

**The democratic accountability of the European Central  
Bank's supervisory activities in the context of the European  
Banking Union**

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## Introduction

The European Central Bank emerged from the financial crisis not only as the institutional ‘winner’ but also as the most central and powerful supranational institution of our times. Besides being the Eurozone’s chief monetary authority, the European Central Bank now executes a critical role in prudential policy as the main supervisory entity of the European Banking Union.<sup>1</sup>

The setting up of the European Banking Union represents the most important achievement of the European Union in the last decade, one which goes well beyond the boundaries of the banking area and the Eurozone. Before the explosion of the great financial crisis, the creation of the European Banking Union was not considered by the European institutions as an urgent policy issue. However, just after the break of the financial and economic crisis, the European Union created a rather original legal framework, constituted of new rules, such as the Single Rulebook, new administrative bodies, exemplified by the three European Supervisory Agencies, procedures focused at preventing and managing systemic risks, new relations between the European Central Bank and the national central banks shaping the European System of Central Banks (ESCB). Moreover, two of the three “pillars” of the European Banking Union were created. A great number of regulations, directives, decisions and acts of diverse legal nature were also adopted.<sup>2</sup>

While the European Banking Union is mainly based within the context of the Eurozone, its rules have a wider scope. They are open to the adherence of Member States whose currency is not the Euro and they are also partly applicable outside the Eurozone.<sup>3</sup>

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<sup>1</sup> Deirdre Curtin, 'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency' (2017) Vol. 23, No. 1-2 European Law Journal

<sup>2</sup> Mario P. Chiti and Vittorio Santoro, *The Palgrave Handbook of European Banking Union Law* (1<sup>st</sup>edn Palgrave Macmillan 2019)

<sup>3</sup> Mario P. Chiti and Vittorio Santoro, (n2)

The European Banking Union is a segmental legal order having its own organisation, which composed by its three pillars: Supervision (Single Supervisory Mechanism, SSM), Resolution (Single Resolution Mechanism, SRM) and Deposit Guarantee (European Deposit Insurance Scheme, not yet completed). The new organisation works through specific procedures, sometimes involving only institutions of the European Union and administrative bodies and on other occasions involving both European Union and national authorities based on the model of “*composite procedures*”.<sup>4</sup> However, the European Banking Union is not a legal order separated from the European Union. All the bodies operating within the context of the European Banking Union are called to act under the Rule of Law and must respect European Union law. Their acts are also subject to judicial review.<sup>5</sup>

With the establishment of the European Banking Union, the European Central Bank became the main banking supervisor in the Euro area.<sup>6</sup> The need to reach an instant solution that would reinstate the stability of the Eurozone’s financial system and absorb the negative effects of the crisis meant that any arrangements would have to be realised within the existing Treaty framework. Consequently, the reform was based on Article 127(6) of the Treaty on the Functioning of the European Union (TFEU)<sup>7</sup>, which granted the power to the Council of the European Union (‘the Council’) to confer on the European Central Bank specific tasks related to the prudential supervision of credit institutions.<sup>8</sup> In particular, the European Central Bank directly supervises the largest (most significant) credit institutions. The remaining credit

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<sup>4</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>5</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>6</sup> Diane Fromage, ‘Guaranteeing the ECB’s democratic accountability in the post-Banking Union era: An ever more difficult task?’ (2019) Vol. 26(1) 48–62 Maastricht Journal of European and Comparative Law

<sup>7</sup> Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. C 326/47

<sup>8</sup> Mario P. Chiti and Vittorio Santoro, (n2)

institutions (less significant) are supervised by the national authorities, with the European Central Bank keeping the oversight.<sup>9</sup>

However, considering that in supervision the European Central Bank has a high level of independence as in monetary matters, concerns emerged on how to secure the European Central Bank's accountability in this field.<sup>10</sup> Given that the exercise of public power must go hand-in-hand with an appropriate accountability regime, any transfer of power triggers the need to ensure that accountability arrangements are in place that mirror the new status quo. The need for accountability, as a counterbalance to the European Central Bank's independence, is identified as an essential component of its institutional design.<sup>11</sup>

The European Central Bank's independence is enshrined in Articles 130 TFEU and 7 ESCB Statute and clarified in Article 282(3) TFEU. Article 282(3) TFEU mentions specifically that *"The European Central Bank shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence."* The independent status of the European Central Bank has operational value. It enables the European Central Bank to effectively pursue the aims and carry out the tasks conferred on it by the Treaties. The balance between independence and accountability of the European Central Bank has remained in the center of academic debate. This discussion originally started in connection with the European Central Bank's exclusive monetary policy mandate, but it now extends to its competences in prudential supervision.<sup>12</sup>

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<sup>9</sup> Paul Weismann, 'The European Central Bank (ECB) Under the Single Supervisory Mechanism (SSM): Its Functioning and Its Limits' (2017) TARN Working Paper

<sup>10</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>11</sup> Diane Fromage, Paul Dermine, Phedon Nicolaidis and Klaus Tuori, 'ECB independence and accountability today: Towards a (necessary) redefinition?' (2019) Vol. 26(1) 3–16 Maastricht Journal of European and Comparative Law

<sup>12</sup> Mario P. Chiti and Vittorio Santoro, (n2)

Accountability is a concept that is subject to multiple definitions. Democratic accountability within the European Union has been defined in article 10 Treaty of the EU (TEU). This article states that both the directly elected European Parliament and the Council, whose members are themselves accountable to their national parliaments or to their people guarantee democracy. Therefore, the European Parliament, as the sole directly elected European Union institution, has an important role to ensure democratic accountability and legitimacy, especially in those areas where the European Union assigns exclusive competences to European Union institutions as such institutions may to protect democratic. However, national parliaments may be also called to play a direct role in relation to the European Central Bank since the Single Supervisory Mechanism Regulation<sup>13</sup> establishes a direct relationship between the European Central Bank and national parliaments.<sup>14</sup>

The aim of this dissertation is, therefore, to examine whether the accountability arrangements that are laid down in the Single Supervisory Mechanism Regulation towards European Union institutions, such as the European Parliament and the Council, as well as towards national parliaments are enough to ensure the democratic accountability of the European Central Bank's supervisory activities in the context of the European Banking Union. However, accountability is not only an instrument of democratic legitimacy. It is also a mechanism for ensuring that the European Central Bank carries out its tasks effectively, meaning ensure financial stability.

This dissertation paper proceeds in the following way. Chapter I gives a brief description of the causes that led to the establishment of the European Banking Union and refers to the first two pillars of the Single Supervisory Mechanism, the Single Supervisory Mechanism, and the Single Resolution Mechanism. Chapter II aims to analyse the content of the Single

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<sup>13</sup> 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

<sup>14</sup> Diane Fromage, Paul Dermine, Phedon Nicolaides and Klaus Tuori, (n11)

Supervisory Mechanism. It analyses the European Central Bank's and national competent authorities' tasks as well as the powers of the European Central Bank in the context of the Single Supervisory Mechanism. Then, it explains the governance structure within the Single Supervisory Mechanism and the role of the new established body within the European Central Bank, namely the Supervisory Board. Chapter III focuses on reviewing the accountability arrangements laid down in the Single Supervisory Mechanism Regulation and assessing whether the European Central Bank has so far acted in an accountable manner.

