many issues, an impression reinforced by the Annual Reports; (iii) many MEPs questions concern issues that are domestic, or fall outside the ECB's remit, whilst the interest in bank regulation is not commensurate with its importance; and (iv) these trends are less pronounced for the SRB: interaction is less assiduous, more concise and focused.

Above we advocated a system under the aegis of ECON's Chair and Vice-Chair, and SSM/SRM Chairs to facilitate access to confidential information by some MEPs. Currently, MEPs operate independently, and uncoordinatedly. The suggested approach would help *ECON take the initiative by having its own accountability agenda, fitting with SSM/SRM supervisory/resolution planning cycle. Spotting in advance the moments at which a deeper exchange or fact-finding mission can yield more meaningful results would make it easier to compare the authority's prognosis, with the actual problems detected, thus gaining a better idea of where things are under control, and where the gaps are. Such agenda would have a few regular highlights but would still have plenty of room to accommodate other issues, e.g. new regulatory or policy initiatives in process*. Even "surprises" would be easier to fit, since previous, meaningful exchanges would help give each problem its due context.

There might be a concern that such a deep involvement could impinge upon the authorities' *independence* in the name of accountability. This concern is unwarranted for several reasons: one, unlike courts, which can annul decisions, political bodies cannot, which means that they can engage more freely with the substance of the issues and decisions; two, both authorities are protected from political pressures by budgetary independence, and composite appointment and removal procedures; three, independence is not only about institutional safeguards, but practice, and current SSM/SRM Chairs and staff offer the best assurance of independence, and this should always be a relevant factor in the selection; four, the "risk to independence" tends to frame the issue backwards; technical independence is justified *because* there is actual political accountability. In any event, to safeguard the principle of independence[133] exchanges and on-site visits should not be read as instructions or any other form of "undue political influence" and should be ex post, to avoid the appearance of influencing the outcome of decisions. Such ex post exchanges would be compatible with the idea of *planning* outlined above if the goal of such planning is not to influence decision-making, but to *focus* the debate.

Our proposal would institutionalise a two-tier system, one tier based on public information and one based on confidential information concentrating more authority on the Chair and Vice-Chair in the process. This need not be detrimental to public debate, though. MEPs involved in confidential exchanges and fact-finding missions could, without disclosing confidential information, still ask more informed questions in public hearings to streamline and focus the debate towards blind spots or controversial points. Such MEPs would have every incentive to raise the relevant issues, since otherwise they could be blamed as part of the problem.

Yet, this would require a behavioural change, where MEPs accept greater coordination, and a stronger role by the Chair, to use all the information, plus the outside expertise (and that of their own staff) to, e.g., organise "thematic" hearings, or divide each hearing in blocks around the main issues, where MEPs would ask separate questions, but would agree on a *single line of questioning*, and would try to obtain commitments by the SSM and SRB Chairs, or draw clear conclusions as a reference point that could be revisited in subsequent meetings.[134]

Finally, *coordination*. In simple terms, the *exercise* of supervisory/resolution tasks is based on a sophisticated system of coordinated action between ECB/SRB and NCAs/NRAs, SSM and SRM,[135] and even (exceptionally) between

[133]Articles 19(1)–(2) SSM Regulation, 47(2) of the SRM Regulation.

[134]Lamandini and Ramos *SSM/SRM Accountability*, n. 1 above.

[135]For resolution plans (art 3 (4) SSM Regulation, arts 8–10 SRM regulation); recital (27) and art 15(5)–(6) (withdrawal of authorisations) SSM regulation, art 18 (resolution procedure) SRM Regulation.

ECB monetary and supervisory levels.[136] There is no comparable coordination for the accountability over those tasks. Although ECON oversees ECB supervisory tasks, SRB resolution tasks, and ECB monetary tasks, which means that there is a continuum of understanding and shared knowledge, on a horizontal level, neither MEPs questions, nor hearings show enough continuity between supervision, resolution, and monetary mandates, and, on a vertical level, although some EU actions have a major impact in some Member States, and engage their legislative bodies (e.g., the Banco Popular resolution in Spain) there is no clear evidence of formal coordination between legislative bodies.

More targeted access to information, and a formal "accountability agenda" (the pillars of the approach suggested here), would enable better coordination. First, deeper exchanges would not only highlight the gaps in each authority's mandate, but also the points of friction between mandates, and transversal problems. One step in this direction would be to organise thematic exchanges where more than one authority (ECB and SRB) could be involved, and therefore questions that cut across mandates would be harder to dodge. This would also offer the opportunity to collect findings through, e.g., in camera hearings, from supervised entities to ensure stakeholders' and banks' experiences and suggestions are heard by the ECB and the SRB.[137]

Second, the "accountability agenda" would help to better fit interparliamentary dialogue, to make the best possible use of the tools granted after Lisbon, by, e.g., requesting information on issues before national parliaments *ahead* of dialogue sessions between the European Parliament and the SSM Chair or the SRB Chair, and feeding back to national parliaments what the European Parliament has learned on these issues.

This, in turn, would be essential to reassure public opinion in the wake of unpopular decisions (e.g. FOLTF assessments of credit institutions): the information which could provide a rationale for the measures would be confidential, but prominent political representatives like ECON's Chair and Vice-Chair, or a representative subgroup, could reassure the public with their own endorsement. In our view, the IIAs restrictions on MEPs statements on the content or results of confidential meetings would not apply if they are pre-agreed with the SSM/SRM Chairs. *In this way, more political accountability would translate, in our eyes, into reinforced credibility of the overall institutional setting for supervision and resolution and, in turn, into its full democratic legitimacy*.

4 | A MULTI-DIMENSIONAL ADMINISTRATIVE ACCOUNTABILITY

4.1 | The operational dimension: European Court of Auditors' law and practice

The European Court of Auditors (ECA) is the main body entrusted with the administrative-financial accountability function. Its mandate is based on: (i) the ESCB Statute, and the SSM Regulation for the ECB;[138] and (ii) the SRM Regulation and the TFEU for the SRB.[139] More specifically, Article 27(2) of the ESCB Statute limits the controls of the ECA over the ECB (including its SSM component) to an examination of the 'operational efficiency of the management of the ECB', as opposed to the wider audit mandate usually conferred upon the ECA by Article 287 TFEU (which applies to the SRM). Again, this difference originates from the fact that the ECB is an EU institution whose independence is mandated under the TFEU (to protect its monetary policy function) the SRB is a European agency.

The exercise of its mandate by the ECA over the SSM and SRM has been a source of friction in the past. In November 2016, the ECA published its first special report (29/2016) on the SSM,[140] in December 2017, its first

[136]The rules emphasise the separation between monetary and supervisory functions. See art 25 SSM Regulation. Yet, the rules also regulate the possibility of objections to Supervisory Board draft decisions by the Governing Council (art 26 (8) SSM Regulation) the differences in views by NCAs with regard to Council objections, and the mediation panel (art 25 (5) SSM Regulation).

[137]On a practical note, ECON Banking Group could benefit from separate, confidential meetings with ECB/SRB officials, on one hand, and industry experts, on the other hand, to anticipate points of friction, in line with practice at the AP.

