Unus Pro Omnibus, Omnes Pro Uno: The Single Supervisory Mechanism as a Unitary Multilevel Administration

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1. *Introduction.* — A common thread links federalist theories and the Single Supervisory Mechanism (hereafter, Mechanism or SSM). Indeed, the subject matter of the former, *i.e.* rationalising the coexistence of a duality of powers in a unitary legal system [1], would seem to be of central relevance for the latter as well.

In the European construct, which is an example of an integrative federative system [2], the allocation of competences is conceptualised as

(*) The views expressed are those of the author and do not necessarily reflect those of the ECB.

[1] M. BRIDEL, *Précis de Droit Constitutionnel et Public Suisse: Notions Préliminaires et Fondamentales*, I, Lausanne, Payot, 1965, 159.

[2] O. BEAUD, *The Allocation of Competence in a Federation - A General Introduction*, in *The Question of Competence in the European Union*, edited by L. AZOULAI, Oxford, Oxford University Press, 19 ff.

the transfer of pre-existing powers of the federated orders to supranational institutions, the latter being empowered to act «only within the limits of the competences conferred upon [them] by the Member States» [3]. Although the Union has historically evolved as a model of «executive federalism» [4], whereby the implementation of supranational law was, to a large extent, a task to be carried out by the national administrations of the Member States, recent trends in case law and legislation show that the administrative sphere is being increasingly re-engineered as a shared supranational space for both European and national institutions [5]. Against this backdrop, the experimental way in which the SSM conceptualises executive tasks and distributes responsibilities between the Union and national administrations shows features of cooperative federalism, and can be seen as a proxy for the wider federalisation process of the regulation and supervision of financial institutions in the EU [6].

The SSM recoded the institutional law of banking supervision in the Union, taking a leap forward in European administrative integration [7]. In a nutshell, Regulation (EU) No 1024/2013 [8] (hereafter SSMR), based on Article 127(6) TFEU, and Regulation (EU) 468/2014 [9] (hereafter, SSMFR), make up the framework designed to centralise, within the European Central Bank (ECB) the implementation of EU Single Rulebook *vis-à-vis*

[3] Article 5(2) TFEU.

[4] J. JACQUÉ, *Pouvoir Législatif et Pouvoir Exécutif dans l'Union Européenne*, in *Traité de Droit Administratif Européen*, edited by J. Auby, J. D. de la Rochère and E. Chevalier, Bruxelles, Bruylant, 2014, 68 ff. (especially 83).

[5] P. CRAIG, *EU Administrative Law*[3], Oxford, Oxford University Press, 2006, 5.

[6] T. TRIDIMAS, *The Constitutional Dimension of Banking Union*, in *The European Banking Union and Constitution-Beacon for Advanced Integration or Death-Knell for Democracy?*, edited by S. Grundmann and H.-W. Micklitz, Oxford, Hart Publishing, 2019, 25 ff. (especially 31); M.P. CHITI and V. SANTORO, *L'unione bancaria europea*, Pisa, Pacini, 2016, 13.

[7] In addition to this codification, the case law of the Court of Justice of the European Union (CJEU) has framed the protection of the stability of the Union's financial system as a public interest of the EU. See Case C-526/14 *Kotnik and Others*, 2016, para. 69 and Joined Cases C-8/15 P and C-10/15 P, *Ledra Advertising Ltd*, 2016, paras 71 and 74.

[8] 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, 2013, OJ L287/63.

[9] 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, 2014, OJ L141/1. This Regulation was adopted on the basis of Article 6(7) SSMR.

the credit institutions [10] established in the territorial scope of the European Banking Union (EBU).

Two major rationales underpin the SSMR. From a single market (microeconomic) point of view, the centralised enforcement of Union prudential law under the ECB enhances the seamlessness of the EU internal banking market. From a financial stability (macroeconomic) perspective, the implementation of supervisory policies in the Union's administrative space makes the supervision of credit institutions — key actors in the economies of Member States — a complementary vehicle of economic and financial policy-making in the EMU, while concurrently reinforcing the transmission of the Eurozone monetary policy [11].

The Mechanism is a «system of financial supervision» [12] composed by the ECB and national competent authorities (NCAS [13]) of participating Member States [14]. It lacks legal personality, similarly to the European System of Central Banks (ESCB), and functions as the institutional platform for the exercise of the ECB's supervisory competence. Indeed, the SSM is structured as a complex machine whereby NCAS assist the ECB in the execution of its supervisory tasks, while concurrently partaking in the governance of its *de facto* decision-making body for supervisory matters, the Supervisory Board (SB) [15].

The ECB, which is entrusted with the general responsibility for the

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[10] See Article 4(1) SSMR. The scope of the SSM-supervised entities, however, is broader than the credit institutions incorporated in participating Member States and the branches of credit institutions established in non-participating Member States operating in a participating Member State; indeed, it extends to «financial holding companies» (in the context of consolidated supervision of banking groups) and «mixed financial holding companies» (in the context of the supplementary supervision of financial conglomerates). See Articles 4(1)(g) and 4(2) SSMR.

[11] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Reformed Financial Sector for Europe*, COM (2014) 279 final, 5.

[12] Article 2(9) SSMR.

[13] Pursuant to Article 2 SSMR, «national competent authority» means a national competent authority designated by a participating Member State in accordance with Reg. (EU) n. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and Directive 2013/36/EU.

[14] Constitutional constraints deriving from Article 127(6) TFEU prevented the Union legislator from extending the EBU beyond the Eurozone members. For this reason, albeit being primarily an administrative mechanism internal to the Eurozone, the Mechanism is open to the participation of non-Eurozone members, which may on a voluntary basis establish a «closed cooperation» relationship with the ECB pursuant to Article 7 SSMR.

[15] Article 25 SSMR.

effective and consistent functioning of the Mechanism [16], is defined as being «exclusively competent» to carry out, in relation to *all credit institutions* in the EBU, the supervisory tasks enumerated at letters (a) through (i) of Article 4(1) SSMR. Such tasks include the major functions covering the banking supervisory lifecycle: granting and withdrawing banking licenses, authorising acquisitions and disposals of qualifying holdings, engaging in the day-to-day supervision of compliance with prudential requirements, and overseeing of early intervention and recovery plans.

Crucially, the ECB is competent for Article 4(1) SSMR tasks «[w]ithin the framework of Article 6» [17]. This provision fundamentally splits the credit institutions incorporated in the EBU into two categories: «significant institutions» [18] (hereafter SIs) and «less significant institutions» (hereafter, LSIs).

The classification of a supervised entity as an SI or an LSI, which is done at the highest level of consolidation by the ECB after an assessment based on pre-established criteria [19], is consequential in terms of the role and powers of NCAs in the supervision of the entity itself. Except for the tasks listed in Article 4(1)(a) and (c) — which are carried out by the ECB with respect to *all credit institutions* —, it is for the ECB to directly carry out the Article 4(1) tasks with respect to SIs, whereas it is for NCAs to directly carry out the Article 4(1)(b), (d)-(g) and (i) tasks with respect to LSIs, in accordance with the regulations, guidelines and general instructions issued by the ECB [20].

To close the circle, Article 6 SSMR sets out provisions allowing for adjustments to the distribution of powers between NCAs and the ECB beyond the formal criteria differentiating SIs from LSIs. On one hand, under Article 6(5)(b) SSMR, the ECB may decide to take over the direct supervision of one of more LSIs «when necessary to ensure consistent

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[16] Article 6(1) SSMR.

[17] Article 4(1) SSMR.

[18] As of April 2022, 111 credit institutions or groups of credit institutions are classified as SIs by the ECB, accounting for about 80 per cent of total euro area banking assets.

[19] The significance status of an institution is assessed by the ECB according to the criteria defined in Article 6(4) SSMR. Those criteria include: (*i*) size, (*ii*) economic importance, (*iii*) significance of cross-border activities, (*iv*) whether public financial assistance is received by the institution and (*v*) being among the three most important banks in participating Member States. Regardless of such criteria, the ECB supervises directly the three most significant institutions of each participating Member States. See also Article 39 SSMFR.

[20] Article 6(5)(a) and (6) SSMFR.

application of high supervisory standards» [21]. On the other hand, Article 6(4), second subparagraph, of the SSMR provides that entities that should be classified as SIs can be directly supervised by NCAs in «particular circumstances».

The systematic interpretation of Article 4(1) SSMR and Article 6(4)-(6) SSMR is key to grasp the institutional logic underpinning the relationship between the ECB and NCAs, and the balance of powers within the SSM. Admittedly, the different ways in which SIs and LSIs are supervised by the ECB could raise doubts as to whether an *exclusive* supervisory competence was bestowed on the ECB for the tasks listed under Article 4(1) SSMR, or whether NCAs maintained a fraction of their pre-existing supervisory competence under national law to supervise LSIs incorporated in their own Member State.