## **Chapter I: The European Banking Union**

### *1. On the Establishment of the European Banking Union*

The need for the European Banking Union emerged from the financial crisis of 2008 and the subsequent sovereign debt crisis. The financial crisis helped regulators to discover that when a credit institution in Europe goes bust the ensuing effects can reach far beyond the immediate threat to its depositors and shareholders. In particular, the crisis showed that an irresponsible behavior in the banking sector could erode the foundations of the financial system and threaten the real economy by turning a banking crisis into a sovereign debt crisis. This scenario describes the situation in Eurozone in 2011. The aim of the European Banking Union was, therefore, to foster financial stability in Europe.<sup>15</sup>

At first, Member States tried to face the systemic instability of their banking systems setting national policy tools. However, these measures proved insufficient as such countries that share a common currency are more interdependent and, therefore, required more integrated

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<sup>15</sup> Luigi Chiarella, 'The Single Supervisory Mechanism: The Building Pillar of the European Banking Union' (2016) Vol. 1, Issue 1 University of Bologna Law Review

responses. As a result, in 2012, the European Council agreed to “*break the vicious circle between banks and sovereigns*” and decided to create the European Banking Union.<sup>16</sup>

The setting up of the European Banking Union should create a ‘Europeanised bank safety net’ consisting of three pillars: a Single Supervisory Mechanism (the ‘SSM’) exclusively for the banking sector (i.e. not for the insurance and securities sectors) and mainly for credit institutions legally incorporated in euro area Member States, with regard to their micro-prudential supervision (the ‘first pillar’), a Single Resolution Mechanism (the ‘SRM’) for unviable credit institutions (also mainly incorporated in euro area Member States) and a Single Resolution Fund (the ‘SRF’) to cover any resulting funding gaps, provided that a decision is made on the resolution of such credit institutions (the ‘second pillar’) and a European Deposit Insurance Scheme (the ‘EDIS’, the ‘third pillar’). The institutional and regulatory initiatives towards establishing the first two pillars of the European Banking Union took place in the course of 2013 and 2014, as we will see below.<sup>17</sup>

Moreover, on 24 November 2015, the Commission submitted a Proposal<sup>18</sup> for a Regulation of the European Parliament and of the Council in order to establish the European Deposit Insurance Scheme gradually, in three stages. The proposal was accompanied by a communication, which sets out further parallel measures to reduce remaining risks in the banking sector. The process of the adoption of this legal is still paused. However, the Euro Summit meeting of 29 June 2018 concluded that work on a roadmap for beginning political negotiations on the European Deposit Insurance Scheme should start immediately after the adoption of the risk reduction measures.<sup>19</sup>

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<sup>16</sup> Luigi Chiarella, (n15)

<sup>17</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>18</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, Strasbourg, 24.11.2015, COM(2015) 586 final

<sup>19</sup> Mario P. Chiti and Vittorio Santoro, (n2)



These pillars are underpinned by a set of common rules for banks in all 28 Member States, known as the 'single rulebook'. In particular, the 'single rulebook' contains substantive rules on all the previous aspects as part of the single market for financial services. The legislative acts (legislative acts in accordance with Article 289 TFEU) which constitute the main corpus of the single rulebook were already in place, since they are 'children' of the international financial crisis. In particular, those on the prudential regulation and supervision of credit institutions and on the deposit guarantee schemes repealed pre-existing legislation in those two issue areas, while that on the resolution of credit institutions introduced for the first time such a regime. It is also worth noting that, even though the three main pillars of the European Banking Union are designed to apply mainly to the euro area Member States, the 'single rulebook' is applicable across all European Union Member States.<sup>20</sup>

The creation and entry into operation of the European Banking Union constitutes a major institutional development about safeguarding banking and generally financial stability in the European Union. Since the establishment of the European Economic Communities, the micro-prudential supervision of credit institutions was always an exclusive competence of national authorities. Despite the significant efforts have taken for establishing a single banking market, this aspect has remained unchanged. Although the conditions for the authorisation and micro-prudential supervision of credit institutions were partly harmonised across the (then) European Community, it was the national competent authorities which were liable to authorise credit institutions and supervise their compliance with micro-prudential regulations, which were harmonised as well. Padoa-Schioppa referred to this situation as "*European regulation with national supervision*"<sup>21</sup>. Moreover, Lastra characteristically mentioned that "*There is an inevitable tension in the current European Union structure: a*

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<sup>20</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>21</sup> Mario P. Chiti and Vittorio Santoro, (n2)

*national mandate in prudential supervision, combined with a single European currency and a European mandate in the completion of the single market in financial services”<sup>22</sup>.*

The function of deposit guarantee schemes was also partly harmonised across the (then) European Community but again it was the (and still is) national deposit guarantee schemes which are responsible to compensate depositors for their covered deposits.<sup>23</sup>

The start of the Economic and Monetary Union in 1999 did not bring about any changes to the system on the authorization and micro-prudential supervision of credit institutions incorporated in any Member State. Contrary to the definition and implementation of the single monetary and foreign exchange policy, for which competences became supranational, the European Central Bank had not undertaken any supervisory competences powers for the European Union financial system. The said competence remained with the Member States. It should be also noted that the three other aspects of the ‘bank safety net’, which are currently included in the system of European Union banking law, namely macro-prudential regulation, and oversight as well as banking resolution, were at hand only after 2010.<sup>24</sup>

The concrete functioning of the European Banking Union confirms how ample and deep is the impact of the new set of rules and measures. After more than a decade since the explosion of the crisis, the main goals of the European Banking Union have been achieved. The major bank crises of this period are over, the financial stability has been preserved, the systemic risks have been avoided. However, the European Banking Union is still an incomplete construction. The ‘third pillar’ of the European Banking Union, the European Deposit Insurance Scheme, is still missing.<sup>25</sup>

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<sup>22</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>23</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>24</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>25</sup> Mario P. Chiti and Vittorio Santoro, (n2)

## 2. Two First Main Pillars of the European Banking Union

### 2.1. *The First Pillar: The Single Supervisory Mechanism (SSM)*

The Single Supervisory Mechanism is an evolutionary reform for the supervision of credit institutions in Europe. It establishes a centralized supervision for credit institutions under the mandate of the European Central Bank.<sup>26</sup> The legal basis of the Single Supervisory Mechanism is the Council Regulation (EU) No 1024/2013 of 15 October 2013 “*conferring specific tasks on the European Central Bank concerning policies relating to the (micro-) prudential supervision of credit institutions*”<sup>27</sup>, which was adopted based on Article 127(6) TFEU. Article 127(6) TFEU reads as follows: “*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.*”<sup>28</sup>

The European Council mandate to explore fully Article 127(6) TFEU led the Commission to make an appropriate use of this Article with a view to creating the Single Supervisory Mechanism.<sup>29</sup> The Single Supervisory Mechanism became operative on 4 November 2014<sup>30</sup>.