[138]Article 27.2 of the Statute of the ESCB and of the ECB, and art 20.7 SSM Regulation.

[139]Article 287 TFEU.

[140]ECA, 'Special Report No. 29/2016. Single Supervisory Mechanism—Good start but further improvements needed', https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=39744 (accessed 1 March 2021).

special report (23/2017) on the SRB,[141] and in January 2018 its second special report (02/2018) on the ECB's crisis management in relation to its banking supervision tasks.[142] In all these cases the ECA pointed out the severe difficulties it encountered in terms of access to the relevant information to fulfil its mandate.

The main cause was the ECB's refusal to grant access to relevant documents (the SRB mostly refused access to documents originated by the ECB).[143] The ECB relied on the language of the ESCB/ECB protocol, which states that the ECB and ESCB accounts shall be audited by independent external auditors 'recommended by the Governing Council and approved by the Council',[144] and that such audit must be circumscribed 'to an examination of the operational efficiency of the management of the ECB',[145] and that this must be interpreted to preserve the ECB's independence.[146] This comes on top of the ECB's adamant defence of its autonomy and independence (Article 19 SSM Regulation mirrors Article 130 TFEU on the ECB independence), which nonetheless has met an equally adamant defence by the CJEU of the need that such independence does not result in an exemption from Union rules of law.[147]

In light of these difficulties, in its October 2017 review of the SSM Regulation the Commission emphasised the ECB's duty to provide access to information by ECA, and the need that both institutions conclude an MoU to structure their cooperation, a cooperation that was also stressed in April 2018 by the European Parliament. The MoU between the ECA and ECB was finally signed in October 2019, and it regulates both the general access to documents by the ECA,[148] and the special treatment of highly confidential documents and information, which must be dealt with on-site, by a limited number of ECA staff, with secure IT systems, and with ECB consultation for their treatment and retention,[149] all subject to the principle of proportionality.

4.2 | The ethical dimension: the Ombudsman

The Commission's Report lists the European Ombudsman (EO) among the EU institutions and bodies entrusted with ensuring the ECB's administrative accountability, without further elaborating on this role,[150] grounded in its general Treaty mandate to fight maladministration,[151] receiving direct complaints from citizens,[152] and undertaking inquiries

[141]ECA, Special report no. 23/2017. Single Resolution Board: Work on a Challenging Banking Union Task Started, but Still a Long Way to Go', https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44424 (accessed 1 March 2021).

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

[143]ECA, 'Communication to the European Parliament concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC))', https://www.eca.europa.eu/other%20publications/pl19_ecb/pl19_ecb_en.pdf, accessed March 2021.

[144]Article 27.1 ESCB-ECB Protocol.

[145]Article 27.2 ESCB-ECB Protocol.

[146]See e.g. MEP, 'Letter from Andrea Enria to Mr. Papadimoulis', (2019), https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter190312_papadimoulis~c82885a8d2.en.pdf (accessed 1 March 2021).

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

[148]MoU between the ECA and the ECB regarding audits on the ECB's supervisory tasks (ECA-ECB MoU) Section I, nos. 3–6.

[149]ECA-ECB MoU, Section II no. 7, a–g.

[150]'As to administrative accountability, the ECB is subject to extensive complementary reviews by various administrative bodies in the EU, namely the Commission, the European Court of Auditors (ECA), the European Banking Authority (EBA) and the European Ombudsman.' EC, Report on SSM (2017), 5, https://ec.europa.eu/info/sites/info/files/171011-ssm-review-report_en.pdf (accessed 1 March 2021).

[151]Article 228 TFEU, article 2 (1) European Ombudsman Statute.

[152]Article 228 (1) TFEU, art 2 European Ombudsman Statute.

based on those complaints or on its own initiative, except where the alleged facts are subject to legal proceedings.[153] The pattern of actions shows similarities with the Parliament's role. Some of the EO's cases do not follow a predictable pattern, and depend on the complainants' problem, e.g., recruiting procedures,[154] delays in handling specific complaints,[155] or the exercise of tasks.[156]

Yet, the more recurring Ombudsman's actions on the SSM/SRM have focused on ethics and procedural irregularities, and access to documents. On the ethics side, the Ombudsman has been proactive in helping the ECB elaborate its Code of Conduct for Supervisory Board Members.[157] On transparency and access to documents, the Ombudsman opened cases on transparency and communication by the ECB,[158] and on access to documents in relation to the SRB in 2018.[159] It closed the SRB case, as the issue was being dealt by courts,[160] but it advised the ECB to enhance its communication policy to make it more transparent.[161]

Although the EO has no clear power to impose consequences (e.g., sanctions) it has clear moral suasion, and it has played a leading, and constructive role *together* with the Parliament on matters of institutional integrity. In 2015 the remarks made by an ECB Board member in a speech resulted in an EO letter expressing concerns, which were met with a long explanatory letter by the ECB's President,[162] followed up by letters from several MEPs,[163] and resulted in changes in the ECB's communication policy.[164]

Conversely, MEPs expressed concerns about the fact that the ECB's participation in international fora (notably the "Group of 30") could increase opacity and compromise its independence, a concern that was followed up by an EO Recommendation.[165] The result was that EO and Parliament were both active participants in the process to bolster the Single Code of Conduct that now regulates the ethical standards of all ECB high officials.[166] Since we have pointed out different shortcomings in the process, it is also fair to point to its successes: EO and EP cooperated well, no one can say that the ECB's independence was jeopardised as a result of its responsiveness, and integrity and transparency were enhanced in the process.

[153]Article 228 (2) TFEU, art 3 European Ombudsman Statute.

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

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

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

[157]2014 ECB Code of Conduct for members of the Supervisory Board. See European Ombudsman Staff Working Paper on the revision of the ECB's Ethics Framework, (2014), https://www.ombudsman.europa.eu/en/letter/en/60111 (accessed 1 March 2021).

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

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

[160]See Decision on Case OI/1/2018/AMF.

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

[162]See EO, 'Response to letter by Mrs. O'Reilly' (11 June 2015).

[163]See e.g. Responses to letters by MEPs Zanni and Valli (14/7/2015), Hayes (3/09/2015), or Viegas (3/12/2015).

[164]Guiding principles for external communication by members of the Executive Board of the European Central Bank, 6 October 2015. In its Report on the follow-up by EU institutions on its recommendations 'Putting it Right?—How the EU institutions responded to the Ombudsman in 2013', (25 November 2014), the Ombudsman stated that: 'In its follow-up reply in case 1339/2012/FOR, the European Central Bank (ECB) announced that its Executive Board and Governing Council decided to make improved communication one of the key priorities of the ECB's medium-term strategic planning for 2013–15'. Such review of its communication policy would include the SSM.

[165]EO Recommendations on the involvement of the President of the European Central Bank and members of its decision-making bodies in the 'Group of Thirty' (1697/2016/ANA) 15 January 2018.