In *L-Bank* [22], however, the Court of Justice of the European Union (CJEU) dispelled all doubts as to the exclusivity of the supervisory competence conferred on the ECB with regard to LSIs, stating that «under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence» [23]. In the words of the General Court, «the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the Basic Regulation and that the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the Basic Regulation» [24].

The objective of this contribution is to provide an analytical and systematic reading of the multi-level administrative model of the Mechanism that can solve, in the light of *L-bank* case, the apparent tension between hierarchy and decentralisation in its institutional architecture [25].

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[21] Article 6(5)(b) SSMR.

[22] Case T-122/15 *Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank*, 2017. The case was confirmed in 2019 in Case C-450/17 P *Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank.*

[23] Case T-122/15, para 72.

[24] Case T-122/15, para 72, para 63.

[25] A. DE GREGORIO MERINO, *Institutional Report*, in *European Banking Union: FIDE Congress Proceedings Volume 1*, edited by G. Bándi, P. Darák, A. Halustyik and P.L. Láncos, Budapest, Wolters Kluwer, 2016, 151 ff. (especially 175).

The analysis of the tasks conferred on the ECB under Article 5 SSMR in the field of macroprudential policies are beyond the scope of this analysis.

To reconstruct the model underpinning the SSM, I will adopt an understanding of the patterns for the implementation of Union law as a continuum of possible institutional arrangements, based on various forms of cooperation between the supranational and national levels [26]. I will conceive of the SSMR as a multi-level form of administration, *i.e.* a European platform on which multiple public institutions, rooted into different layers of the composite Union's legal system, are interlinked for the execution of Union law. I will argue that the contradiction between decentralisation and hierarchy within the SSM must be resolved using a teleological reading of the ECB's prudential mandate, such that banking supervision is conceptualised as a *shared* function of both the ECB and NCAs, each working as integral components of the Mechanism [27].

In Section 2, I engage with the core criteria defining the allocation of authority, tasks and powers between the ECB and NCAs to expound how the Mechanism works in two different institutional configurations in line with a distinct allocation of decisional powers. In Sections 3 and 4, I explore how in both the Mechanism's institutional configurations banking supervision is executed as a «multi-level function» [28] where the ECB and NCAs cannot be considered as stand-alone administrations, but rather as integral components of a single administration. In Section 5, I briefly outline some considerations on the interaction between the functional singleness of the SSM and the current system of dualistic judicial review of composite administrative action in the Union. In Section 6, I present my conclusions.

2. *The Mechanism's dual institutional configuration.* — This section engages with the law of the SSM in two parts. First, it will be argued that the interaction between Articles 4(1) and 6(4)-(6) SSMR leads to a dual

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[26] H. HOFMANN and A. H. TÜRK, *EU Administrative Governance*, Cheltenham, Edward Elgar, 2006, 574.

[27] L. WISSINK, *Challenges to an Efficient European Centralised Banking Supervision (SSM): Single Rulebook, Joint Supervisory Teams and Split Supervisory Tasks*, in 18 *European Business Organisation Law Review* (2017), 431 ff. (especially 434), where the author frames the SSM as a «mixed administration».

[28] A. H. TÜRK, *European Banking Union and Its Relation with European Union Institutions*, in *The Palgrave Handbook of European Banking Union Law*, edited by M. Chiti and V. Santoro, London, Palgrave Macmillan, 2020, 41 ff. (especially 43).

administrative model whereby the ECB's exclusive competence is exercised according to the principle of *dynamic subsidiarity*, through two institutional configurations, each allocating a set of powers to NCAs for their contribution to the ECB's prudential mandate. Second, the governance of the SB will be briefly described to conclude that the Board functions as an institutional conduit between the two levels of the Mechanism, hardwiring NCAs into the *locus* of decision-making on matters of banking supervision in the EBU.

2.1. *Dynamic subsidiarity in a dual and variable Mechanism.* — Prior to the enactment of the SSMR, Union law had not altered the fundamental allocation of administrative powers in the realm banking supervision across the single market, remaining true to the home/host supervisory model [29]. In line with Article 291(1) TFEU, rules enacted at the supranational level by the Union legislator were designed to be enforced in each Member State by national administrative authorities.

Against this backdrop, and departing from a previous system of «European regulation with national supervision» [30], the SSMR is the product of a post-internal market regulatory philosophy: the Mechanism is executive in nature, and its establishment results in the integration of the supervisory jurisdictions of participating Member States into a single supervisory jurisdiction within the territorial scope of the EBU.

Under the SSMR and the SSMFR, banking supervision is re-engineered as a multi-institutional administrative activity organised according to a *asymmetrical attribution of supervisory competence and powers* between the ECB and NCAs [31]: despite the exclusive supervisory competence of the former, the latter are nonetheless endowed with statutory powers — and, to some extent, the discretion to exert such powers — to participate in the execution of the ECB's tasks.

The SSM thus functions as a supervisory governance model, defining the respective spheres of action of the ECB and NCAs in line with different procedural modules. The interaction between Article 4(1) and Article

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[29] A. MAGLIARI, *Vigilanza bancaria e integrazione europea. Profili di diritto amministrativo*, Naples, Editoriale Scientifica, 2020, 25.

[30] T. PADOA-SCHIOPPA, *Regulating Finance*, Oxford, Oxford University Press, 2004, 121.

[31] R. D'AMBROSIO, *Single Supervision Mechanism: Organs and Procedures*, in *The Palgrave Handbook of European Banking Union Law*, edited by M. Chiti and V. Santoro, London, Palgrave Macmillan, 2020, 157 ff. (especially 161).

6(4)-(6) SSMR, which epitomises the tension between unity (hierarchy) and differentiation (partial decentralisation) within the Mechanism, means that the EBU is a *multi-level supervisory jurisdiction*: in principle, both the ECB and NCAs can operate as the authorities responsible for enforcing Union prudential law.

Partial decentralisation within the SSM means that, in practice, supervisory activities take place at both the supranational and national level. The significance criterion crystallised in Article 6(4) SSMR, which is the direct operationalisation of the principle of subsidiarity [32], operates as a *ratione personae* criterion, dividing the EBU-supervised entities in SIs and LSIs and directly attributing to NCAs the authority to enforce Union law *vis-à-vis* the latter institutions for certain supervisory tasks, by virtue of a decentralised implementation of the ECB's supervisory competence. This means that the SSMR confers the power to adopt supervisory decisions [33] *vis-à-vis* a supervised institution — including the power to adopt the decision at the outcome of a Supervisory Review and Evaluation Process [34] (SREP) — upon the ECB or to NCAs in accordance with Article 6(4) SSMR.

Although the SSM supervisory jurisdiction is multi-level in nature, its hierarchical «core» lies in the ECB. The singleness of the SSM supervisory jurisdiction is a reflection of the pan-European prudential mandate assigned to the ECB: only the latter — and not NCAs — has been entrusted with contributing «to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State» [35]. For this reason, the supervisory remit of the ECB logically

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[32] A. DE GREGORIO MERINO, *Institutional Report*, cit., 175.

[33] See Article 4(1) and 22(1) SSMR with regard to the ECB and Article 6(6) SSMR with regard to NCAs. Supervisory decisions are legal acts commanding a supervised entity to take certain courses of action — such as modifying its balance sheet or organisational structure — or granting permission for conduct in which the entity would otherwise not be authorised to engage. See R. BAX and A. WITTE, *The Taxonomy of ECB Instruments Available for Banking Supervision*, 2019, ECB Economic Bulletin Issue 6/2019, available at *www.ecb.europa.eu/pub/economic-bulletin/articles/2019/html/ecb.ebart201906_02~3e2f0e4f63.en.html.*

[34] The SREP is the prudential assessment, carried out on an ongoing basis for each supervised entity, on the adequacy of the entity's capital, liquidity and governance arrangements (Article 97, 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, 2013, OJ L176/338).

[35] Article 1 SSMR.

extends to both SIs and LSIs, given that *all* credit institutions can pose a threat to the financial stability of the Union [36].

Such a conclusion is consistent with the rationale underlying the SSMR: the uniformity of supervisory action and the preservation of financial stability in the EBU are context-driven objectives, the achievement of which presupposes the SSM-wide institutional perspective of the ECB, which is thus granted hierarchical predominance within the SSM in the implementation of Union prudential law [37]. In light of these considerations, one can readily understand why the supervisory tasks relating to license authorisation (and withdrawal) and to the approval of qualifying holdings listed in Article 4(1)(a) and (c) are carried out by the ECB, regardless of the significance of the supervised entity. Indeed, the ECB acts as the ultimate gatekeeping authority in the SSM supervisory jurisdiction, directly supervising access to, and exit from, the EBU banking market.