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<sup>26</sup> Gianni Lo Schiavo, 'From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe?: The Stability Function of the Single Supervisory Mechanism' (2014) Vol. 21, Issue 1 Maastricht Journal of European and Comparative Law

<sup>27</sup> 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

<sup>28</sup> TFEU, Article 127(6)

<sup>29</sup> Gianni Lo Schiavo, (n26)

<sup>30</sup> Single Supervisory Mechanism Regulation, Article 33(2), first sub-paragraph

<sup>31</sup> Mario P. Chiti and Vittorio Santoro, (n2)

The institutional framework referring to the Single Supervisory Mechanism is further specified in several legal acts of the European Central Bank, containing provisions on the detailed operational arrangements for the execution of the new and extensive tasks conferred upon it by the Single Supervisory Mechanism Regulation. The most important of these legal acts is the Regulation (EU) No 468/2014 of 16 April 2014 “*establishing the framework for cooperation within the SSM between the [ECB] and national competent authorities and with national designated authorities (‘SSM Framework Regulation’) (ECB/2014/17)*”<sup>32</sup>, which further explains some provisions of the Single Supervisory Mechanism Regulation.<sup>33</sup>

The Single Supervisory Mechanism Regulation mainly applies to the ‘participating Member States’. These are defined as meaning both “*a Member State whose currency is the euro (in the Single Supervisory Mechanism Framework Regulation also called ‘euro area participating Member States’) or a Member State whose currency is not the euro (including the Member States which opted out of the European Monetary Union, i.e. the United Kingdom and Denmark) which has established a close cooperation in accordance with Article 7 (of the Single Supervisory Mechanism Regulation).*”<sup>34</sup>

The Single Supervisory Mechanism Regulation is based on four main elements, which reflect the compromise reached between the European Union and its Member States during its creation. The first referred to the tasks conferred to the European Central Bank for the (macro-) prudential supervision of certain types of financial firms incorporated in the participating Member States.<sup>35</sup>

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<sup>32</sup> REGULATION (EU) No 468/2014 OF THE EUROPEAN CENTRAL BANK of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17)

<sup>33</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>34</sup> Single Supervisory Mechanism Regulation, Article 2, point 1

<sup>35</sup> Single Supervisory Mechanism Regulation, Article 4(1), and Article 5(2)

The second element is the designation of the credit institutions with regard to which these tasks have been conferred on the European Central Bank.<sup>36</sup> Article 6 of the Single Supervisory Mechanism Regulation installed a ‘two-tier system’ with regard to the distribution of powers within the Single Supervisory Mechanism, distinguishing between ‘significant’ and ‘less significant’ credit institutions. In particular, the ‘significant’ credit institutions are directly supervised by the ECB while the national authorities shall exercise the powers of supervision for credit institutions that are considered ‘less significant’. However, if it is considered necessary to ensure consistent application of ‘high supervisory standards’, the European Central Bank may decide to directly exercise the supervision of a ‘less significant’ credit institution.<sup>37</sup> In addition, in accordance with Article 4(1), points (a) and (c), which also referred to Articles 14 and 15, the authorisation and withdrawal of authorisation of credit institutions as well as the acquisition and disposal of qualifying holdings in credit institutions is an exclusive power of the European Central Bank for all credit institutions.<sup>38</sup> The European Central Bank’s tasks in the context of the Single Supervisory Mechanism will be analysed in more detail below.

The fact that the European Central Bank cooperate closely with the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA), the European Systemic Risk Board (ESRB), and the other authorities which form part of the European System of Financial Supervision (ESFS), without touching upon their tasks, constitutes the third element of the Single Supervisory Mechanism.<sup>39</sup> Lastly, the fourth main element is the creation of ‘Chinese

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<sup>36</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>37</sup> Single Supervisory Mechanism Regulation, Article 6(5), point (b)

<sup>38</sup> Single Supervisory Mechanism Regulation, Article 6(4)

<sup>39</sup> Single Supervisory Mechanism Regulation, Article 3

walls' within the European Central Bank to ensure the efficient separation of its supervisory tasks from its monetary policy and other tasks.<sup>40</sup>

## *2.2.The Second Pillar: The Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF)*

A Single Resolution Mechanism (SRM) and a Single Resolution Fund (SRF) were established in 2014, based on the 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 (...)*”<sup>41</sup>, and the Intergovernmental Agreement (No 8457/14) “*on the transfer and mutualisation of contributions to the Single Resolution Fund.*”<sup>42</sup>

The Single Resolution Mechanism Regulation was espoused based on the Article 114 TFEU and is applicable from 1 January 2016.<sup>43</sup> Its main aim is to “*establish uniform rules and a uniform procedure*” to ensure the efficient resolution of failing credit institutions (as well as parent institutions, including financial holding companies and mixed financial holding companies, investment firms and financial institutions, if they are subject to consolidated supervision carried out by the European Central Bank in accordance with Article 4(1), point (g) of the Single Resolution Mechanism Regulation) incorporated in the euro area Member States and in the Member States which have entered into a ‘close cooperation’ with the European Central Bank without recourse to taxpayers’ money (including public financial

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<sup>40</sup> Single Supervisory Mechanism Regulation, Article 25(1)–(4)

<sup>41</sup> 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

<sup>42</sup> Intergovernmental Agreement (8457/14) on the Transfer and Mutualisation of Contributions to the Single Resolution Fund

<sup>43</sup> Single Resolution Mechanism Regulation, Article 99(2)

assistance by EU facilities) for their recapitalisation.<sup>44</sup> The Single Resolution Board ensures swift decision-making procedures, allowing a credit institution to be resolved over a weekend. As a supervisor, the European Central Bank will have an important role in deciding whether a bank is failing or likely to fail. The Single Resolution Fund, financed by contributions from credit institutions, is responsible to pay for resolution measures.<sup>45</sup>

Those "uniform rules and that uniform procedure" must be applied by the Single Resolution Board, together with the Council, the Commission, and the national resolution authorities within the framework of the Single Resolution Mechanism. The adoption of the Single Resolution Board was necessary so as in the event of a need of resolution, the relevant decisions to be made at a European level and not at a national level, having in mind also that the credit institutions were directly supervised by the European Central Bank at European level.<sup>46</sup>

The Single Resolution Fund Agreement is an instrument of public international law and, therefore, the rights and obligations included therein are subject to the principle of reciprocity, that is, the equivalent performance of those rights and obligations by all Parties. It is also applicable also from 1 January 2016 and complements and supports the Single Resolution Mechanism Regulation which established the Single Resolution Fund.<sup>47</sup> Only Sweden and the United Kingdom have not entered the Single Resolution Fund Agreement.

## **Chapter II: The Single Supervisory Mechanism Regulation (SSMR)**

The Single Supervisory Mechanism Regulation on the conferral of supervisory tasks to the European Central Bank was formally adopted by the Council on 15 October 2013. The Single

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<sup>44</sup> Single Resolution Mechanism Regulation, Article 1

<sup>45</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>46</sup> Mario P. Chiti and Vittorio Santoro, (n2)

<sup>47</sup> Single Resolution Mechanism Regulation, Articles 1 (second sub-paragraph, second sentence) and 67–69).

Supervisory Mechanism Regulation refers to the impact of the financial crisis and the need to adopt an integrated system of banking supervision.<sup>48</sup> It is important to refer to Recital 2 of the Single Supervisory Mechanism Regulation as it clearly shows the rationale that has driven the Single Supervisory Mechanism: "The present financial and economic crisis has shown that the integrity of the single currency and the internal market may be threatened by the fragmentation of the financial sector. It is therefore essential to intensify the integration of banking supervision in order to bolster the Union, restore financial stability and lay the basis for economic recovery".<sup>49</sup> This recital confirms that there is a need to intensify the integration of banking supervision with a view to foster financial stability as well as to proceed with economic recovery.<sup>50</sup>

The Single Supervisory Mechanism Regulation is divided in five Chapters. Chapter 1 deals with subject matter and definitions. Chapter 2 provides rules on cooperation and tasks. Chapter 3 refers to the powers of the European Central Bank with particular attention to investigatory and sanctioning powers. Chapter 4 sets out the organizational principles regarding the Single Supervisory Mechanism and Chapter 5 contains the final and general provisions.

#### 1. *European Central Bank's tasks vs. national competent authorities' tasks*

The Single Supervisory Mechanism is composed by the European Central Bank and by the national competent authorities, whose decisions are prepared by a new Supervisory Board.<sup>51</sup>

In many areas, a regime of "dual supervision" is installed regarding the prudential supervision. Some tasks remain exclusively in the realm of national competent authorities.