[166]ECB Code of Conduct for High Level Officials, 2019, https://www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190116.en.html, accessed March 2021. The Code responded to requests from the EP and EO recommendations, e.g., the Recommendations of the European Ombudsman on the involvement of the President of the European Central Bank and members of its decision-making bodies in the 'Group of Thirty' (1697/2016/ANA), (15 January 2018), which were important input for the Single Code of Conduct were a follow-up on its earlier decision on the Group of 30 in Case 1339/2012/FOR. See also the Letter from the European Ombudsman to the ECB on the Supervisory Review and Evaluation Process, case SI/10/2016/EA, https://www.ombudsman.europa.eu/es/case/en/48792 (for the letter and the ECB reply).

4.3 | The specialist dimension: European Banking Authority (EBA), supervisory quality and convergence

The EBA is required to contribute to the establishment of high-quality common regulatory and supervisory standards and practices, ensuring the consistent application of the Single Rulebook, in particular by contributing to a common supervisory culture, and conducting peer-review analyses of the competent authorities.[167]It is called to monitor and review ECB and NCAs' supervisory practice and effectiveness through analyses that assess the effectiveness of supervisory activities and implementation of provisions vis-à-vis those of their peers. Peer reviews assess the adequacy of resources and governance arrangements, or the application of regulatory technical standards and implementing technical standards (RTS-ITS).[168]

The EBA also spurs the process of supervisory convergence, by promoting best practices. Its Review Panel[169] develops the methodological framework for peer reviews and regularly conducts them over competent authorities' activities, to further strengthen consistency in supervisory outcomes. The EBA regularly publishes reports on convergence of supervisory practices,[170] which analyse the information collected on supervisory practices also from the ECB, in particular during bilateral convergence visits, first introduced in 2016 and through the organisation of peer reviews and its participation in colleges of supervisors. This mandate applies also to the supervisory review and evaluation process (SREP) under Article 107 of Directive 2013/36.

Finally, for the purpose of establishing a common supervisory culture, the EBA shall develop and maintain: (i) an up-to-date Union handbook on the supervision of financial institutions in the Union; and (ii) an up-to-date Union handbook on the resolution of financial institutions in the Union, both of which must take into account the nature, scale and complexity of risks, business practices, business models and the size of financial institutions and of markets,[171] and at least every three years the EBA identifies up to two supervisory priorities of Union-wide strategic relevance,[172] and thus also contributes to the definition of the ECB supervisory action plan.

Thus, *the EBA can monitor the ECB's practice, the existence of breaches of Union law and its organisation, compare its practice with that of NCAs, assess convergence and best practices, and help foster a common supervisory culture, and identify supervisory priorities. All of it without instituting any hierarchical administrative control or jeopardising its independence and technical discretion*. In our view, this role and tasks should be put to a better use as part of the accountability process, as suggested below.

4.4 | Applying our taxonomy: A better partnership between parliaments, and EBA-ECA to bridge political and administrative accountability

Some challenges of administrative accountability become apparent as we apply our taxonomy.

Starting with *information and expertise*, if we focus on ECA/EBA as *recipients* of information for accountability purposes, there is insufficient clarity about the role that ECA and national auditing courts can play as an independent mechanism of control. The ECA's mandate of review over the ECB is limited to the "operational efficiency" of the "management" of the ECB.[173] This raises interpretative issues over what "operational efficiency" or "management" means, thus giving the ECB much power to set the terms of the audit.[174] The EBA, for its part, is in a relatively

[167]Article 8 (1) (a), (aa), (ab) (d) Regulation 1093/2010 (EBA Regulation).
[168]Article 30 EBA Regulation.
[169]See EBA, 'Supervisory Convergence', https://eba.europa.eu/supervisory-convergence/review-panel (accessed 1 March 2021).
[170]Compare, e.g., EBA-OP-2019-02 of 14 March 2019.
[171]Article 29 of the EBA Regulation.
[172]Article 29a of the EBA Regulation.
[173]Article 27 (2) ESCB-ECB Statute.
[174]Some have interpreted this as focusing on 'performance audits', thereby leaving out 'financial compliance' audits. See e.g., F. Allemand 'Accountability and Audit Requirements in Relation to the SSM', (2017) ECB Legal Conference Proceedings, 71.

advantageous position in terms of access to information and expertise over the banking sector, as well as links with both NCAs (including outside the Eurozone) and ECB, but *does not form part* of the accountability structure.

If we focus on ECA and EBA as *providers* of information and expertise to the European Parliament, the picture is even more puzzling. Even if the two-tiered system of access to confidential information discussed before[175] is implemented, the Parliament would lack the kind of reliable information that comes with an external (regulatory) *audit*. Yet, evidence of formal collaboration between technical bodies and Parliament is scant. As we discuss below this is primarily a coordination problem.

Moving on to *planning, continuity and deliverability*, there could be a better liaison between ECA/EBA and the Parliament, which would, in turn, contribute to a better planning and continuity. Without an external audit, the Parliament cannot replicate the tests or a sample of tests carried out by the SSM, which means that, even with knowledgeable and informed opinions, it would still lack benchmarks to measure the work by ECB, SRB and NCAs/NRAs.[176] In our view, the information collected and processed by ECA, and even more by EBA, could fulfil this role. They could be conveyed through an opinion to the ECON Committee as an "external" audit that would act as the flip side to the "internal" tools (e.g. the SSM Supervisory Dashboard Pilot).[177]

The Parliament and ECON are aware that leveraging other institutions' strengths and coordinating efforts can help make authorities more accountable. They did so with the European Ombudsman to effect changes in the ECB communications policy and ethical framework.[178] The ECA, for its part, is also fully aware that leveraging political bodies is useful to obtain better access to information, hence its direct appeal to the Parliament with regard to the ECB,[179] which led to the ECA-ECB MoU. Yet, such joint efforts seem to be episodical, and there has been no initiative to cooperate regularly.

The case of EBA is particularly illustrative. It has a very structured workflow, with much planning, its technical perspective has indubitable political relevance (i.e., convergence, peer-reviews, best practices etc) but it is only mentioned in the Parliament's Reports for its direct exercise of regulatory or supervisory measures,[180] and its input is not incorporated into any "accountability cycle" over the Banking Union,[181] i.e., the two bodies that would appear to complement each other in the accountability function do not talk to each other much, let alone plan together.

Finally, *coordination*. The main cause for the observed mismatch between supply and demand of information and expertise for accountability purposes, and the ensuing deficiencies in planning and continuity is the insufficient coordination between technical bodies (ECA and EBA) and the political body (European Parliament). This is a practical mistake, since the rules applicable present, in our view, no insurmountable obstacle.

In the case of ECA, the TFEU provides that the ECA will assist Parliament and Council in their powers of control over the implementation of the budget,[182] and *also* that it may submit observations, in the form of special reports 'on specific questions and deliver opinions at the request of one of the other institutions of the Union',[183] and SSM rules seem to place ECA's review in the context of parliamentary accountability.[184] Yet, it is unclear whether any of ECA's Special Reports on the Banking Union[185] responded to ECON's questions. Indeed, despite being matters

[175]See Section 3.2.

[176]Nicolaides, 'Accountability of the ECB's Single Supervisory Mechanism…', see n. 85 above.

[177]Nicolaides, 'Accountability of the ECB's Single Supervisory Mechanism…', see n. 18 above, 25.

[178]See Section 4.1.2.

[179]Communication to the EP concerning the EP's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC)) Adopted by Chamber IV at its meeting of 13 December 2018.