As a result of the asymmetrical attribution of the supervisory competence and powers, the SSM functions as a dual platform, on which banking supervision is carried out according to two distinct institutional paradigms. Each paradigm dictates a different level of involvement of the ECB and NCAs, which is reflected in a different attribution of supervisory powers. Under the first paradigm (that will be labelled «centralised configuration»), the SSM primarily works as a one-tier centralised system, whereby the ECB acts as the competent authority under Union prudential law *vis-à-vis* supervised entities. Under the second paradigm (that will be called «decentralised configuration»), the SSM works as a two-tier system, in which broad supervisory powers are attributed to NCAs to carry out the tasks established under Article 4(1)(b) and (d)-(g) and (i) SSMR *vis-à-vis* LSIs.

Saliently, not only is the architecture of the SSM dual; it is also *variable.* Adjustment to the distribution of SIs and LSIs within the

[36] See Recital (16) SSMR.

[37] See Recital (87) SSMR, which reads that «the objectives of this Regulation, namely setting up an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution, and ensuring the consistent application of the single rulebook to credit institutions, cannot be sufficiently achieved at the Member State level and can therefore, by reason of the pan-Union structure of the banking market and the impact of failures of credit institutions on other Member States, be better achieved at the Union level».

centralised or decentralised paradigm is a task for the ECB [38]: through the activation of the takeover clause under Article 6(5)(b) SSMR, the ECB can discretionally bring the supervision of individual LSIs under the centralised configuration. In other words, individual LSIs are directly supervised by NCAs *as long as* the ECB is satisfied with the level of supervisory standards maintained by the respective NCA. Equally, it is for the ECB to assess whether «particular circumstances» exist, under Article 6(4) SSMR, that make the classification of a supervised entity significantly inappropriate and lead to the institution being supervised by the ECB and NCAs in the decentralised configuration [39].

Finally, it is worth underscoring that *synergetic responsibilities* bind the tasks of the ECB and NCAs under the SSMR, making banking supervision a joint function between the two levels of administrations beyond the formal demarcation between the centralised or decentralised configurations [40]. In particular, Article 6(3) SSMR ties the responsibilities of NCAs to the supervisory competence of the ECB, regardless of the institutional configuration deployed, stating that NCAs «shall be responsible for assisting the ECB […] with the preparation and implementation of any acts relating to the tasks referred to in Article 4 related to all credit institutions».

On the operational level, and in line with the view that the SSM is the result of the «integration of supervisory responsibilities» [41], common responsibilities of the ECB and NCAs are reflected the a common duty to cooperate in good faith and to exchange information [42]. The objective of the SSMR is to create a mechanism in which the activities of the ECB and NCAs are integrated into a single administrative apparatus, and in which responsibilities are not mutually exclusive [43]. Quite to the contrary, the

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[38] A. PIZZOLLA, *The Role of the European Central Bank in the Single Supervisory Mechanism: A New paradigm for EU Governance*, in 1 *European Law Review* 2018, 3 ff. (especially 19).

[39] Case T-122/15 at para 62, in which the General Court confirmed that the ECB is exclusively competent to determine the content of such «specific circumstances».

[40] A. DE GREGORIO MERINO, *Institutional Report*, cit., 171.

[41] Recital (5) SSMR.

[42] Article 6(2) SSMR.

[43] P.G. TEIXEIRA, *Europeanising Prudential Banking Supervision. Legal Foundations and Implications for European Integration*, in *The European Union in Crises or the European Union as Crises*, edited by J.E. Fossum and A.J. Menéndez, 2014, 527 ff. (especially 554), where the author defines the SSM as characterised by «a unique and unprecedented juxtaposition of European and national responsibilities which defies any clear definition or categorisation».

responsibilities of the ECB and of NCAs can be defined as *mutually dependent:* the ECB can ensure the proper functioning of the SSM — and the stability of the EBU banking market — only on the condition that NCAs duly perform their tasks under the SSMR and SSMFR. As far as the law of non-contradiction is concerned, this means that the SSM, on the basis of the authority of Article 127(6) TFEU, has constitutionally (and federally) re-functionalised NCAs' roles as embedded within the institutional framework of the SSM and infused NCAs' national mandates *with supranational responsibilities* under the control of the ECB.

All of the features mentioned above paint an unprecedented multilevel executive system in Union law, which escapes existing classifications due to the *dynamic subsidiarity* encoded in the SSM's institutional design. In line with the literature framing the SSM as a sub-system of Union law within the Union legal system itself [44], in fact, the true legal innovation of the Mechanism can be observed in the circumstance that the principle of subsidiarity under Article 5(3) TEU was embedded by the Union legislator as a *context-driven standard* governing the differentiation between the SSM's centralised and decentralised configurations, the ultimate interpreter of which is the ECB. Despite the hierarchical position of the ECB in the SSM, however, dynamic subsidiarity also dictates decisional decentralism, which is «proceduralised» in the participation of NCAs in exercising the ECB's competence.

2.2. *The Supervisory Board as the SSM's infra-level link.* — Far from being limited to the operational level of banking supervision, the involvement of NCAs in the ECB's supervisory functions pertains to the very governance of the SB. The SB is the internal body of the ECB, organisationally separate from the branch in charge of monetary policy in the EMU [45], responsible for the planning and execution of the tasks conferred upon the ECB by the SSMR [46]. Although the adoption of legal acts relating to banking supervision must ultimately be imputed [47] to the Governing Council as the supreme ECB decision-making body, the approval of the SB

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[44] M. MACCHIA, *Integrazione amministrativa e unione bancaria*, Torino, Giappichelli, 2018, 227.

[45] Article 25 SSMR.

[46] Article 26 SSMR.

[47] Via the non-objection procedure laid out in Article 26(8) SSMR and Article 13g.2. of the Rules of Procedure of the ECB, a draft decision submitted by the SB is deemed to be adopted unless the Governing Council objects within ten working days.

is required for all draft supervisory acts prior to their submission to the GC [48].

The structure of the SB is based on the blueprint of the ECB's Governing Council [49]: a transnational network of representatives of national administrations, brought together under a European mandate and tempered by the presence of members of the Union administration. Specifically, the SB is composed of four representatives of the ECB, a Chair and a Vice-Chair appointed by the Council and one representative of the NCA of each participating Member State [50]. Such a structure seems to present an inherent ambivalence [51]. On one hand, the SB is shaped by the SSMR as a purely supranational body, the members of which must act independently from any Union or national public or private body and in the sole interest of the Union [52]. At the same time, the participation of NCAS' representatives in the SB is a typical module of transnationalism, in that they necessarily remain employed by national bodies and express a national point of view.

In its Opinion of 7 September 2016 [53], issued in the context of a consultation on a draft law concerning the Finnish NCA, the ECB clarified that the SSMR requirement of independence for NCAS' representatives in the SB is a building block of the supranational nature of the SB itself. The Opinion clarified that the SSMR's independence affects the *internal* relationship between NCAS and their representatives sitting in the SB. Essentially, the prohibition on SB members taking instructions from any other public body was interpreted to exclude any influence on the NCA representative from the internal decision-making of their NCA. As the «Board is not intended to function as an inter-governmental body» [54], NCAS' representatives in the Board cannot be bound to take instructions from

[48] See *infra* for the sole exception to this rule, *i.e.* the delegation framework.

[49] Pursuant to Article 283(1) TFEU, the ECB's Governing Council comprises the governors of the national central banks of the Member States whose currency is the euro and the members of the ECB's Executive Board, the latter being a President, a Vice-President and four other members.

[50] Article 26(1) SSMR.

[51] C.A. PETIT, *The SSM and the ECB Decision-making Governance*, in *The European Banking Union and the Role of Law*, edited by G. Lo Schiavo, Cheltenham, Edward Elgar, 2019, 108 ff. (especially 114).

[52] Article 19(1) SSMR.

[53] ECB, Opinion of the European Central Bank of 7 September 2016 on the role of the Financial Supervisory Authority's representative on the European Central Bank's Supervisory Board, and on supervision fees (CON/2016/43).

[54] *Ibidem.*

the internal bodies of their NCA, «as this could mean that supervision would be driven by national rather than European interests» [55]. Arguably, the ECB construed independence under Article 19 SSMR as giving a full supranational mandate to NCAs' representatives, in a manner not too dissimilar from the Treaty-based independence of the members of the ECB's Governing Council [56].

Other than confirming the supranational nature of the SB, the ECB's interpretation provides a useful key with which to recompose the SB's European mandate and its transnational composition. The mandate of NCAs' representatives to bring a national point of view to the SB, while acting in the sole interest of the Union, is instrumental to achieve institutional building in the SSM. Transnationalism is put to the service of supranationalism [57], and provides the modules through which a multilevel but unitary European administration obtains its legitimisation. It should not be forgotten, in this sense, that NCAs' representatives remain in charge of direct supervision of LSIs in their Member States under the decentralised configuration, so that the Board practically functions as a central hub where national perspectives over the supervision of both SIs and LSIs are centripetally brought together [58]. In this sense, the SB is the *locus* of institutional cooperation within the SSM, where national administrations cooperatively federate their mandates to integrate their action and impute it to a newly incorporated Union authority, subject to Union administrative rules.