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<sup>48</sup> Gianni Lo Schiavo, (n26)

<sup>49</sup> Single Supervisory Mechanism Regulation, Recital 2

<sup>50</sup> Gianni Lo Schiavo, (n26)

<sup>51</sup> Luigi Chiarella, (n15)



The European Central Bank is responsible for all tasks not designated to the national competent authorities. However, there are several exceptions to this rule and several substantial counter-exceptions.<sup>52</sup> More details on the European Central Bank's tasks and national competent authorities' tasks are set out below.

### *1.1. General tasks of national competent authorities*

According to Recital 28 of the Single Supervisory Mechanism Regulation "Supervisory tasks not conferred on the ECB should remain with the national authorities. Those tasks should include the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services, to supervise bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law, to supervise credit institutions from third countries establishing a branch or providing cross-border services in the Union, to supervise payments services, to carry out day-to-day verifications of credit institutions, to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments, the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection."<sup>53</sup>

### *1.2. General tasks of the European Central Bank*

According to Article 4 of the Single Supervisory Mechanism Regulation, the European Central Bank will be exclusively responsible for all the main tasks relating to the supervision of credit institutions established in the participating Member States. Relating to these tasks, the national competent authorities only give assistance to the European Central Bank.

These tasks include the granting and withdrawing authorizations to credit institutions, assessing notifications of the acquisition or disposal of qualifying holdings in credit

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<sup>52</sup> Benedikt Wolfers and Thomas Volland, 'Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank' (2014) *Common Market Law Review* 51

<sup>53</sup> Single Supervisory Mechanism Regulation, Recital 28

institutions, ensuring compliance with rules on fund requirements, securitization, large exposure limits, liquidity and leverage, as well as reporting and disclosing information on those matters, ensuring compliance with (European Union) governance requirements such as those relating to the managers of credit institutions or to risk and remuneration policies, carrying out supervisory reviews and stress tests, carrying out supervisory tasks in relation to recovery plans, early intervention (where a credit institution is likely to breach the applicable prudential requirements) and structural changes required from credit institutions to prevent financial stress or failure (excluding any resolution powers) and applying measures related to European Union Regulation 575/2013<sup>54</sup> and European Union Directive 2013/36<sup>55</sup>, such as those concerning an entity's capital, and applying requirements for extra capital buffers.<sup>56</sup>

Nevertheless, there are credit institutions are exempted from these European Central Bank's tasks. As it was mentioned above, the national competent authorities are responsible for "less significant" credit institutions. The significance of a credit institution is assessed on the basis of the following criteria: its size, its importance for the economy of the European Union, as well as for the economy of the participating Member State, and the extent of its cross-border activities. When a credit institution is incorporated in a participating Member State, these criteria will be assessed on a consolidated basis at the highest level of this institution's group. Contrary, in the case of credit institutions incorporated in non-participating Member States, their branches in participating Member States will be assessed individually.<sup>57</sup>

Regarding (probably) the most important criterion, the size, a credit institution will not be considered "*less significant*" unless if any of the following conditions is met: (i) the assets of

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<sup>54</sup> REGULATION (EU) No 575/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012

<sup>55</sup> DIRECTIVE 2013/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC

<sup>56</sup> Single Supervisory Mechanism Regulation, Article 4

<sup>57</sup> Single Supervisory Mechanism Regulation, Article 6(4)

the bank exceed 30 billion euros, (ii) the ratio of its total assets to the GDP of its Member State of establishment is above 20%, unless the total value of its assets is below EUR 5 billion; or (iii) the competent national authorities define the institution as significant relevance with regard to the domestic economy.<sup>58</sup>

Moreover, there is a substantial counter-exception to the exception for “*less significant*” credit institutions. The European Central Bank may also exercise certain competences with regard to less significant credit institutions. For example, according to Article 6(5) point (a) of the Single Supervisory Mechanism Regulation, the European Central Bank can issue regulations, guidelines or general instructions to national competent authorities, according to which they have to perform “outstanding” tasks.<sup>59</sup> In addition, if it deems “*necessary to ensure consistent application of high supervisory standards*”, the European Central Bank can directly exercise all the relevant powers itself for one or more “*less significant*” credit institutions.<sup>60</sup> As a result, Article 6(5) of the Single Supervisory Mechanism Regulation confers very far-reaching responsibilities (and competences) on the European Central Bank.

### *1.3. Specification of the allocation of tasks through a “framework”*

Pursuant to Article 6(7) of the Single Supervisory Mechanism Regulation “*(T)he ECB shall, in consultation with national competent authorities, and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to organise the practical arrangements for the implementation of this Article (meaning Article 6).*”<sup>61</sup> This provision, in conjunction with Article 33(1) of the Single Supervisory Mechanism Regulation, required the European Central Bank to adopt and make public a framework to organize the practical elements of the implementation of Article 6 of the Single Supervisory Mechanism Regulation. Indeed, as it was mentioned above, the European Central Bank recently

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<sup>58</sup> Single Supervisory Mechanism Regulation, Article 6(4)

<sup>59</sup> Single Supervisory Mechanism Regulation, Article 6(5), point (a)

<sup>60</sup> Single Supervisory Mechanism Regulation, Article 6(5), point (b)

<sup>61</sup> Single Supervisory Mechanism Regulation, Article 6(7)

published the Single Supervisory Mechanism Framework Regulation<sup>62</sup>, specifying, inter alia, the methodology that will be used to determine whether a particular credit institution is significant or not.<sup>63</sup> In case that a credit institution is to be considered significant this credit institution should in general fall under the direct supervision of the European Central Bank for at least three consecutive years. Nevertheless, the European Central Bank must determine at least annually whether the criteria for significance are still met. On the other hand, if a credit institution has been considered to be less significant, each national competent authority should review, on at least an annual basis, whether this assessment is still justified.<sup>64</sup>

The Single Supervisory Mechanism Framework Regulation also includes provisions that guide the cooperation between the European Central Bank and the national competent authorities. Specifically, it provides for detailed procedural rules for the supervision of both “significant”<sup>65</sup> and “less significant”<sup>66</sup> credit institutions, stating the respective responsibilities of the European Central Bank and national competent authorities. Moreover, the Single Supervisory Framework Regulation includes, inter alia, additional rules which go beyond the issues addressed in Article 6(7) of the Single Supervisory Mechanism Regulation. These rules define the rights and obligations of supervised credit institutions and third parties and aim at providing greater legal certainty.<sup>67</sup>

## 2. Powers of the European Central Bank

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<sup>62</sup> REGULATION (EU) No 468/2014 OF THE EUROPEAN CENTRAL BANK of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17)

<sup>63</sup> Single Supervisory Mechanism Framework Regulation, Part IV

<sup>64</sup> Single Supervisory Mechanism Framework Regulation, Articles 43 and 47 and see also Single Supervisory Mechanism Regulation, Recital 40

<sup>65</sup> Single Supervisory Mechanism Framework Regulation, Part VI contains the procedures applicable to significant supervised credit institutions

<sup>66</sup> Single Supervisory Mechanism Framework Regulation, Part VII addresses the procedures applicable to less significant supervised credit institutions

<sup>67</sup> Benedikt Wolfers and Thomas Volland, (n52)

According to Article 9(1) of the Single Supervisory Mechanism Regulation, *"the ECB shall have all the powers and obligations set out in this Regulation"*<sup>68</sup>. In addition, the European Central Bank *"..shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation."*<sup>69</sup> In particular, the ECB shall have the powers listed in Sections 1 and 2 of the Chapter III of the Single Supervisory Mechanism Regulation, i.e. namely investigatory and supervisory powers.<sup>70</sup>

Moreover, *"(T)o the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers."*<sup>71</sup>

According to Articles 10 to 13 of the Single Supervisory Mechanism Regulation, the European Central Bank have at its disposal a full arsenal of investigatory measures. It may request information<sup>72</sup>, conduct general investigations<sup>73</sup> and carry out on-site inspections<sup>74</sup>.