[180]Banking Union Report 2018 refers to EBA's 'stress-test' exercises, its new role in anti-money laundering, its guidelines in NPLs, and the need to differentiate between EBA's regulatory and ECB's supervisory competences (paras. 9, 10, 16, 21). The EP's Banking Union Report 2019 refers to EBA's Risk Assessment, or the need to advance on climate risks (paras. 6, 44). Even on a 'convergence' issue, such as the determination of systemic risk buffers (para. 31) the focus is on divergences *between Member States*.

[181]Lamandini and Ramos; Ruiz *EMU & Dialogue*, n. 1 above.

[182]Article 287 (4) 4th para. TFEU.

[183]Article 287 (4) 2nd para. TFEU.

[184]Article 20 (7) SSM Regulation.

[185]ECA Special Reports No. 02/2018 (ECB's crisis management) or No. 23/2017 (SRB) are based on Art 287(4) 2nd subparagraph TFEU, but there is no indication of whether some other institution requested them.

overseen by ECON,[186] the relationship with ECA is channelled through the Parliamentary Committee on Budgetary Control (CONT),[187] which lacks the expertise to put ECA findings in a Banking Union context. ECON members, for their part, seem more adamant to ensure that the ECB grants the ECA access to information as input for its work than in ECA's output.[188] Tellingly, the ECA Report No. 02/2018 on the operational efficiency of the ECB crisis management only received a cursory citation in the Banking Union Annual Report 2018 and was not used in ECB hearings. As usual, ECON's SRB hearings leaned more on ECA's findings to point at operational shortcomings,[189] but that does not invalidate the broader point: coordination between ECA and Parliament is insufficient, and thus ECON's concerns are not covered.

EBA seems a case of "form over substance". *Its expertise is not used simply because it is not formally perceived as part of the accountability structure. Yet, its involvement in the accountability structure and coordination with Parliament falls squarely within EBA's mandate*.[190] For the SSM EBA can aid with expertise from: (i) its contribution to high-quality common regulatory and supervisory standards and practices; (ii) its duty to develop a supervisory handbook setting out 'supervisory best practices and high-quality methodologies and processes'; and (iii) to conduct regularly 'peer review analyses of competent authorities'.[191] For the SRM, EBA's expert role is part of its mandate under Directive 2014/59/EU (BRRD), which requires Member States to ensure that each resolution authority has expertise, resources and operational capacity to apply resolution actions, and can exercise their powers with speed and flexibility to achieve the resolution objectives,[192] and requires EBA to monitor the implementation of this requirement,[193] while EBA Regulation (similarly to the supervision) requires EBA to develop a resolution handbook that identifies best practices and high-quality methodologies and processes, taking into account the SRB's work.[194] As a matter of coordination, in general EBA may, upon a request from the European Parliament (among other institutions) provide opinions on all issues related to its area of competence,[195] a request that may "include a technical analysis".[196] Furthermore, the tasks listed before can be achieved through guidelines, recommendations, warnings, etc. but also *opinions* to other Union institutions.[197] This would re-purpose EBA's administrative accountability tasks in aid of political accountability.

Such an auxiliary role by the EBA would not pose a threat to the authorities' independence. It would not pose a legal challenge for a Treaty-based institution like the ECB, which voiced these concerns when EBA Regulation was amended to vest EBA with the power to set supervisory priorities, and yet the statute solidly cemented EBA's ability to identify at least every three years up to two supervisory priorities of Union-wide strategic relevance.[198] This can combine well with its auxiliary role to give opinions to the European Parliament, including "technical analysis". Thus, rather than intruding upon SSM/SRM supervisory/resolution tasks, EBA would technically assess their performance in general or in specific areas to furnish the European Parliament with a "regulatory audit" of sorts, the missing tool

[186]The EP's internal research classifies the issue as 'Economic and Monetary Affairs'. See R. Korver; G. Zana and A. Puccioni, 'Special Reports of the European Court of Auditors. A Rolling Check-list of recent findings', (2019), EPRS Ex-Post Evaluation Unit PE 631.735.

[187]See the follow-up Parliament Reports CONT Working Document of 12 July 2018 on ECA Special Report 23/2017 (2017 Discharge); or CONT Working Document on ECA Special Report 2/2018 (Discharge 2017) (Rapporteur: Inés Ayala Sender).

[188]See e.g., Committee, 'Public Hearing with Andrea Enria…' op. cit. n. 97 above., or J. Deslandes, C. Dias, M. Magnus and M. Peraki, 'Public Hearing with Danièle Nouy, Chair of the Supervisory Board', (2018), https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2018)624410 (accessed 1 March 2021).

[189]Committee on Economic and Monetary Affairs, 'Public Hearing with Elke Konig, Chair of the Single Resolution Board', (2019), https://www.europarl.europa.eu/cmsdata/186301/CRE_SRB_hearing_22092019_EN-original.pdf (accessed 1 March 2021). This also contributes to the impression of a less deferential tone in the SRB hearing, since there were less open hints at possible operational inefficiencies in the SSM hearings.

[190]Lamandini and Ramos *SSM/SRM Accountability* n. 1 above; Lamandini; Ramos; Ruiz *EMU & Dialogue*, n. 1 above.

[191]Article 8 (1) letters a), aa) and e) EBA Regulation, as amended by Regulation (EU) 2019/2175.

[192]Article 3 (8) BRRD.

[193]Article 3 (9) BRRD.

[194]Article 8 (1) (ab) EBA Regulation as amended.

[195]Article 34 (and also recital 45) of EBA Regulation.

[196]Article 16a EBA Regulation.

[197]Article 8 (2) (g) EBA Regulation.

[198]Article 29a of the EBA Regulation, as amended.

in the kit to transform political accountability from passive to proactive without undermining the institution's independence.

These efforts could also point to the gaps in vertical coordination. In the case of the ECA, although the ECB is responsible for the SSM, the direct supervision of many entities is undertaken by NCAs, and the ECA's competence is circumscribed to the ECB. This means that, whereas the ECB and NCAs are organised in a *single*, coordinated, system, the ECA and national auditors are not. This can also affect audits over the SRM–SRB, to the extent that the information was originated by the ECB.

In the case of EBA, its potential role to fill vertical coordination gaps is obvious. EBA may be an EU authority but it has evolved from a Lamfalussy Committee, a fact that is still reflected in its composition. Thus, whereas recent reforms have strengthened the importance of a "European vision" at EBA's core, the presence of NCAs is still strong. While this is often highlighted as a weakness with the aim to turn it into an effective supervisory authority, it has undeniable advantages for its role as a tool for administrative accountability, that can effectively channel information between national and EU levels.

5 | THE COMPLEXITIES OF THE BANKING UNION'S LEGAL ACCOUNTABILITY

5.1 | Judicial and quasi-judicial review

Both the actions of the ECB and the SRB are subject to review by the General Court and the Court of Justice of the European Union (CJEU) and at least some of the actions of the national competent authorities acting within the SSM and SRM are subject to review by national courts. At the European level, both are subject to annulment procedures, to be decided by the General Court, under Article 263 TFEU, actions for failure to act, under Article 265 TFEU, and actions in damages, under Article 340 TFEU. In actions before national courts involving issues of EU law (including domestic law provisions implementing EU directives) those courts can use the preliminary reference procedure under Article 267 TFEU to dialogue with the CJEU.