In the «conundrum of the EU's ipseity» [59], the transfer of supervisory competence to the ECB can be described as the federation of national supervisory competences into a pan-European one, rather than a loss of national competence. In other words, the institutional logic behind the

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[55] *Ibidem.*

[56] Article 130 TFEU and Article 7 of the Statute of the ESCB/ECB.

[57] E. CHITI and F. RECINE, *The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position*, in 24 *European Public Law* (2018), 101 ff. (especially 111).

[58] Although not explicitly required by the SSMR, the representatives that NCAs appoint to sit in the SB are typically the NCAs' officials acting as the heads of banking supervision in their respective states. This could be seen as an effect of the Opinion of the ECB, as arguably no one but the heads of supervision could take decisions in the SB without being bound by national law requirements to take instructions from hierarchically superior colleagues in the same NCA.

[59] G. TUSSEAU, *Theoretical Deflation: The EU Order of Competences and Power-conferring Norms Theory*, in *The Question of Competence in the European Union*, edited by L. Azoulai, Oxford, Oxford University Press, 2014, 39 ff.

centralisation of banking supervision in the hands of the ECB is one that aims at recoding the role of national administrations as integral vehicles of a wider European administrative apparatus, the decision-making process of which experiences collegial participation by NCAs [60].

Drawing a parallel with the ECB Governing Council, in which the governors of national central banks collegially define the Eurozone's single monetary policy in a supranational capacity [61], it is not impossible to argue that the supranational capacity of the NCAs' representative sitting in the SB infuses the entire architecture of the SSM in a top-down manner, functionally elevating the NCAs and enabling them to partake in a European form of «co-administration» [62] responsible for supervisory output under the SSM.

3. *The SSM in its centralised configuration.* — This section will focus on the supervisory governance between the ECB and NCAs in the SSM centralised configuration for the exercise of the ECB's competence, as designed by the SSMR and SSMFR. As shown above, the configuration is deployed, in principle, for the Article 4(1)(a) and (c) tasks *vis-à-vis* all credit institutions in the EBU — and executed through the «common procedures» described in Articles 14 and 15 SSMR — and for Article 4(1)(b) and (d)-(i) SSMR tasks *vis-à-vis* SIs. Through the takeover clause, however, the ECB can bring the supervision of individual LSIs under the centralised configuration.

Under the centralised configuration, the ECB assumes the institutional posture of a direct supervisor. In such a capacity, the ECB is considered the competent authority under the Single Rulebook with regard to supervised entities. Not only is the ECB entrusted with explicit supervisory powers under Article 16 SSMR; it also has «all the powers and obligations which competent and designated authorities shall have under

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[60] H. SCHWEITZER, *Banking Union and the European Economic Constitution: A Brief Comparison of Regulatory Styles in Banking Regulation and Competition Law*, in *The European Banking Union and Constitution - Beacon for Advanced Integration or Death-Knell for Democracy*, edited by S. Grundmann and H.-J. Micklitz, Cambridge, Hart, 2019, 121 ff. (especially 134).

[61] Article 283(1) TFEU.

[62] P. WEISMANN, *The ECB's Supervisory Board Under the Single Supervisory Mechanism (SSM): A Comparison with European Agencies*, in 24 *European Public Law* (2018), 311 ff. (especially 334).

the relevant Union law» [63], including the power to exercise the options and discretions available to NCAs [64].

Article 9(1) SSMR lays out the core principles underpinning the exercise of the ECB's powers as a direct supervisor, including the allocation of direct ECB powers, *i.e.* powers exercised by means of supervisory decisions and sanctions adopted by the ECB, and indirect powers, powers exercised through ECB instructions addressed to NCAs, which in turn adopt supervisory decisions *vis-à-vis* supervised entities. Under the centralised configuration, the SSM thus operates as a one-stage of a two-stage supervisory apparatus: in the former, the supervisory output of the ECB's direct supervision is composed of ECB decisions, whereas in the latter, the supervisory output is composed of ECB instructions and the implementing acts of NCAs.

3.1. *The role of NCAs in the exercise of the ECB's direct powers.* — Article 16 SSMR explicitly affords to the ECB wide-ranging direct adjudicatory powers, to be performed with a considerable level of discretion. Such powers include the power to carry out investigations [65], to adopt supervisory decisions [66] (including the SREP), and to impose sanctions [67] on supervised entities.

When acting on the basis of direct powers, the ECB applies the substantive rules of the EU Single Rulebook within the framework of the EU administrative procedural rules, being bound by the Union's general

[63] Recital (45) SSMR.

[64] Article 4(3) SSMR. Relating to its exercise of options and discretions *vis-à-vis* SIs, the ECB has adopted Regulation (EU) 2016/445 of the ECB of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4), 2016, OJ L78/60. Further, at the time of writing, the ECB is updating its 2016 ECB Guide on options and discretions available in Union law, available at *www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/ond/ssm.ond_guide_draft_202106.en.pdf.*

[65] Section 1 SSMR.

[66] Article 16(1) and (2) SSMR.

[67] Article 18(1) SSMR and Articles 122, 124 and 134 SSMR. The ECB is only competent to impose administrative penalties when credit institutions breach a requirement under directly applicable Union law, whereas for breaches of national law transposing a directive, the ECB may require NCAs to open proceedings with a view to ensuring that a penalty is imposed, through its indirect powers (see *infra*). As for the imposition of pecuniary penalties for breaches of the ECB regulations and decisions, the ECB is exclusively competent for all credit institutions under Article 18(7) SSMR.

principles on due process and transparency [68]. However, in letters [69] of 2016 and 2017, the ECB has interpreted its direct powers to also include specific supervisory powers afforded by national legislation to NCAs which are *not* explicitly mentioned in Union law, on the condition that such powers «fall within the scope of the ECB's tasks under Articles 4 and 5 of the SSM Regulation» [70] and that they «underpin a supervisory function under Union law» [71]. Across national legislations, such powers include the approval of mergers, de-mergers, statutes and asset transfers of supervised entities.

Given the lack of uniformity in the Single Rulebook across the EU, Article 4(3) SSMR empowers the ECB, for the purpose of carrying out Article 4(1) SSMR tasks, to apply «all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives».

The conferral on a Union institution of the statutory authority to apply national law is unprecedented in Union law, and results in a paradoxical hierarchy whereby the administrative action of a European institution, taking the final form of a Union act, derives its legitimacy from national law. However, the ECB's power to apply national law was mandatory for the Union legislator, given that much of Union banking legislation takes the form of directives — chiefly the Capital Requirements Directive (CRD V) [72] —, the direct applicability of which to private parties is conditional.

New legal questions arise: for instance, is the ECB bound by the interpretation of national law provided by a national court [73]? Or, what should the ECB do, as a competent authority, when the transposition of

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[68] Article 22 SSMR. See also E. KOUPEPIDOU, *Unified Administrative Law at the European Level* in *ESCB Legal Conference 2016*, available at *www.ecb.europa.eu/pub/pdf/other/escblegal conference2016_201702.en.pdf*, 198 ff.

[69] ECB, *Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law*, Letter SSM/2017/0140 of 31 March 2017, available at *www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.en.pdf?d01637f249f9109f54a70a6803078b66.* The 2016 letter is reproduced in Annex I to the 2017 letter.

[70] *Ibidem.*

[71] *Ibidem.*

[72] Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (Text with EEA relevance.)

[73] According to the CJEU case-law, the interpretation of national laws, regulations or administrative provisions must be carried out in light of the interpretation given to them by national courts. See CJEU, 1996, Case C-240/95 *Schmit*, para 14.

the Single Rulebook is incompatible with Union law, including CRD V [74]? Some uncertainty seems to be inherent to the SSM, and it is likely that only the case-law of the CJEU will shed light on unsolved questions.

In practice, the power of the ECB to apply national law is a far-reaching tool that will be instrumental in achieving greater convergence of regulatory and technical standards across the SSM supervisory jurisdiction [75]. Observed from a system-wide perspective, Article 4(3) SSMR is another instance of the profound institutional re-arrangement upon which the multi-level SSM supervisory jurisdiction is built: shifting away from the rigidity of Article 291(1) TFEU, the power can be read as a first experimental attempt to set up new forms of supranational administrative models where Union administrations are mandated to implement national rules.

Nevertheless, the procedural modules designed by the SSMR and SSMFR for the exercise of the ECB's direct powers exhibit inherent decentralisation traits, as well: in short, the ECB's supervisory action requires, on both the operational and organisational level, intense forms of participation and assistance from NCAs. In particular, the exercise of the ECB's direct powers is operationalised through two innovative devices, which can be seen as proxies of the integrative logic that aims to blend the ECB and NCAs into an integrated co-administration: the common procedures described in Article 14 and 15 SSMR and the Joint Supervisory Teams (JSTS) responsible for the direct supervision of SIS.