Pursuant to Article 10(1) of the Single Supervisory Mechanism Regulation, the European Central Bank may require credit institutions, financial holding companies, mixed financial holding companies, mixed-activity holding companies established in participating Member States as well as persons belonging to these entities and third parties to whom these entities have outsourced functions or activities, to provide all information necessary to carry out its

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<sup>68</sup> Single Supervisory Mechanism Regulation, Article 9(1)

<sup>69</sup> Single Supervisory Mechanism Regulation, Article 9(1)

<sup>70</sup> Single Supervisory Mechanism Regulation, Article 9(1)

<sup>71</sup> Single Supervisory Mechanism Regulation, Article 9(1)

<sup>72</sup> Single Supervisory Mechanism Regulation, Article 10

<sup>73</sup> Single Supervisory Mechanism Regulation, Article 11

<sup>74</sup> Single Supervisory Mechanism Regulation, Articles 12 and 13

tasks.<sup>75</sup> These legal and natural persons may also be the subject of all necessary investigations pursuant to Article 11(1) of the Single Supervisory Mechanism Regulation. The ECB shall have the right to, inter alia, require the submission of all relevant documents.<sup>76</sup> According to article 11(2), where any person prevents the conduct of the investigation, the national competent authorities of the respective Member State are bound to provide any necessary assistance.<sup>77</sup>

Furthermore, the business premises of the legal persons specified in Article 10 of the SSM Regulation may be inspected by the European Central Bank. If necessary, the European Central Bank *"may carry out the on-site inspection without prior announcement to those legal persons."*<sup>78</sup> The national competent authorities must assist, if necessary, by force and by sealing any business premises and books or records.<sup>79</sup> Pursuant to Article 13(1) *"If an on-site inspection....requires authorisation by a judicial authority according to national rules, such authorisation shall be applied."*<sup>80</sup> However, Article 13(2) provides for only limited review by the national courts, that is these courts *"shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection"*.<sup>81</sup> However, the national courts *"shall not review the necessity for the inspection"*<sup>82</sup>. The lawfulness of the European Central Bank's decision will be subject to review only by the Court of Justice of the European Union.<sup>83</sup>

The ECB has numerous specific supervisory powers, including the right to impose fines and other administrative sanctions. It should be noted that the supervisory powers conferred on

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<sup>75</sup> Single Supervisory Mechanism Regulation, Article 10(1)

<sup>76</sup> Single Supervisory Mechanism Regulation, Article 11(1)

<sup>77</sup> Single Supervisory Mechanism Regulation, Article 11(2)

<sup>78</sup> Single Supervisory Mechanism Regulation, Article 12(1)

<sup>79</sup> Single Supervisory Mechanism Regulation, Article 12(2)

<sup>80</sup> Single Supervisory Mechanism Regulation, Article 13(1)

<sup>81</sup> Single Supervisory Mechanism Regulation, Article 13(2)

<sup>82</sup> Single Supervisory Mechanism Regulation, Article 13(2)

<sup>83</sup> Single Supervisory Mechanism Regulation, Article 13(2)

the European Central Bank in Articles 14 to 16 of the Single Supervisory Mechanism Regulation in conjunction with Part V of the Single Supervisory Mechanism Framework Regulation reflect its tasks (see 1.2. section above). Pursuant to Article 14, the European Central Bank has the final word in granting authorizations to take up the business of a credit institution. An application for such an authorization is first submitted to the national competent authority, which assesses whether the application meets all requirements under the relevant national law. If it does not, the national authority rejects the authorization. If it does, the national competent authority takes a draft decision and proposes that the European Central Bank grants the authorization.<sup>84</sup> The European Central Bank may then still refuse, or withdraw, an authorization on the grounds of European Union law. Article 15 provides for the assessment of acquisitions of qualified holdings in credit institutions. Such acquisitions must first be reviewed by the national competent authorities. However, the European Central Bank will have the final word.<sup>85</sup>

Article 16 of the SSM Regulation addresses cases where a credit institution either does not meet regulatory requirements<sup>86</sup>, is “*likely*” to breach those requirements within the next 12 months<sup>87</sup> or comes into a situation where its funds and liquidity “do not ensure a sound management and coverage of its risks”<sup>88</sup>. In these cases, the European Central Bank will have substantial powers of intervention pursuant to Article 16(2) of the Single Supervisory Mechanism Regulation. For example, these powers include, inter alia, the right to require credit institutions to hold their own funds in excess of the usual capital requirements<sup>89</sup> restrict or limit their business, operations or network or to divest activities that pose excessive risks

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<sup>84</sup> Single Resolution Mechanism Regulation, Article 14

<sup>85</sup> Single Resolution Mechanism Regulation, Article 15

<sup>86</sup> Single Resolution Mechanism Regulation, Article 16(1)(a)

<sup>87</sup> Single Resolution Mechanism Regulation, Article 16(1)(b)

<sup>88</sup> Single Resolution Mechanism Regulation, Article 16(1)(c)

<sup>89</sup> Single Resolution Mechanism Regulation, Article 16(2)(a)

to the soundness of the institution<sup>90</sup>, limit variable remuneration as a percentage of net revenue when it is inconsistent with the maintenance of a sound capital base<sup>91</sup>, restrict its distributions to shareholders<sup>92</sup> and remove at any time members from its management body who do not fulfil legal requirements<sup>93</sup>.

For carrying out its tasks, the European Central Bank may impose administrative pecuniary penalties in several cases. For example, *"such penalties may be imposed on credit institutions, financial holding companies, or mixed financial holding companies"* when they, *"intentionally or negligently, breach a requirement under relevant directly applicable acts of Union law.."*<sup>94</sup>. The penalties can amount to twice the amount gained because of the breach or up to 10 percent of total annual turnover.<sup>95</sup> Sanctions may also be imposed in cases of breaches of European Central Bank's regulations or decisions. The ECB may not impose sanctions on natural persons.<sup>96</sup> However, it may require national competent authority to make appropriate use of their specific powers under national law. According to Article 18(5) of the Single Supervisory Mechanism Regulation, this will be applicable in particular to the imposition of *"any administrative sanctions or measures"* on members of the board of the entity concerned or on *"any other individuals who under national law are responsible"* for the respective breach.<sup>97</sup>

### 3. Governance Structure

The Single Supervisory Mechanism provides for a critical change in the structure inside the European Central Bank as it establishes an independent and autonomous internal body that

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<sup>90</sup> Single Resolution Mechanism Regulation, Article 16(2)(e)

<sup>91</sup> Single Resolution Mechanism Regulation, Article 16(2)(g)

<sup>92</sup> Single Resolution Mechanism Regulation, Article 16(2)(i)

<sup>93</sup> Single Resolution Mechanism Regulation, Article 16(2)(l)(m)

<sup>94</sup> Single Resolution Mechanism Regulation, Article 18(1)

<sup>95</sup> Single Resolution Mechanism Regulation, Article 18(1)

<sup>96</sup> Single Resolution Mechanism Regulation, Recital 53

<sup>97</sup> Single Supervisory Mechanism Regulation, Article 18(5)



undertake the European Central Bank supervision functions, the Supervisory Board.<sup>98</sup> This body is a new organ of the European Central Bank and has to plan and to execute the tasks conferred upon the European Central Bank.<sup>99</sup> Although the Supervisory Board does not have any decision-making powers, it will be able to exert a considerable factual influence. It is composed of a Chair, a Vice Chair, four representatives of the European Central Bank, and one representative of the national competent authority of each participating Member State.<sup>100</sup> The Supervisory Board is assisted by a full-time Secretariat and a Steering Committee. The latter is composed of up to ten members of the Supervisory Board and performs preparatory tasks but has no decision-making powers.