In a few years after the establishment of the SSM and SRM quite a number of litigation proceedings have been brought against the ECB and the SRB,[199] and their number and overall significance have probably exceeded policymakers' expectations. As per administrative review, both the SSM and the SRM contemplate the review of acts by the ECB and the SRB by an Administrative Board of Review (ABoR)[200] and an Appeal Panel (AP)[201], in line with recent EU practice to subject some decisions to the benefits of independent review. However, the two review bodies are different.

The ABoR provides an "internal" review for all SSM decisions taken by the ECB following a request by the decision's addressee, or a person directly or individually concerned by it, while the AP makes "decisions" over "appeals" but only on a handful of matters.[202] For the ABoR the result of the procedure is an "Opinion". If it is contrary to the Supervisory Board's act, the latter shall propose to the Governing Council a new draft decision abrogating the initial decision, replace it with an amended decision, *or* with a decision of identical content,[203] i.e., the ECB may choose to not follow the ABoR opinion, which is therefore not binding in its conclusions on the merit (although, following the ABoR decision, the Supervisory Board is compelled to propose a new decision to the Governing Council, which is then directly challengeable before the CJEU). In contrast, the Appeal Panel adopts a "decision", which 'may confirm the decision taken by the Board, or remit the case to the latter', and, as it happens with a court decision, 'the Board

[199]For the list and a description prepared by René Smits and Federico Della Negra compare https://ebi-europa.eu/publications/eu-cases-or-jurisprudence.
[200]Article 24 SSM Regulation.
[201]Article 85 SRM Regulation.
[202]Article 24.7 SSM Regulation; article 85.8 SRM Regulation.
[203]Article 24.7 SSM Regulation.

shall be bound by the decision of Appeal Panel and it shall adopt an amended decision'.[204] Therefore, it offers a quasi-judicial scrutiny.

This difference is based, first, on the relevance of ECB independence, outlined in Article 130 TFEU, and SSMR Article 19 and, second, on Article 263(5) TFEU, which allows the possibility to establish specific arrangements for the review of acts of Union agencies (e.g. the SRB), but not of EU institutions, such as the ECB.[205]

5.2 | Applying our taxonomy: independence and legitimacy are buttressed, not hindered, by judicial and quasi-judicial review and a better partnership between the EU Parliament and the European courts and administrative review bodies

Starting with *information and expertise*, both are essential for legal accountability to be effective. The General Court rules of procedure contemplate an ample list of measures of inquiry,[206] including the appointment of expert witnesses,[207] requests for information, production of materials or documents,[208] oral testimony,[209] etc. Sensitive confidential information can be handled effectively thanks to the provisions that permit the weighing of confidentiality against judicial protection, including the adversarial principle,[210] as well as *in camera* hearings.[211]

When it comes to expertise, judicial specialisation may be the response to the particular features of financial cases, especially in the European Union, and help to: (i) effect a more robust review of the substance of the authorities' decisions; (ii) more quickly understand the nature of the dispute, and spot the pivotal issues amidst matters of detail; and (iii) in this sense, act as a filter for generalist courts.[212] Although we acknowledge the difficulties of this,[213] *a certain level of specialisation is inevitable, and seems to be slowly taking place, with, e.g., the Eighth Chamber of the General Court taking over most SRF cases*. We elaborate on the role of review bodies in the next point.

Moving on to *planning, continuity and deliverability*, at first glance, one could surmise that these criteria have little application here. Plaintiffs, not courts (and quasi-courts) pick their cases; and thus courts are essentially reactive, and lack an agenda, or "strategy", of their own. And yet, on second thought, these ideas are a key ingredient for their success as an accountability tool, in the small details but also in the "essence" of their role.

Starting with the small details, courts may lack a "strategy", but *"planning"* is key to enhance a court's preparedness. Although some conflicts are unforeseeable, many are not, and constitute yet another stage in a protracted process of disagreement and exchange between authority and industry about the meaning and implications of the relevant framework. Litigation over issues such as the distinction between "significant" and "non-significant" institutions,[214] or the criteria for consolidated supervision[215] (SSM), or the liabilities, risk factors and "changes of status" used to calculate Single Resolution Fund (SRF) contributions (SRM),[216] was hardly

[204]Article 85.8 SRM Regulation. For some aspects of detail of this principle, see Appeal Panel decision in case 1/2021 (available at www.srb.europa.eu).
[205]The fifth paragraph of Art 263 TFEU reads as follows: 'Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them'.
[206]Article 91 General Court Rules of Procedure (RoP).
[207]Articles 91 (e) and 96 *et seq* RoP.
[208]Article 91 (b), (c) RoP.
[209]Article 91 (d) RoP.
[210]Article 103 (3) RoP.
[211]Article 109 RoP.
[212]Lamandini and Ramos Muñoz,'Law and Practice of Financial…', see n. 92 above, 119–160.
[213]Ibid.
[214]Case T-122/15 *Landeskreditbank Baden-Würtemberg v. ECB*, EU:T:2017:337.
[215]Case T-712/15 *Crédit Mutuel Arkéa v. ECB*, EU:T:2017:900.
[216]See e.g., case T-365/16 *Portigon AG v SRB*, EU:T:2019:824; and case T-323/16 *Banco Cooperativo Español v. SRB* EU:T:2019:822 (although in the end the two decisions were based on formal matters. Issues such as whether 'changes of status' (e.g., merger, acquisition, resolution, liquidation, etc) are taken into account for the calculations are discussed in the preliminary reference in case C-255/18 *State Street Bank GmbH v. Banca d'Italia* (pending). The treatment of alleged intra-group liabilities for purposes of calculating *ex ante* contributions is the subject matter of, e.g., Judgment of 3 December 2019, case C-414/18 *Iccrea Banca SpA v. Banca d'Italia*, EU:C:2019:1036.

surprising, since the issues were central and/or disagreements had been out in the open for some time, sometimes around the authority's *guidelines*.[217] Thus, since supervision and resolution are frequently cyclical, and/or very planned activities, it is very useful to catch a glimpse of where the disagreements lie during consultation and implementation stages.

Moving to "essential aspects", courts' role is essential, as the only forum that can impose clear sanctions (including annulment or damages). Since, for obvious reasons courts cannot give "forward guidance" to authorities this puts an enormous weight on *"continuity"*, i.e., the consistency and predictability of their case law.

Yet, "deliverability" is the criterion where evidence suggests there is more room for improvement. In both the SSM and SRM the number of challenged decisions is considerable, showing that courts are trusted accountability fora.[218] The fundamental problem lies in time management (e.g., four years after the Banco Popular resolution there is still no decision on the merits).

In terms of deliverability, quasi-courts can be highly complementary to the European courts and strengthen legal accountability by ensuring that appellants have their affairs handled impartially, fairly and within a very reasonable time.[219] Yet, both show some design flaws that limit their effectiveness in such task.