The common procedures for the granting and revocation of authorisations to exercise the activity of credit institutions (Article 14 SSMR [76]) and for the ECB's authorisation to the acquisition of qualifying holdings (Article 15 SSMR [77]) are instances of EU composite procedures [78]. In Union law, composite procedures are predetermined sequences of acts

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[74] For an analysis of the challenges and uncertainties that the ECB would encounter, see F. ANNUNZIATA, *Fostering Centralisation of EU Banking Supervision Through Case-Law. The European Court of Justice and the role of the European Central Bank*' in Bocconi Legal Studies Research Paper Series No. 3372346, 2019, available at *ssrn.com/abstract=3372346*, 20.

[75] T. TRIDIMAS, *The Constitutional Dimension of Banking Union*, cit., 34.

[76] Further detailed in Article 73-84 SSMFR.

[77] Further detailed in Article 85-87 SSMFR.

[78] Except for the NCA's rejection of an application for a bank authorisation under Article 14(2) SSMR and the revocation of a credit institution's license upon the ECB's initiative under Article 14(5) SSMR, which take place only at national and Union administrative levels, respectively.

that involve the action of both EU and national bodies and lead to the adoption of a single administrative act [79].

Decisional interdependence between the Union and national administrations typically means that both levels must cumulatively participate, according to the form and powers dictated by each procedure, to the adoption of the final act. However, each specific legislative instrument governing a composite procedure defines which authority is empowered with the *decisional dominance* to define the content of the procedure's final decision.

Under Articles 14 and 15 SSMR [80], the ultimate decision-making power over the granting and withdrawal of banking licenses and the assessment of the acquisition of qualifying holdings in credit institutions lies with the ECB. As clarified by the CJEU in *Berlusconi* [81], the role of NCAs under Article 15 SSMR does not extend to the decision-making phase of the procedure, which belongs to the sole responsibility of the ECB. The same conclusions can be drawn with respect to the procedure under Article 14 SSMR. Nonetheless, NCA participation in the procedures under Article 14 and 15 SSMR is nonetheless crucial to enable the ECB's decision-making [82]: they act as points of entry for the applicants, examine the applications, and provide the ECB with all the information necessary to carry out its tasks and make preparatory decisions [83].

Beyond common procedures, the remaining supervisory tasks under Article 4(1) SSMR are carried out *vis-à-vis* SIs by the ECB through JSTs [84]. JSTs are institutional devices designed by the SSMFR, each responsible for the supervision of an SI and for the implementation of the decisions of the SB [85].

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[79] Composite procedures, also defined as «composite», «integrated» or «shared», have been framed by scholars as one of the peculiar features of the Union's multi-level administration. For a thorough analysis, see F.B. BASTOS, *Derivative Illegality in European Composite Administrative Procedures*, in 55 *Common Market Law Review* (2018), 101 ff. (especially 105).

[80] Again, except for Article 14(2) and (5) SSMR.

[81] CJEU, 2018, Case C-219/17, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, para 54.

[82] C. BRESCIA MORRA, *The Interplay Between the ECB and NCAs in the "Common Procedures" Under the SSM Regulation: Are There Gaps in Legal Protection*, in *Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia*, 2018, no. 84, 79 ff. (especially 85).

[83] Articles 76, 80 and 86 SSMFR.

[84] Article 3(1) SSMFR.

[85] JSTs receive from SIs all applications and notifications related to the ECB's supervisory tasks, see Article 95 SSMFR.

The tasks of JSTs cover the entire day-to-day supervision of SIs [86]. They are composed of staff from both the ECB and the NCAs, but are coordinated by an ECB staff member, the JST coordinator. Each NCA of a participating Member State in which an SI operates appoints its members to serve in the respective JST, including a JST sub-coordinator, so that JSTs of SIs operating in more than one participating Member State are composed of staff members of multiple NCAs. In terms of internal governance, all JST members must follow their coordinator's instructions, whereas sub-coordinators can give instructions to the NCA members of the JST insofar as the instructions do not conflict with those issued by the JST coordinator.

The very structure of JSTs is a novelty under Union law. Instead of relying on its indirect power to give NCAs instructions for the performance of its direct supervision, the ECB set up an organisational arrangement to directly pool and steer NCA staff. The solution perfectly reflects the SSMR's functional need to integrate the expertise of NCAs into the ECB's supervisory action [87].

The composition of JSTs embeds a balance between transnationalism and supranationalism; however, similarly to the SB, the dominance of the ECB coordinator over JSTs denotes them as predominantly supranational in nature. In this vein, JSTs are innovative devices in that they repurpose staff members of national administrations to achieve objectives set by a Union administration [88]. Such national staff members are, effectively, at the service of an integrated administration made up of both the ECB and NCAs [89].

This conclusion should not be read as demoting the function of NCAs within JSTs. To the contrary, the activity of NCAs is fundamental for the efficient functioning of JSTs: sub-coordinators, for instance, remain responsible for thematic and geographic areas of supervision of the JST and channel the views of their respective NCA into the supervisory stance of

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[86] Article 3(2) SSMFR.

[87] Recital (37) SSMR.

[88] See Article 2(1) of Decision (EU) 2019/976 of the European Central Bank of 29 May 2019 laying down the principles for defining objectives and sharing feedback in joint supervisory teams and repealing Decision (EU) 2017/274 (ECB/2019/14), 2019, OJ L 157/61.

[89] R. D'AMBROSIO, *The Involvement of the NCAs in the ECB Supervisory Proceedings*, in *Quaderni di Ricerca Giuridica della Consulenza Legale di Banca d'Italia*, 2020, no. 88, 163 ff. (especially 175).

the ECB [90]. In addition, NCAs maintain the power to submit to the ECB draft decisions through the relevant JSTs [91], and collect and check information submitted by SIs for the ECB's consideration [92]. Finally, beyond the formal decision-making power attributed to the JST coordinator, NCA representatives in a JST naturally benefit from their proximity to the bank supervised by the JST itself and from local technical expertise in the national rules transposing Union directives applicable to the supervised institution.

3.2. *The role of NCAs in the exercise of the ECB's indirect powers.* — Where the SSMR does not explicitly confer upon the ECB the power underpinning one of its tasks, Article 9(1) SSMR, third paragraph, affords to the ECB the power to use a peculiar instrument, *i.e.* «instructions», to require NCAs to use their powers under national law to achieve a certain result determined by the ECB. In case of sanctioning powers, for instance, the ECB can instruct NCAs to open proceedings and impose sanctions by virtue of supervisory powers that are not required by Union law [93].

Article 9(1) SSMR instructions, which must be distinguished from the «general instructions» mentioned in Article 6(5)(a) SSMR — supervisory instruments typical of the SSM's decentralised configuration which will be explored *infra* —, are binding legal instruments concerning individual credit institutions and commanding NCAs to take a particular course of action, such as the adoption of a national decision, with the degree of discretion permitted by the ECB [94]. The design of this supervisory tool appears to be equivalent to that of the instructions that the ECB can address to national central banks in the Eurosystem's statutory framework [95].

The use of instructions constitutes a procedural module typical of composite administration, as the legal instruments require a complementing implementing act by the NCAs to achieve their effect [96]. This has

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[90] ECB, Guide to Banking Supervision, 2014, *www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf*, 17.

[91] Article 91(2) SSMFR.

[92] Articles 140 and 141 SSMFR.

[93] Article 18(5) SSMR.

[94] R. BAX and A. WITTE, *The Taxonomy of ECB Instruments Available for Banking Supervision*, cit.

[95] Article 14.3 ESCB/ECB Statute.

[96] C. HERNÁNDEZ SASETA, *The Legal Review of ECB Instructions Under Article 9 SSM Regulation*, in *Judicial Review in the European Banking Union*, edited by C. Zilioli and K.-P. Wojcik, Cheltenham, Edward Elgar, 2020, 304 ff. (especially 309).

the interesting consequence that the final decision affecting supervised entities, albeit formally imputable to NCAs, traces its ultimate source of authority to the ECB's authority.

However, Articles 9(1) SSMR and 22 SSMFR are silent on the responsibility left to NCAs for the implementation of Article 9(1) SSMR instructions. The ECB may well leave some space for NCA discretion in executing the instruction, if deemed appropriate in the interests of efficiency. Alternatively, the ECB may also issue instructions leaving NCAs no margin of discretion, imposing upon them the precise content of the implementing action. In this sense, Article 9(1) SSMR instructions perfectly epitomise the multi-level nature of banking supervision as executed in a multi-level supervisory jurisdiction, whereby discretion can be left to national authorities under the hierarchical dominance of the ECB.