The Supervisory Board as such will be fully independent in conducting supervisory functions within the governing structure of the European Central Bank. However, the decision-making procedure and the strong links with the Governing Council might undermine the required level of independence to carry out supervisory functions.<sup>101</sup> Within the European Central Bank, the Governing Council will be ultimately responsible for taking supervisory decisions. The Governing Council acts, in principle, however, only based on proposals by the Supervisory Board.<sup>102</sup>

Another view is the degree of separation between supervisory and monetary policy functions to be respected to conduct a sound monetary policy and to achieve an effectively independent supervision.<sup>103</sup> While pursuant to Article 127(1) TFEU monetary policy functions are aimed at maintaining price stability as the overarching objective of the European Central Bank, the exercise of supervision has a different aim, which is to “*protect the safety and the soundness*

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<sup>98</sup> Gianni Lo Schiavo, (n26)

<sup>99</sup> Single Supervisory Mechanism Regulation, Article 26(1)

<sup>100</sup> Single Supervisory Mechanism Regulation, Article 26(1)-(3)

<sup>101</sup> Gianni Lo Schiavo, (n26)

<sup>102</sup> Single Supervisory Mechanism Regulation, Articles 24(7) and (9) & 26(8)

<sup>103</sup> Charles Goodhart and Dirk Schoenmaker, ‘Should the Functions of Monetary Policy and Banking Supervision be Separated?’ (1995) Oxford Economic Papers 47

*of credit institutions and the stability of the financial system*"<sup>104</sup>. Article 25 provides that "(T)he ECB shall carry out the tasks conferred on it by this Regulation without prejudice to and separately from its tasks relating to monetary policy and any other task."<sup>105</sup> It is supported that such an obligation derives directly from the overall European Central Bank mandate which needs to be duly respected. Goodhart and Schoenmaker argued that this is mainly to avoid conflicts of interest in conducting different functions.<sup>106</sup> Nevertheless, the referral of the Supervisory Board preparatory work to the Governing Council questions the real effectiveness of the regulatory arrangements to separate monetary and supervisory functions. The Single Supervisory Mechanism Regulation mandates that the meetings and agendas will be separated when the Governing Council exercises the two functions. It is, however, not excluded that the Governing Council will violate the strict separation of the two functions in practice.<sup>107</sup>

Lastly, with a view to ensuring separation between monetary policy and supervisory tasks, the European Central Bank has created a Mediation Panel. *"This panel shall resolve differences of views expressed by the competent authorities of participating Member States concerned regarding an objection of the Governing Council to a draft decision by the Supervisory Board"*<sup>108</sup>.

### **Chapter III: The European Central Bank's accountability as banking supervisor**

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<sup>104</sup> Single Supervisory Mechanism Regulation, Recital 65

<sup>105</sup> Single Supervisory Mechanism Regulation, Article 25

<sup>106</sup> Charles Goodhart and Dirk Schoenmaker, (n103)

<sup>107</sup> Gianni Lo Schiavo, (n26)

<sup>108</sup> Single Supervisory Mechanism Regulation, Article 25(5)

1. Independence and Accountability: Essential Features of the European Central Bank'

Status

In the European Union, accountability is a settled principle of good governance, which demands that the exercise of public functions be subject to sufficient balances and checks. Although the principle is straightforward, its application is largely circumstantial. There is not a single approach, as accountability arrangements need to accommodate the specificities of the functions whose exercise is controlled. Moreover, assessing the effectiveness of accountability arrangements is a dynamic exercise that needs to account for changes in the mandate and governance of the accountable body as well as for the evolution of public preferences.<sup>109</sup>

The European Central Bank has been described as the most independent central bank in the world. In particular, the European Central Bank has been endowed, for good reasons, with a high degree of independence to pursue its mandates.<sup>110</sup> As such, it should be subject to strong accountability. Accountability is essential for assessing the European Central Bank's performance and for holding it responsible with a view to legitimising its activities.<sup>111</sup>

The need to strike a balance between independence on the one hand and accountability on the other was one of the central challenges recognised in the scholarly literature on the European Central Bank from the very beginning. The literature more generally recognises that accountability and independence are not at all contradictory, but quite the opposite in the sense that they can and should co-exist.<sup>112</sup> While independence is meant to avoid undue pressure from other actors, namely the political ones, accountability ensures the appropriate *"relationship between an actor and a forum, in which the actor has the obligation to explain*

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<sup>109</sup> Larisa Dragomir, 'The ECB's accountability: Adjusting accountability arrangements to the ECB's evolving roles' (2019) Vol. 26(1) 35–47 Maastricht Journal of European and Comparative Law

<sup>110</sup> Diane Fromage, Paul Dermine, Phedon Nicolaides and Klaus Tuori, (n11)

<sup>111</sup> Larisa Dragomir, (n109)

<sup>112</sup> Madalina Busuioc, 'Accountability, Control and Independence: The Case of European Agencies' (2009) 15 European Law Journal, 599–615

and justify his or her conduct, the forum can pose questions and pass judgment, and the actor might face consequences"<sup>113</sup>. As Zilioli stated pre-crisis, they are "complementary instruments for democracy"<sup>114</sup>.

Concerns about the accountability of the European Central Bank are not recent.<sup>115</sup> The Delors Report, in 1989, referred to 'accountability' as one of the two central features of the European Central Bank's status, next to its independence.<sup>116</sup> Whilst the European Central Bank was already operating in relatively benign monetary conditions, with relatively few policy targets, it was always fully aware that the independence and the powers it enjoys come with grave responsibilities. In 2002, it had already acknowledged that *"in modern democracies, independent institutions bestowed with a public function must be held accountable for their actions. Therefore, the high degree of independence granted to the European Central Bank goes hand in hand with well-defined ways of holding the latter accountable"*<sup>117</sup>. Accountability has therefore traditionally been viewed by the European Central Bank as a *"core element of its legitimacy"*<sup>118</sup>.

However, in the post-crisis time, holding the European Central Bank to account has become ever more complex and, simultaneously, ever more necessary. Now that the European Central Bank evolves in a more complex economic environment, is responsible for new tasks and

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<sup>113</sup> Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007) 13 European Law Journal 4

<sup>114</sup> Chiara Zilioli, 'Accountability and Independence: Irreconcilable Values or Complementary Instruments for Democracy? The Specific Case of the European Central Bank', (2003) Mélanges en hommage à Jean-Victor Louis ; Vol. 2. - Bruxelles : Ed. de l'Univ. Libre de Bruxelles, ISBN 2-8004-1316-6.