The ABoR issued (until 31 December 2019) twenty-three opinions, which, despite their importance (*L-Bank*, *Arkéa*, *Trasta*, just to mention a few, where cases first decided by ABoR) are only a fraction of the SSM decisions litigated before the CJEU, showing that entities are sometimes reluctant to use it, and prefer to directly challenge ECB decisions before the General Court. This may be due to the fact that ABoR does not have the last word; the ECB does, and since it may choose to ignore the ABoR's "Opinion", this may be seen by the industry less as an independent review than as an opportunity for the ECB to rehearse or strengthen its arguments in preparation for the General Court. Indeed, the Courts themselves have contributed to this state of affairs by holding that the ABoR's Opinion counts when assessing the ECB's compliance with the duty to state reasons:[220] if the ABoR's unfavourable opinions can be ignored by the ECB, and their favourable opinions can be used to strengthen its initially weak arguments, this will only make entities more reluctant.

Equally important as noted by Smits, ABoR proceedings are confidential: the ABoR's arguments are only known to the parties, and will not transcend to the public unless if so authorised by the Governing Council, the ECB President makes the outcome of the ABoR proceedings public,[221] or if the parties contesting a decision include a reference to the ABoR in their pleadings, or the General Court decides to include an excerpt of said decision.[222] Since the public is kept in the dark about ABoR's proceedings and opinions, this rules out any "continuity" in the ABoR's role, which decisively hinders its effectiveness. This is out of step with the practice of other review bodies,[223] and cannot be justified on grounds of ECB independence. This (unacceptable) institutional weakness undermines the institution's otherwise sincere efforts to become more open and responsive.

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[217]This was, e.g., a point in *Crédit Mutuel Arkéa*, see n. 203 above.

[218]Only a tiny minority of ECB decisions has been contested before the General Court (roughly 0.003%, roughly 50 cases), low in relative terms (see e.g., René Smits, 'The ECB and the Rule of Law', see n. 18 above, 350–383) but a good sample in absolute terms. As the CJEU noted in *Gauweiler*, legal accountability is an essential component of the ECB legitimacy and the less the political accountability, the more the legal accountability required. See case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400. With regard to the SRB, so far there are more than 100 cases (and four appeals to the CJEU) on the Banco Popular resolution, including the resolution decision and the decision regarding the expert valuation and six cases on access to documents concerning the Banco Popular Español; two pending cases against the decision not to initiate resolution action in respect of ABLV and one case concerning a decision not to initiate resolution action in respect of PNB Banka. On top of that, there are more than 30 cases (and two appeals to the CJEU) on the calculation of ex ante contributions to the SRF.

[219]To use the words of the CJEU, case C-439/11 P, *Ziegler SA v Commission*, EU:C:2013:513, para. 154.

[220]Case T-122/15, *Landeskreditbank Baden-Württemberg v. ECB*, EU:T:2017:337; case C-450/17 P, *Landeskreditbank Baden-Württemberg v. ECB*, EU:C:2019:372.

[221]Article 22 (Confidentiality and professional secrecy) of the ABoR Decision.

[222]Smits no. 2.1.2. 'even the fact that the opinion has been adopted is not known beyond the affected parties: the applicant and the ECB. It is only through any subsequent judicial proceedings that the opinion may become known. (…)' R. Smits, 'The ECB and the Rule of Law', see n. 18 above, 350.

[223]Ibid.

The AP, in contrast, has received roughly 120 appeals in less than four years and decided them following "fair trial" standards, within the pressing timelines set by its Rules of Procedure.[224] Furthermore, the SRB AP can be, and is much more transparent. All decisions are published on the SRB website,[225] with only minor redactions (mostly concerning the identity of the appellants) and including keywords. This offers a timely idea to an outside observer of the issues under dispute.

Despite its strengths, the AP also has weaknesses. Perhaps the main one is the AP's remit, which is narrow,[226] and does not seem to follow clear, coherent criteria.[227]

Finally, *coordination* is the greatest challenge for the system of legal accountability. The reason is that the system needs to cope with the complexities of the SSM/SRM composite system between EU authorities (ECB and SRB) and national authorities (NCAs, in the SSM, and NRAs in the SRM). Furthermore, in the specific banking context, crisis-management also involves a sequential decision-making by the ECB, which determines that a bank is failing or is likely to fail (FOLTF), the SRB (which decides on resolution and the application of its tools), and the Commission, which endorses the SRB's decision, to what one must add the Council, in particular cases, and then possibly a decision by the ECB to withdraw the bank's licence (subject to the SRB opinion).[228] This jigsaw puzzle makes it difficult to determine what is "the" relevant decision. Recent case law by EU courts has clarified some of these aspects, while leaving others unresolved.

One of the important issues that has been settled concerns cases where a decision is adopted by the ECB upon proposal by the NCA. The CJEU with its judgment in *Silvio Berlusconi/Fininvest v Banca d'Italia*,[229] drew a general distinction between preparatory acts which are binding upon the ECB, and others which are not, to determine the courts' jurisdiction. In particular, the CJEU concluded that a decision[230] adopted by the ECB following preparatory acts and *a non-binding proposal* of a decision prepared by the NCA can be appealed only before the General Court, and such Court has also:

> jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision (…) is affected by any defects rendering unlawful the acts preparatory to that decision that were adopted by [national competent authority].[231]

This very principle has been confirmed by the CJEU also in the context of the SRM with judgment of 3 December 2019, in case C-414/18, *Iccrea Banca*[232] and was equally applied in the context of horizontal composite proceedings—namely, the determination by the ECB that a bank is failing or likely to fail (FOLTF) as a fundamental step that enables the SRB to determine that the bank must be subject to resolution measures—by the General Court in case T-283/18 *Ernest Bernis et al.*[233] (the FOLTF determination is not challengeable as such, and can be challenged together with the resolution decision).

[224]This means 1 month since the appeal is lodged. See Article 21 (3) SRB AP RoP. The average duration of AP proceedings is a few months longer than the *accelerated* proceedings before the ABoR, where there is no exchange of written submissions after the notice of appeal and there is only an oral discussion by the parties in a hearing.

[225]See SRB, 'Cases', https://srb.europa.eu/en/content/cases (accessed 1 March 2021).

[226]Article 85 (3) SRM Regulation states that: 'any natural or legal person, including resolution authorities, may appeal against a decision of the Board referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) which is addressed to that person, or which is of direct and individual concern to that person'.

[227]E.g., the AP decides on contributions to SRB administrative expenses (art 65 (3) SRM Regulation), but not, e.g., contributions to the Single Resolution Fund (SRF), it decides on the assessment of resolvability (art 10 (1)) and MREL but not on resolution plans (art 8), etc.

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

[229]Case C-219/17, *Silvio Berlusconi/Fininvest v Banca d'Italia*, EU:C:2018:1023.

[230]The approval of an acquisition of qualifying holdings under Article 15 SSM Regulation.

[231]*Berlusconi*, see n. 217 above, para. 57.

[232]Case C-414/18, *Iccrea Banca v. Banca d'Italia*, ECLI:EU:C:2019:1036

[233]Case T-283/18, *Ernest Bernis v. ECB*, EU:T:2019:295. On appeal, the CJEU confirmed with judgment of 6 May 2021 in joined cases C-551/19P and C-552/19 P, ECLI:EU:C:2021:369.