3.3. *NCA s as components of an integrated administration.* — In light of the above, when the SSM works in its centralised configuration, it is the ECB that maintains the formal decisional dominance over executing banking supervision. At the same time, NCAs are mandated with an ancillary role that is functionally and operationally embedded in all SSMR procedural modules setting out the exercise of ECB powers. In particular, the role of NCAs in common procedures, the structure of JSTs and the implementation of the ECB's instructions exemplify how national administrations pervasively participate in the exercise of the ECB's direct supervision.

Bearing in mind that NCA representatives always participate in SB decision-making, it can be concluded that the first configuration follows a paradigm of integrated co-administration between the ECB and NCAs, in which the supervisory output is the result of procedural modules in which both SSM levels participate [97].

4. *The Mechanism in its decentralised configuration.* — This section will focus on the supervisory governance between the ECB and NCAs in the decentralised configuration for the exercise of the ECB's competence, as designed by Article 6 SSMR. As shown above, the configuration is deployed, in principle, for the execution of the tasks under Article

[97] A.L. RISO, *A Prime for the SSM Before the Court: the L-Bank Case*, in *Judicial Review in the European Banking Union*, edited by C. Zilioli and K.-P. Wojcik, cit., 494 ff. (especially 502).

4(1)(b), (d)-(g) and (i) SSMR *vis-à-vis* LSIs. Through the takeover clause, however, the ECB can reshuffle its position and bring the supervision of individual LSIs under the centralised configuration.

4.1. *NCAs' powers under the ECB's oversight.* — When acting in their direct supervisory capacity *vis-à-vis* LSIs, NCAs are considered those entities' competent authority under the Single Rulebook, and they have the adjudicatory powers to adopt supervisory decisions [98], carry out the SREP [99] and impose administrative sanctions [100].

The institutional logic behind the model thus recognises substantial room for discretion and formal decision-making on the part of NCAs. At the same time, NCA responsibility for the day-to-day supervision of LSIs does not relieve the ECB of its overall mandate to ensure the effective functioning of the SSM, which covers both the constant review of the supervisory practices and standards applied by NCAs and LSIs themselves [101]. As this configuration could naturally tilt towards centrifugal tensions, the SSM's legal technology operationalises the ECB's oversight role through two sets of instruments countering decentralisation risk.

First, the SSMR establishes a set of obligations ensuring that NCAs channel extensive *ex ante* and *ex post* information to the ECB, relating to both qualitative and quantitative data of LSIs supervision, with a view to enabling the latter to exercise its oversight role [102]. Concerning *ex ante* information, NCAs must notify the ECB of any material supervisory procedure [103] and transmit material draft supervisory decisions [104], on which the ECB may express its views [105].

As for *ex post* information, NCAs must also report to the ECB on the adjudicatory measures taken and on their performance of supervision [106].

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[98] Article 6(6) SSMR.

[99] ECB, *SSM Supervisory Manual*, 2018, available at *www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf*, 109.

[100] Article 122 SSMFR.

[101] ECB, *SSM Supervisory Manual*, 2018, available at *www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf*, 106.

[102] Article 6(6) SSMR.

[103] Article 97 SSMFR.

[104] Article 98 SSMFR.

[105] Article 6(7)(c) SSMR.

[106] Articles 99 and 100 SSMFR.

Without prejudice to the above, the ECB may at any time exercise investigative power and request information from both NCAs and LSIs [107].

Second, Article 6(5)(a) SSMR confers upon the ECB the essential power to adopt regulations, guidelines and general instructions addressed to NCAs. The letter of the provision is clear: NCA supervision of LSIs is, in fact, to be performed — and NCA supervisory decisions to be taken — *according to* the abovementioned ECB acts.

Guidelines and general instructions do not fall within the catalogue of ECB's acts listed in Article 132(1) TFEU, and are thus *sui generis* legal instruments addressed to NCAs, commanding them to supervise groups or categories of LSIs in accordance with the ECB's determinations. Although they are instruments of general application, in that they cannot compel NCAs to take a specific course of action *vis-à-vis* an individual LSI, they nonetheless enable the ECB to pervasively compress NCAs' discretion to the degree deemed appropriate to maintain high supervisory standards across the EBU.

Guidelines are quasi-regulatory in nature, in that they apply to all NCAs and prescribe, in a general fashion, how to use their supervisory powers in a particular area or situation [108]. For instance, the ECB has adopted Guideline 2017/697 [109] to ensure that certain options and discretions under the Capital Requirements Regulation II (CRR II) [110] or CRD V are exercised by NCAs with regard to LSIs in a way aligned with its expectations. Recital 4 of the Guideline, by stating that «the ECB's overarching oversight role within the SSM enables it to promote the consistent exercise of options and discretions in relation to both significant and less significant institutions, where appropriate», shows that the ECB may use such legal instruments in a far-reaching manner to ensure consistency in the supervision of LSIs.

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[107] Article 6(5)(d) and (e) SSMFR.

[108] R. BAX and A. WITTE, *The Taxonomy of ECB Instruments Available for Banking Supervision*, cit.

[109] Guideline (EU) 2017/697 of the ECB of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9), 2017, OJ L101/156.

[110] Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (Text with EEA relevance).

General instructions, on the other hand, are typically addressed to individual NCAs, and set out the main rules that they must implement in response to a specific situation affecting only a group of LSIs [111]. As they can refer to specific supervisory powers listed in Article 16(2) SSMR, they too can have a far-reaching directional effect on the action of NCAs.

4.2. *The takeover clause.* — In the spectrum of powers available to the ECB to limit NCA discretion in the supervision of LSIs, the suppression of an NCA's authority to supervise individual entities through the takeover clause under Article 6(5)(b) SSMR appears to be the ultimate measure to ensure a consistent supervisory outcome under the decentralised configuration. As shown above, the power results in the expansion of the perimeter of the ECB's direct supervision, and brings the institutional posture of the relevant NCA under the centralised configuration. As a result, the ECB automatically acquires the legal qualification of competent authority with regard to the specific LSI.

The SSMFR sets out criteria for the activation of the takeover clause: some echo the economic size and relevance used as thresholds for the significance of credit institutions, whereas others refer to NCA non-compliance with Union law or the guidance issued by the ECB under Article 6(5)(a) SSMR [112]. However, as the list of criteria is non-exhaustive, some concerns have been voiced by NCAs relating to the predictability of the takeover clause [113]. The ECB's activation of the clause should, in fact, be read as an *ultima ratio* of the SSM, to be justified on the grounds of

[111] R. BAX and A. WITTE, *The Taxonomy of ECB Instruments Available for Banking Supervision*, cit.

[112] See Article 67(2) SSMFR, which reads «[b]efore taking the ECB decision referred to in paragraph 1, the ECB shall take into account, inter alia, any of the following factors: (*a*) whether or not the less significant supervised entity or less significant supervised group is close to meeting one of the criteria contained in Article 6(4) of the SSM Regulation; (*b*) the interconnectedness of the less significant supervised entity or less significant supervised group with other credit institutions; (*c*) whether or not the less significant supervised entity concerned is a subsidiary of a supervised entity which has its head office in a non-participating Member State or a third country and has established one or more subsidiaries, which are also credit institutions, or one or more branches in participating Member States, of which one or more is significant; (*d*) the fact that the ECB's instructions have not been followed by the NCA; (*e*) the fact that the NCA has not complied with the acts referred to in the first subparagraph of Article 4(3) of the SSM Regulation; (*f*) the fact that the less significant supervised entity has requested or received indirectly financial assistance from the EFSF or the ESM».

[113] R. D'AMBROSIO and S. MONTEMAGGI, *Supervision of Less Significant Credit Institutions*, in *Quaderni di Ricerca Giuridica della Consulenza Legale di Banca d'Italia*, 2020, no. 88, 203 ff. (especially 209).

objectives circumstances, given that partial decisional decentralisation constitutes an overarching principle underpinning the SSM's institutional logic.

Nonetheless, teleological and systematic considerations lead to the recognition of a wide margin of discretion to the ECB in assessing the circumstances justifying the activation of the takeover clause [114]. The power must be read as a tool to counter the risk of administrative decentralisation within the SSM and to compensate for the lack of the ECB's power to issue specific instructions addressed to NCAs with regard to LSIs supervision [115].

From this perspective, Article 6(5)(b) SSMR functions as a disciplinary device that maintains the correct inter-institutional incentives in place in the SSM, effectively eliminating the risk that supervisory capture and lower supervisory standards at the national level can jeopardise the soundness of the EBU banking market. However, the real significance of the power would seem to lie in its potential to deter NCAs, rather than in its actual exercise. The ECB, in fact, seems to make limited use of the tool [116].