<sup>115</sup> Diane Fromage, Paul Dermine, Phedon Nicolaidis and Klaus Tuori, (n11)

<sup>116</sup> Jacques Delors, 'Report on Economic and Monetary Union in the European Community', presented April 17, 1989 (commonly called the Delors Plan or Report) by Committee for the Study of Economic and Monetary Union', EU Commission Working Document

<sup>117</sup> European Central Bank, 'The Accountability of the ECB', Monthly Bulletin, November 2002

<sup>118</sup> Hanspeter Scheller 'The ECB – History, Role and Functions' (2006) European Central Bank

exercises new competences, it becomes imperative to ask how its accountability is discharged.<sup>119</sup>

## 2. To whom is the European Central Bank accountable?

The ultimate beneficiary of the European Central Bank's accountability is the public at large and in general there are mechanisms that oblige the European Central Bank to address the public directly. However, the most accountability mechanisms expose the European Central Bank only indirectly to the public, through the scrutiny by another public body which acts in the public interest. This body is usually a political, administrative, or judicial body at European Union or national level, and may act in relation to all or specific tasks of the European Central Bank. In particular, the European Central Bank are primarily accountable to political bodies that either represent elected governments, namely the Council or are directly elected, namely the European Parliament or national parliaments. Legislation mandates allows reviews of specific European Central Bank's functions also by administrative and judicial bodies.<sup>120</sup>

Regarding the European Central Bank's monetary policy tasks, political accountability mechanisms are enshrined directly in the TFEU, specifying that the European Central Bank is accountable to the European Parliament and the Council. Article 284 TFEU demands the European Central Bank to present an annual report to and attend debates organized by the Council and the European Parliament.<sup>121</sup> According to the same provision "*(T)he President of the European Central Bank and the other members of the Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the competent*

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<sup>119</sup> Diane Fromage, Paul Dermine, Phedon Nicolaidis and Klaus Tuori, (n11)

<sup>120</sup> Larisa Dragomir, (n109)

<sup>121</sup> TFEU, Article 284(3)

*committees of the European Parliament.*<sup>122</sup> The TFEU, thus, designs in broad terms the accountability arrangements for monetary policy tasks, emphasizing the role of the European Parliament but saying little about the strength of the review. The European Parliament's rules of procedure provide more details on the format and frequency of interactions between the European Parliament and the European Central Bank. Interaction between the European Central Bank and the Council is framed by the underpinning Council procedures, with the European Central Bank participating regularly in the Economic and Financial Affairs Council, the Eurogroup and their preparatory committees. So far, interactions with the Council are not commonly examined in terms of their potential to act as an accountability forum, although the agenda of relevant Council meetings regularly includes discussions of various European Central Bank's reports, its priorities, and other European Central Bank's activities.<sup>123</sup> Although the TFEU does not lay down accountability arrangements relating to the national parliaments, in practice the European Central Bank's President or other members of the European Central Bank's Executive Board have also accepted, on occasion, to appear before national parliaments.<sup>124</sup>

As regards the supervisory side, European Central Bank's accountability arises from the Single Supervisory Mechanism Regulation, not the TFEU.<sup>125</sup> Although the Single Supervisory Mechanism Regulation contains noteworthy provisions that aim at guaranteeing the required level of independence, it also contains essential accountability and reporting obligations on the part of the European Central Bank.<sup>126</sup> According to Recital 75 of the Single Supervisory Mechanism Regulation *"(I)n order to carry out its supervisory tasks effectively, the ECB should exercise the supervisory tasks conferred on it in full independence, in*

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<sup>122</sup> TFEU, Article 284(3), paragraph 2

<sup>123</sup> Larisa Dragomir, (n109)

<sup>124</sup> The ECB President has appeared before seven national parliaments in: Germany (in 2012 and 2016), Spain and France (2013), Finland (2014), Italy (2015), the Netherlands (2017) and Ireland (2018), whilst other members of the Executive Board have also participated in meetings in national parliaments.

<sup>125</sup> Larisa Dragomir, (n109)

<sup>126</sup> Gianni Lo Schiavo, (n26)

*particular free from undue political influence and from industry interference which would affect its operational independence.*"<sup>127</sup> Article 19 is the most important in that regard as it specifies that an appropriate level of independence is required for the Supervisory Board.<sup>128</sup> Respectively, however, both Recital 55 and Recital 85 to the Single Supervisory Mechanism Regulation refer to democratic accountability and thereby imply that accountability is a political instrument.<sup>129</sup> *"The ECB should therefore be accountable for the exercise of those tasks towards the European Parliament and the Council as democratically legitimised institutions representing the citizens of the Union and the Member States."*<sup>130</sup>

According to Article 20(1) of the Single Supervisory Mechanism Regulation, the European Central Bank is accountable to the European Parliament and to the Council for the implementation of the Single Supervisory Mechanism Regulation. In particular, Article 20 of the Single Supervisory Mechanism Regulation lays down four democratic accountability mechanisms: (1) submission of an annual reporting to the European Parliament and the Council; (2) transmission and presentation of the Annual Report to the European Parliament, the Council, the Commission and to the Euro group; (3) participation in hearings before the Euro group and the European Parliament competent committees; and (4) replies to parliamentary questions and to questions posed by the Euro group.<sup>131</sup>

The practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the European Central Bank within the framework of the Single Supervisory Mechanism are specified in an Interinstitutional Agreement between the European Parliament and the European Central Bank as well as in the Memorandum of Understanding (MoU) entered by the European Central Bank with the Council. Both bilateral

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<sup>127</sup> Single Supervisory Mechanism Regulation, Recital 75

<sup>128</sup> Single Supervisory Mechanism Regulation, Article 19

<sup>129</sup> Single Supervisory Mechanism Regulation, Recital 55 and 85

<sup>130</sup> Single Supervisory Mechanism Regulation, Recital 55

<sup>131</sup> Single Supervisory Mechanism Regulation, Article 21

arrangements are subject to regular reviews and provide a tool for specifying the concrete modalities for holding the European Central Bank accountable. They define, inter alia, the content of the reports that the European Central Bank must prepare, the rules for the conduct of its hearings and meetings, and its procedures for appointments.<sup>132</sup>

Furthermore, the Single Supervisory Mechanism Regulation provides that national parliaments 'may' call the European Central Bank to account. Pursuant to Article 21 "*When submitting the report provided for in Article 20(2), the ECB shall simultaneously forward that report directly to the national parliaments of the participating Member States.*"<sup>133</sup>

National parliaments may apply to the European Central Bank their reasoned comments on that report.<sup>134</sup> In addition, national parliaments of the participating Member States "*may request the ECB to reply in writing to any observations or questions submitted by them to the ECB in respect of the tasks of the ECB under this Regulation.*"<sup>135</sup>

In addition to accountability mechanisms, the European Central Bank is held to account for various aspects of its activities by several administrative bodies, usually entrusted with performance of reviews.<sup>136</sup> The role of administrative bodies differs about the European Central Bank's exclusive powers for monetary policy and to its supervisory tasks. Although the European Court of Auditors<sup>137</sup> (ECA) and the European Ombudsman exercise their mandates in the context of both functions, the Commission<sup>138</sup>, and the European Banking

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<sup>132</sup> Phedon Nicolaides, 'Accountability of the ECB's supervisory activities (SSM): Evolving and responsive' (2019) Vol. 26(1) 136–150 Maastricht Journal of European and Comparative Law

<sup>133</sup> Single Supervisory Mechanism Regulation, Article 21(1)

<sup>134</sup> Single Supervisory Mechanism Regulation, Article 21(1), paragraph 2

<sup>135</sup> Single Supervisory Mechanism Regulation, Article 21(2)

<sup>136</sup> See European Commission (2017), *Report on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013*, COM(2017) 591 final and the accompanying staff working Document SWD(2017) 336 final

<sup>137</sup> The European Court of Auditors assesses the operational efficiency of ECB's management in the context of both monetary and supervisory functions.

<sup>138</sup> Article 32 of the Single Supervisory Mechanism Regulation requires the Commission to regularly review the functioning of the Single Supervisory Mechanism, specifying an extensive set of review aspects.