In any event, this leaves open the issues about the resolution decision itself, which is entirely prepared by the SRB, but is then adopted, by endorsement, by the European Commission and Council.[234] Therefore, the proper identification of the appealable decision (and of the ensuing individual/joint liability) is less straightforward.[235] In second place, if the SRB determines that there is no public interest in the resolution, and insolvency action is then taken at the national level, it is still unclear what avenues are open, if any, to challenge the SRB determination.

A related source of difficulties is the application in both the SSM and SRM of EU law *and* domestic law.[236] If domestic courts have doubts about EU law, there is the preliminary reference procedure of article 267 TFEU, but this may significantly increase the CJEU's workload, and hinder time-responsiveness (which is already an issue). For the opposite case, there is no clear framework for cases where the ECB or SRB must apply national rules transposing EU directives, which: (i) go beyond minimum harmonisation of EU rules and add requirements; or (ii) are non-harmonised rules that complement the transposing rules (e.g., procedural rules to apply EU fit-and-proper testing rules); or (iii) transpose EU provisions wrongly; or (iv) untimely.[237] Furthermore, for doubts arising from domestic law provisions, European courts have relied so far on national case law, where the issue *was settled*,[238] but there is no clear answer where there is no settled case law, especially if the validity or constitutional legality of the domestic provisions is disputed.

Perhaps the most consequential issue is the *centralisation* pattern that emerges if we put the pieces together. This is partly an inevitable consequence of SSM/SRM, but partly a matter of choice. First, the General Court and the CJEU ruled that the ECB has the *sole* supervisory competence under SSM, both over significant and non-significant institutions.[239] Second, although EU courts have traditionally seen EU and national spheres as mutually exclusive,[240] as this airtight division has proven increasingly untenable for the Banking Union structure, the CJEU's response in *Berlusconi* was to allocate jurisdiction to EU courts,[241] *and* to *prohibit* national courts from reviewing national preparatory measures, because in this "specific cooperation mechanism" (SSM) the ECB's *exclusive* competence must be corresponded by an exclusive CJEU jurisdiction.[242] Third, in at least one case (admittedly based on specific circumstances) EU courts have already bestowed upon themselves the prerogative of directly annulling national measures that go against EU principles.[243] This skews inter-court "dialogue" towards a "monologue", where domestic courts ask, and the CJEU answers. Yet, where ECB/SRB must apply domestic provisions that are allegedly unconstitutional, EU courts' competence to apply domestic law, including corrective interpretations,[244] may need to be accompanied by more open, e.g., bi-directional, dialogue. This may look unattractive to EU courts, but may be less so than the

[234]In some of the many pending cases on the Banco Popular resolution, the GCEU is called to determine if, were the decision to be considered grossly negligent (as some private applicants claim), the ensuing liability pertains to the SRB or the European Commission.

[235]E.g., in the Banco Popular case, where the Spanish NRA (FROB) implemented the resolution decision and whose implementing acts have been challenged by private applicants before Spanish courts.

[236]F. Annunziata and R. D'Ambrosio, 'L'applicazione del Diritto degli Stati Membri da parte della Banca Centrale Europea', (2019) 2 Giurisprudenza Commerciale; V. Di Bucci, 'Quelques Questions Concernant le Controle Jurisdictionnel sur le Mecanisme de Surveillance Unique', (2018), in Liber Amicorum Antonio Tizzano, De la Cour CECA à la Cour de l'Union: Le Long Parcours de la Justice Europeenne, Giappichelli, pp 316–331; M. Prek and S. Lefevre, 'The EU Courts as 'National' Courts: National Law in the EU Judicial Process', (2017) 54 *CMLR*, 369.

[237]It is doubtful whether the court could uphold a decision of the ECB or SRB giving so-called inverse direct application to unconditional and sufficiently precise provisions of the directive, although this may well be meant to be necessary to perform the tasks conferred on the SSM or SRB by the relevant Regulations. R. Smits, 'Competences and Alignment in an Emerging Future. After L-Bank: How the Eurosystem and the Single Supervisory Mechanism May Develop', (2017) 77 *ADEMU* (*Working Paper 77/17*).

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

[239]See *Landeskreditbank*, see n. 28 above.

[240]The impregnability of EU Law to matters of national law is based on the principle of autonomy of EU Law. See Case 26/62, *Van Gend en Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1; case 14/68, *Walt Wilhelm and others v Bundeskartellam*, EU:C:1969:4. The exclusivity of the national order (see e.g. case 6/60, *Jean Humblet v Kingdom of Belgium*, ECLI:EU:C:1960:48) balances this, but sometimes with odd results, such as the rejection of the derivative illegality of an EU measure only because it was based on a national measure that was illegal under domestic laws, as in case C-97/91, *Borelli v Commission*, EU:C:1992:491.

[241]A distinction based on the real decision-making power was drawn between the *Borelli* and *Sweden v. Commission* (case C-64/05 P, *Sweden v. Commission*, EU:C:2007:802) lines of case law by AG Sánchez Bordona in *Berlusconi*, op. cit. n. 217 above, paras. 102–107, and was followed by the Court in paras. 41–46. See F. Brito Bastos, 'Judicial Review of Composite Administrative Procedures in the Single Supervisory Mechanism: Berlusconi', (2019) 56 *Common Market Law Review*, 1355.

[242]*Berlusconi*, see n. 217 above, paras. 49–50, 57–59.

[243]Joined Cases C-202/18 and C-238/18 *Rimšēvičs v Republic of Latvia*, EU:C:2019:139.

[244]Prek and Lefèvre, 'The EU Courts as 'National' Courts…', see n. 224 above, 369–402.

alternative, i.e., a rebuke by domestic courts, or a ruling that, while formally abiding by their decision, reasons from opposite premises.[245]

A recent case, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*[246] although not exactly a Banking Union case (as it involves the EBA, but not the ECB, or SRB), suggests how complex the system of regulation and supervision can get, and how limited the current system is to ensure meaningful accountability. The case concerned the EBA's adoption of its "product governance" guidelines, which was followed by a statement by the French authority (ACPR) that it would comply with said guidelines. The French banking federation (FBF) challenged the decision before a national court, arguing that the EBA had overstepped its mandate, and the national court made a preliminary reference. This raised extremely complex questions about the justiciability of the measure (are "guidelines" subject to challenge under an Article 263 TFEU annulment procedure? Are they subject to challenge through a preliminary reference procedure? Should the FBF be directly and individually concerned by the decision to challenge it before a national court?) and its substance (did the EBA act within its mandate? How strict should the court scrutiny be?).