4.3. *NCAs as components of a decentralised administration.* — In light of the above, the SSMR empowers NCAs to widely exercise their discretion in the day-to-day supervision of LSIs. At the same time, the obligations of NCAs to channel supervisory information to the ECB, the directional function performed by the ECB through guidelines and general instructions, and the ultimate power of the ECB to take away the supervision of individual LSIs from NCAs all confirm the conclusion that the supervision of LSIs by NCAs is «a mechanism of assistance to the ECB rather than the exercise of autonomous competence» [117]. Two observations can be made to support the view that the decentralised configuration is a «new organisational model» [118] for the implementation of the ECB's competence.

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[114] European Commission, *Report on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013, 11 October 2017*, COM (2017) 591 final, 7.

[115] In this sense, see Case T-122/15, paras 60 and 61.

[116] As of April 2022, only one credit institution was reported as being directly supervised by the ECB on the basis of Article 6(5)(b) SSMR. See the latest List of Supervised Entities published by the ECB, available at *www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.listofsupervisedentities202205.en.pdf?d0f183f19f9e36e98cd0c664b45d6107.*

[117] Case T-122/15, para 58.

[118] A.L. RISO, *A Prime for the SSM Before the Court: the L-Bank Case*, cit., 502.

First, supervisory governance under the decentralised model allows for two levels of decision-making for the formal day-to-day supervision of LSIs [119]. In this sense, the decentralised implementation of the ECB's supervisory competence by NCAs relies on the logic of *decisional decentralism*: both the Union and national administrations participate as two separate decisional nodes — the ECB by adopting guidelines and general instructions and NCAs by taking supervisory decisions *vis-à-vis* LSIs.

In a novel type of inter-institutional dialogue governed by dynamic subsidiarity, NCAs retain the authority to exert adjudicatory functions within their Member States, but their discretion is modulated by the ECB in accordance with the alignment of their supervisory output with the objectives set by the ECB itself. The rationale for this is entrenched in efficiency, as it allows the ECB to focus on the broader picture of supervision in the EBU. However, should the ECB not be satisfied with the quality and consistency of the NCAs' action, that authority can be unilaterally revoked.

Second, and in light of the previous point, some authors have rationalised decentralised configuration as being based upon *a model of delegation of tasks* from the central to the peripheral levels of the SSM [120]. The tenets of the delegation would have been determined by the Union legislator in the SSMR itself: its institutional actors, *i.e.* the ECB as a principal and NCAs as agents; its scope, or the day-to-day supervision of LSIs; and its conditions, the powers of the ECB and to revoke the supervisory authority of NCAs [121].

From a Union law perspective, the delegation of administrative tasks from Union bodies to national administrations, whereby the former is mandated with an original exclusive competence, would seem to be admissible. First, in *Tralli* [122], the CJEU set out the principle that «the powers conferred on an institution include the right to delegate, in compliance with the requirements of the Treaty, a certain number of

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[119] A. DE GREGORIO MERINO, *Institutional Report*, cit., 175.

[120] P. SCHAMMO, *Institutional Change in the Banking Union: The Case of the Single Supervisory Mechanism*, in 40 *Yearbook of European Law* (2021), 265 (especially 290); R. SMITS, *After L-Bank: How the Eurosystem and the Single Supervisory Mechanism May Develop*, Ademu WP 2017/077, 6; A. WITTE, *The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?*, in 21 *Maastricht Journal of European and Comparative Law* (2014), 89 ff. (especially 103).

[121] A.L. RISO, *A Prime for the SSM Before the Court: the L-Bank Case*, cit., 498.

[122] Case C-301/02 *Carmine Salvatore Tralli v European Central Bank*, para 41.

powers which fall under those powers, subject to conditions to be determined by the institution».

Furthermore, the Union legislator has already experimented with mechanisms allowing Union bodies to delegate the exercise of some of its administrative tasks to Member States' administrations. Under Regulation (Eu) No 513/2011, for instance, Esma may delegate some of the tasks within its competence to national agencies [123]. Against this background, the delegated nature of Ncas acting as agents of the Ecb in supervising Lsis could be accepted based on an *a fortiori* argument, given that it is established by the Union legislator itself.

However, although the category of delegation offers a partial explanation for the Ssm in its decentralised configuration, it does not capture the reality that Ncas remain directly responsible for the supervision of Lsis and for the supervisory measures adopted in this capacity under the Ssmr [124]. Ncas appear as *sui generis* institutions under Union law, recognised as having the authority to carry out the day-to-day supervision of Lsis on the basis of their expertise and proximity to the supervised entities, as well as of the inherent low risk profile that Lsis pose to the Ebu from a systemic perspective.

Under the decentralised paradigm, and in stark contrast with the general model of indirect implementation of Union law by Member States under Article 291(1) Tfeu [125], banking supervision is functionally split into an «operational supervision» attributed to Ncas, and a «second-order supervision» [126] carried out by the Ecb over Ncas' supervision, both levels being considered as integral parts of a unitary administration. Both the supranational and the national layers can, nonetheless, work harmoniously as a single European administration, as shown by the joint methodologies [127] and policy stances [128], innovative supervisory products

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[123] Recital (6) and Article 30 of Regulation (Eu) No 513/2011.

[124] M. Macchia, *Integrazione amministrativa e unione bancaria*, cit., 147.

[125] A. Pizzolla, *The Role of the European Central Bank in the Single Supervisory Mechanism: A New paradigm for Eu Governance*, cit., 19.

[126] In this sense, my definition partially «administrative supervision» of the Ecb over Ncas, proposed by G.C. Rowe, *Administrative supervision of administrative action in the European Union*, in *Legal challenges in Eu Administrative Law. Towards an Integrated Administration*, edited by H.C.H. Hofmann and A.H. Türk, Cheltenham, Edward Elgar, 2009, 179.

[127] Ecb, *Ssm Lsi Srep Methodology*, 2020, available at *www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep_methodology_booklet_lsi_2020.en.pdf.*

concerning the supervision of LSIs that are jointly produced by the ECB and NCAs.

5. *Joint administrative action and dualistic judicial review.* — The purpose of this final section is not to attempt to provide a comprehensive analysis of the mechanics of judicial review in the SSM, but rather to formulate considerations on the interaction between the unitary purpose of the SSM and the centrifugal risks inherent in the current system of judicial review of composite administrative action in the Union. For our purposes, suffice it to recall that the SSM's institutional reform and its push to integrate the ECB and NCAs into a unitary executive machine were not accompanied, at the legislative level, by an equivalent overhaul of the rules governing judicial review of administrative action in the Union. As a result, both Union and national courts, as separate judicial systems, have a role in the review of supervisory output under the SSM.

According to the established «dualistic» [129] system for judicial review of administrative action in the Union, the allocation of jurisdiction between Union and national courts follows the rule of thumb that each system of courts is competent to review the measures adopted by authorities of their «own» legal order [130].

The criterion is purely *formal* and hinges on the identity of the authority responsible for the relevant action, according to the principle that Union courts lack the jurisdiction to review the legality of acts adopted by national authorities [131] and national courts are not competent to annul an act adopted by a Union institution, agency or body [132]. In principle, the application of this principle would seem to draw the divide between the Union and national jurisdictions according to the distinction

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[128] For instance, Joint Supervisory Standards describing the ECB's and NCAs' joint expectations on specific supervisory topics *vis-à-vis* LSIs.

[129] F. BRITO BASTOS, *An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law*, in 16 *European Constitutional Law Review* (2020), 63 ff.

[130] This principle stems from Article 263 and 267 TFEU, which by conferring on the Union courts the jurisdiction to review the acts adopted by Union bodies concurrently delimits the jurisdiction of national courts in that respect.

[131] CJEU, 1992, Case C-97/91, *Oleificio Borelli v Commission*, para 9. For an exception to this general principle, see Article 14(2) of the Statute of the European System of Central Banks and of the ECB and CJEU, 2019, Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia*, paras 64-77.

[132] CJEU, 1987, Case 314/85 *Foto-Frost*, paras 15-18.

between the SSM's centralised and decentralised paradigms. It is for Union courts to review the ECB decisions and sanctions under Article 263 TFEU, when the SSM functions in its centralised configuration and the ECB acts through its direct powers [133].

Symmetrically, when the Mechanism works in its decentralised configuration, it is for national courts to review the administrative measures taken by their respective NCAs. The formal criterion would apply even in the case of a violation of the basic allocation of powers between the ECB and NCAs: if a NCA were to take a supervisory decision *vis-à-vis* an SI, the competent court to review the decision — and to annul it on the ground of lack of competence to act pursuant to Article 4(1) and 6(4) SSMR — would be the NCA's national court, not the CJEU. To provide another example, when NCAs assist the ECB in the course of on-site inspections under Article 12(4) SSMR, their action remains amenable to the review of their respective national courts; however, the scope of the judicial review of the latter would be limited to the execution of inspections by NCAs. The legality of the inspections as such, ordered based on the authority of the ECB, would fall within the jurisdiction of Union courts.