Authority (EBA)<sup>139</sup> have a formal review role only in the context of the supervisory function. Findings from these performance reviews, including possible recommendations, are transmitted to the European Central Bank, as well as to the political bodies to which it is accountable.

Lastly, like all European Union, the European Central Bank's actions may be challenged in front of the European courts and indirectly in national courts, which may submit references for preliminary ruling to the Court of Justice of the European Union<sup>140</sup>. European courts have been increasingly dealing with actions concerning the European Central Bank not only relative to its new supervisory functions, but also in relation to the scope of its monetary policy tasks in the context of the crisis-related measures. Whereas the judicial review focuses on the legality and proportionality considerations, with the degree of intrusiveness of the review being often influenced by the complexity of the case and the degree of discretion or independence conferred on public bodies<sup>141</sup>, the judicial proceedings constitute an essential forum for the European Central Bank to clarify and justify its actions.<sup>142</sup>

### 3. Assessment of the accountability arrangements

Overall, the Single Supervisory Mechanism Regulation establishes an original accountability framework. It not only establishes relationships *vis-à-vis*<sup>143</sup> the European Parliament and the Council, but it also foresees the existence of relationships with national parliaments. However, the truth is that none of the provisions of the Single Supervisory Mechanism

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<sup>139</sup> The European Banking Authority is responsible for convergence reviews related to the application of the single rulebook by supervisory authorities, including the European Central Bank. It must regularly deliver a report on the convergence of the supervisory review and evaluations process (SREP), which is at the core of European Central Bank's supervisory task.

<sup>140</sup> See for instance Case C-62/14 Gauweiler on the monetary side, and Case C-219/17, Berlusconi and Fininvest, on the supervisory side.

<sup>141</sup> Joana Mendes, 'Discretion, Care and Public Interests in the EU Administration: Probing the Limits of EU Law' (2016) Vol.53, Issue 2 Common Market Law Review

<sup>142</sup> Larisa Dragomir, (n109)

<sup>143</sup> in relation to; with regard to

Regulation or the Interinstitutional Agreement guarantee the kind of accountability most Member States would impose on their national regulatory agencies.

At the time of writing, the ECB had published seven Annual Reports on its supervisory activities. In every Annual Report, under the title "Discharging of accountability requirements", the European Central Bank lists the following: (i) the appearances of the Single Supervisory Mechanism chair before the European Parliament, (ii) the number of replies to the Members' of the European Parliaments questions, (iii) the submission to the European Parliament of the proceedings of the Single Supervisory Mechanism Board meetings, (iv) the attendance of Council meetings by the Single Supervisory Mechanism chair, and (v) the interaction with the European Court of Auditors and the main recommendations of the European Court of Auditors in its special report. It can be said that although the Annual Reports, refers explicitly to the discharge of European Central Bank's accountability requirements, the information it provides is rather basic as it only lists procedures.<sup>144</sup>

Moreover, European Union or Member State institutions do not have the right to give instructions to the European Central Bank regarding its role as banking supervisor or to repeal a decision by its Supervisory Board.<sup>145</sup> Nevertheless, it can be said that a certain indirect external control may be exercised through the Single Supervisory Mechanism Regulation's rules on management selection.<sup>146</sup> This applies to the Supervisory Board as the central organ of the European Central Bank supervisory authority. Candidates for the Chair and for the Vice Chair of this board will need the approval of the Council and of the European Parliament.<sup>147</sup> In a few cases, these two institutions may also request the Chair to

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<sup>144</sup> Phedon Nicolaides, (n132)

<sup>145</sup> Benedikt Wolfers and Thomas Volland, (n52)

<sup>146</sup> Single Supervisory Mechanism Regulation, Article 26

<sup>147</sup> Single Supervisory Mechanism Regulation, Article 26(3)

be removed from office.<sup>148</sup> Otherwise, "(T)he term of office shall be five years and shall not be renewable."<sup>149</sup> Most of the members of the Supervisory Board are representatives of the national competent authorities in participating Member States. Another four members of the Supervisory Board will represent the European Central Bank and will be selected by the European Central Bank's Governing Council, which is constituted in a fashion like the Supervisory Board.<sup>150</sup>

Accountability is not only an instrument of democratic legitimacy. It is also a mechanism for ensuring that the European Central Bank carries out its tasks effectively.<sup>151</sup> The European Central Bank's Annual Reports on supervisory activities are the principal written evidence of whether the European Central Bank carries out its regulatory tasks effectively. Both the Interinstitutional Agreement between the European Parliament and the European Central Bank and the Memorandum of Understanding (MoU) between the European Central Bank and the Council require that the first item to be covered in the Annual Report is the execution of the supervisory tasks. However, they do not define any standards of reporting or benchmarks of performance. As a result, this is left to the European Central Bank, which is not unreasonable if it can be confirmed that the reporting and performance are satisfactory.<sup>152</sup>

The European Central Bank, in Chapter 1 of Annual Reports, refers to the main risks and explains what the Single Supervisory Mechanism did to prevent financial instability. However, it is important to note that preventing instability is not the same as maintaining stability. This is because the Single Supervisory Mechanism may have addressed, for example three risks to financial stability, but failed to identify or deal with a fourth risk. Naturally, a non-expert does not know whether the Single Supervisory Mechanism did

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<sup>148</sup> Single Supervisory Mechanism Regulation, Article 26(4)

<sup>149</sup> Single Supervisory Mechanism Regulation, Article 26(3), paragraph 2

<sup>150</sup> Single Supervisory Mechanism Regulation, Article 26(1)

<sup>151</sup> Phedon Nicolaides, (n132)

<sup>152</sup> Phedon Nicolaides, (n132)

everything that it possibly could to maintain financial stability. Therefore, it is incumbent on the European Central Bank not just to explain what it does but to justify how its actions protect the financial system and preserve stability.<sup>153</sup>

## **Conclusion**

Prudential supervision in the European Union has drastically changed since the 2014 entry into force of the Single Supervisory Mechanism Regulation establishing the Single Supervisory Mechanism. The Single Supervisory Mechanism Regulation conferred on the European Central Bank exclusive powers to carry out specific prudential supervisory tasks vis-à-vis all euro area credit institutions (significant and less significant). At the same time, the European Central Bank's national counterparts assist the former in implementing its supervisory tasks vis-à-vis less significant credit institutions. The Single Supervisory Mechanism, in order to ensure the effective and independent performance of supervision tasks by the European Central Bank, established an independent and autonomous internal body within it, the Supervisory Board.

This dissertation paper argued that such a scheme requires a clear accountability arrangement to be in place to ensure democratic accountability of the European Central Bank's supervisory activities in the context of the European Banking Union as well as to guarantee that these activities are carried out effectively to maintain financial stability. On the whole this dissertation has found that the Single Supervisory Mechanism Regulation establishes an original accountability framework as it not only establishes relationships towards other European institutions, such as the European Parliament and the Council but it also foresees the existence of relationships with national parliaments. However, it is argued that although

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<sup>153</sup> Phedon Nicolaides, (n132)

Annual Reports, submitted to European institutions and national parliaments, refer explicitly to the discharge of European Central Bank's accountability requirements, the information they provide is rather basic as it only lists procedures. In addition, either European Union institutions, or Member State institutions have the right to give instructions to the European Central Bank regarding its role as banking supervisor or to repeal a decision by its Supervisory Board. Lastly, it is argued that although the Annual Reports explain what the Single Supervisory Mechanism do to prevent financial instability, the European Central Bank should better explain how its regulatory actions protect financial stability.

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