On the justiciability issues, the Court of Justice answered "no", the "guidelines" were not challengeable acts under Article 263 TFEU, since they are not susceptible of "producing binding legal effects",[247] (a point where the Court disagreed with Advocate General Bobek)[248] but, "yes", their validity could be assessed through a preliminary reference procedure,[249] and "no", the admissibility before national courts of an exception of illegality against an EU measure (like the Guidelines), which would eventually be decided by the Court of Justice via a preliminary reference (under Art. 267 TFEU), cannot be made conditional on a requirement that the act is of "direct and individual concern" to the plaintiff/appellant (as required under article 263 TFEU).[250] On the substance, the Court held that the EBA was competent to adopt the Guidelines, as they were sufficiently linked to the relevant legal provisions used as a basis.[251] On this, the Court disagreed with AG Bobek, who had said that, whereas the EBA Guidelines regulated product governance, the relevant provisions used as a basis for that merely referred to corporate governance, and thus the EBA had acted beyond its mandate.[252]

Yet, as suggested by the disagreement with the AG Opinion, things were less simple than the Court's assertive and reassuring tone would suggest. The AG suggested that the EBA was harmonising product governance through the back door, by creating a brand-new regime, which may have been inspired by MiFID (Directive 2014/65/EU) provisions (outside its remit), but not by *any* of the norms allegedly used as a basis by the EBA.[253] This created a sort of "crypto-legislation" bypassing the legislative process, which raised problems of legitimacy and institutional balance.[254] Unusually, the Commission itself agreed with the plaintiff that the EBA was acting beyond its mandate,[255] and most likely gave weight to the arguments that ultimately led the AG to recommend annulment. Indeed, the AG's view was that, even though the preliminary reference could be used to assess the validity of the guidelines, it would be desirable that these be also susceptible of "normal" judicial review, possibly through the annulment procedure,[256] as a response to the risk that soft law instruments pose for the whole system.

Extrapolating to the Banking Union, let us imagine now a situation where there are EBA guidelines, ECB guidelines, and SRB guidelines, plus supervisory action by the ECB (perhaps having to apply national law *and* to reconcile

[245]E.g., compare the German Bundesverfassungsgericht holding that the Banking Union framework is constitutional *if* it does not fully confer on the ECB the supervision of all credit institutions in the euro area (BverfG 2 BvR 1685/14, 2 BvR 2631/14 30 July 2019, op. cit. n. 17 above) with EU courts' ruling in *Landeskreditbank*, see n. 28 above.

[246]Judgment of 15 July 2021, case C-911/19, *FBF v. ACPR*, ECLI:EU:C:2021:599.

[247]*FBF v. ACPR* at 36, 39, 42–48, with reference to Judgment of 20 February 2018, case C-16/16 P, Belgium v Commission, EU:C:2018:79.

[248]Opinion of AG Bobek, 15 April 2021, case C-911/19, *FBF v. ACPR*, ECLI:EU:C:2021:294.

[249]*FBF v. ACPR* at 52–57, again with reference to *Belgium v. Commission*.

[250]*FBF v. ACPR* at 58–65.

[251]*FBF v. ACPR* at 66–132, especially 94–132. The relevant laws used as a basis for the Guidelines included Directives 2013/36/EU, 2009/110/EC, or 2007/64/EC.

[252]AG Bobek Opinion at 60–108.

[253]AG Bobek Opinion at 56, 69.

[254]AG Bobek Opinion at 85–86.

[255]AG Bobek Opinion at 57.

[256]AG Bobek Opinion at 93, 108, 118, 148–150.

that law with EBA guidelines, and its own guidelines) plus resolution action by the SRB, which may depart from a previous action by the ECB, and so on. The different combinations can raise daunting challenges for the rule of law in the EU.

In *FBF v. ACPR* the AG Opinion advised a relatively drastic course of action (full annulment of the guidelines) but expressed a legitimate concern (loss of legitimacy). The question is whether (or why) should the brunt of the work to ensure the system's accountability fall solely on the shoulders of judges. If the problem was, like the AG and the Commission suggested, that legislative competences may have been invaded, EU legislators like the Parliament should have been able to ask for an explanation. In fact, within a more articulated system of checks-and-balances like the one suggested here, one where the EBA has a regular interaction with the Parliament (for purposes of assessing the ECB/SRB action, but also beyond that) the issue should have come up earlier, at least, that is, if the dialogue were meaningful and substantial.

6 | CONCLUSIONS: TOWARDS A SINGLE ACCOUNTABILITY MECHANISM (SAM) FOR THE BANKING UNION

'You can't see the forest for the trees' so the saying goes. Yet, when it comes to Banking Union accountability, a closer look to the *details of every tree* is needed to see the forest with a fresh pair of eyes. To do that, we sought a synthesis between the desirable goals of an accountability system and the reality of the Banking Union's legal constraints, looking at political, administrative and legal accountability not as isolated tools, but as part of a system. Our taxonomy of features included "information and expertise", "planning, continuity and deliverability", and "coordination", which we assessed in relation to each accountability dimension. A summary of our conclusions is found in the following table.

Accountab. Dimensions	Assessment	Information & expertise	Planning, continuity & deliverability	Coordination
Political	Overall	Medium	Low	Low
	Weak spots	Confidential information	Unplanned and discontinuous activity	No visible interplay with national parliaments
	Solutions	Confidential access or missions (by representative group of MEPs) and accountability "cycle" or agenda coordinated by Chair and Vice-Chair		Interparliamentary coordination
Administrative	Overall	High	Medium/Low	Low
	Weak spots	Access to info by ECA, role of EBA	ECA coordinated by CONT, not ECON. EBA not part of accountability structure.	
	Solutions	Coordination ECA-ECON. Need to use EBA in accountability "cycle" for benchmarks' purposes		
Legal	Overall	Medium	Medium	Low
	Weak spots	Courts lack specialisation. Administrative review weak (SSM) or limited (SRM)	Time management by courts, flaws in design of administrative review	Court coordination unilateral, no coordination with quasi-courts
	Solutions	Court specialisation, improve design of administrative review		Courts' bi-directional coordination. Coordinat. with admin. review

One clear conclusion is that stereotypes need to be abandoned when it comes to Banking Union accountability. MEPs are knowledgeable and ask pertinent questions, the ECA, the Ombudsman (EO) and EBA are meticulous and systematic, courts are thorough and not particularly deferential. The problems, however, are less obvious and more challenging. Specific, granular information is confidential, and cannot be shared publicly, the activity of EP's ECON Committee looks unplanned and not well coordinated with national parliaments, let alone with other fora. Of the administrative accountability authorities, EBA arguably could improve the EP's gap in information and expertise, and the continuity and deliverability of control, but it is "outside" accountability activities, while ECA is coordinated by the EP budget Committee (CONT) which makes it difficult to heed ECON's real priorities. EU courts are strong, but lack specialisation and good time management to be effective, and their coordination with domestic courts is not up to the challenges posed by the Banking Union. The design of administrative review bodies is either weak (ECB–ABoR) or too limited (SRM–AP) to fill all the gaps. The pattern that emerges shows that the main flaw is "coordination", which is "low" across the board. The problem is not difficult to diagnose: the different accountability "tools" need to work together as part of a "system", hence our proposal of a Single Accountability Mechanism (SAM).

The good news is that many of these flaws can be corrected within the system as it stands. Some are easy (e.g. coordination with EBA or ECA), others require planning (e.g. interparliamentary coordination) others difficult compromise (e.g. a stronger agenda-setting role for ECON's chair). Fortunately, nowadays there seems to be a better understanding of what is at stake in the Banking Union and the crucial importance of effectively and rapidly treating these well-curable flaws.

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