However, beyond clear-cut cases, the intricacies of the labyrinthine structure of the SSM strain the formal criterion delimiting the respective competences of Union and national courts. It will be necessary to ensure that the dualistic mechanism for judicial review, designed for a system in which the administrative spheres of the Union and Member States were unambiguously divided, remains fit for the administrative reality of the SSM, in which decision-making is the result of the «entangled» exercise of discretion by both Union and national administrations [134]. The novel forms of joint administrative action introduced by the SSMR are already urging Union and national courts to find new appropriate answers [135].

In *Berlusconi* [136], the CJEU hinged on a centripetal interpretation of the SSM to clarify that the jurisdiction of Union courts extended, in the

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[133] Interestingly, when the ECB applies national law in the exercise of its supervisory tasks by virtue of Article 4(3) SSMR, the Union courts called to review the legality of the ECB measures cannot avoid interpreting national statutes. See the CJEU cases of 2018, T-133/16 to T-136/16 *Crédit Agricole v ECB*, paras 84-92.

[134] F. BRITO BASTOS, *An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law*, cit., 64.

[135] M. LEHMANN, *Jurisdiction, Locus Standi and the Circulation of Judgements in the Banking Union*, in *Judicial Review in the European Banking Union*, edited by C. Zilioli and K.-P. Wojcik, Cheltenham, Edward Elgar, 2020, 77ff. (especially 79).

[136] Case C-219/17, para 48-50.

context of Articles 14 and 15 SSMR common procedures, to the review of the preparatory acts adopted by NCAs and submitted to the ECB. In essence, the CJEU emphasised the decisional dominance enjoyed by the ECB in the adoption of the final acts of these procedures to argue that a «single judicial review» [137] of Union courts was necessary to avoid the risk that divergent judicial assessments could threaten the unity of the common procedures under the SSM. As a consequence, national courts are prevented from reviewing the preparatory acts issued by NCAs.

The concept of a single judicial review must be welcomed, as it fosters the functional singleness of the SSM by insulating the common procedures from concurring jurisdictional claims.

However, it is unclear how the principles set out in *Berlusconi* would play out in the context of other SSM procedural modules, in which it would be more difficult to clearly which layer of the Mechanism enjoys decisional dominance [138]. For instance, would national courts have jurisdiction over the sanctions formally adopted by an NCA at the outcome of national proceedings opened upon the request of the ECB under Article 18(5) SSMR? Or, at least, would they have jurisdiction over the procedural or substantial aspects of sanctions determined at the discretion of NCAs, outside the scope of the ECB request? What solution would national courts find if they were asked to review an NCA act adopted to implement an ECB instruction issued under Article 9(1) SSMR?

In his opinion [139], Advocate General Campos Sánchez-Bordona hinted at some of the principles that could help answer these questions. In principle, national courts would remain competent to review the final decision of an NCA based on a prior act of the ECB. However, if the legality of the ECB instruction was challenged in the course of the proceedings, the national court would have to make a reference to the CJEU under Article 267 TFEU for a preliminary ruling on the validity of the ECB's act. One may wonder if the same principles would apply to the review of the measures taken by NCAs in the context of their direct supervision of LSIs, under the guidelines and general instructions issued by the ECB under Article 6(5)(a) SSMR.

In conclusion, the integration of the Union's and Member States'

[137] Case C-219/17, para 49.

[138] S. LUCCHINI and A. ZOPPINI, *Vigilare le Banche in Europa: Chi Controlla il Controllore?*, Florence, Passigli, 2019, 89.

[139] Opinion of AG Campos Sánchez-Bordona in Case C-219/17, para 62.

executive spheres forged through the SSM is still exposed to the risk of decentralisation posed by the judicial review performed by two systems of courts. Thus, whether the SSM can function as an «efficient» [140] European administration will also depend on the capacity of Union and national courts to ensure its coherence and efficiency by successfully defusing diverging positions and develop consistent approaches to judicial review.

Ultimately, stronger forms of cooperation between Union and national courts — whether through the preliminary reference procedure under Article 267 TFEU or other informal mechanisms of judicial dialogue — will be fundamental to ensure that the supervisory convergence for which the SSM was set up is fully achieved.

6. *Conclusions.* — Whereas the attention of the literature has rightfully focused on the unprecedented centralisation features in the SSM [141], the Mechanism remains multi-level in form albeit single in function, having a uniquely *hybrid* apparatus [142] between the categories of centralised administration of the Union and shared management administration of the Union and Member States [143].

Whereas the model certainly departs from the Union's executive federalism, it does so by federating national administrations into a system heavily relying on decisional, as well as operational, decentralism. If a new exclusive competence was bestowed on the ECB, the exercise of such competence is — somewhat counterintuitively — framed as the responsibility of NCAS, which participate as integral components of SSM governance according to two different administrative models.

In its centralised configuration, described in Section III, the SSM functions as a model of integrated administration between the ECB and NCAS, governed by the formal decisional dominance of the former.

In its decentralised configuration, described in Section IV, the SSM functions according to a novel administrative model enabling the imple-

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[140] Pursuant to Art. 298(1) TFEU, «[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration».

[141] M. MACCHIA, *Integrazione amministrativa e unione bancaria*, cit., 225 ff.

[142] For a thought-provoking categorisation of hybrid European administrations as multi-level in form but single in function, see A. ROSAS and L. ARMATI, *EU Constitutional Law: An Introduction*, London, Hart, 2018, 107.

[143] P. CRAIG, *EU Administrative Law*[3], cit., 28.

mentation of the ECB's supervisory competence by NCAs, on the basis of a delicate balance between decisional decentralisation, interinstitutional dialogue, and the possibility for the ECB to activate the takeover clause enshrined in Article 6(5)(b) SSMR.

Under the current model of dualistic judicial review, however, the ability of the SSM to function as a single supervisory jurisdiction will also depend on the capacity of Union and national courts to develop consistent approaches to the review of the joint administrative action of the ECB and NCAs.

From a Union law perspective, the *sui generis* legal relationship tying together the ECB and NCAs is close to the model linking the ECB and national central banks in the ESCB in its Eurosystem configuration [144]. The description of the ESCB, offered by the CJEU, as «a novel legal construct in EU law which brings together national institutions […] and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails» [145] seems to capture the nature of the SSM, as well. Equally, one may wonder whether the doctrine of *dédoublement fonctionnel* [146], which has been used to conceptualise national central banks as being functionally disconnected from the institutional framework of the Member States when performing their tasks within the Eurosystem, could apply to NCAs when they perform their tasks under the SSMR.

Differently from the Eurosystem, however, dynamic subsidiarity [147] was embedded in the SSM to afford NCAs various degrees of discretion in the performance of the ECB's supervisory competence. In turn, this difference is a consequence of the distinct type of competence existing in the two multi-layered systems: the ESCB (in its Eurosystem configuration) is a *law-making system* which defines and implements monetary policy in the EMU, whereas the SSM is an *executive system* based on Article 127(6) TFEU whereby the ECB and NCAs implement the policy devised by the

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[144] A. PIZZOLLA, *The Role of the European Central Bank in the Single Supervisory Mechanism: A New paradigm for EU Governance*, cit., 23.

[145] CJEU, Joined Cases C-202/18 and C-238/18, para 69.

[146] C. ZILIOLI and M. SELMAYR, *The Law of the European Central Bank*. London, Hart, 2002, 77.

[147] In the exercise of the ECB's exclusive competence in monetary policy, the subsidiarity principle does not apply pursuant to Article 5(3) TEU, but it is replaced by operational decentralisation under Article 12.1 of the ESCB/ECB Statute.

Union legislator in the EBU. If the model underpinning the ESCB is one of decentralised implementation of centralised decision-making, the SSM could be classified as a model of implementation of variably centralised decision-making, with the caveat that the power to determine the appropriate degree of centralisation to ensure financial stability in the EBU lies with the ECB.

The complexity of providing a clear theoretical categorisation of the SSM, however, should invite the observer to look at the SSM from a realist perspective, too, in its practical dimension of a «fluid framework» [148] in which the synergetic relationship between the ECB and NCAS will evolve *beyond* the formal letter of the SSMR.

Not even eight years since its inception, the SSM has succeeded in strengthening the EBU banking sector in the aftermath of a financial and sovereign crisis, propelling supervisory convergence across Member States and defusing the risks that the Covid-19 crisis could unravel into a fully-fledged financial crunch [149]. In simpler words, the multi-level structure of the SSM did not obstruct cooperation between the ECB and NCAS.

To the contrary, practical considerations might also lead one to conclude that the balance between hierarchy and decisional decentralisation appears *needed* within the SSM to provide administrative differentiation in respect of the two types of heterogeneity that (still) exist in the EBU.

First, an extent of administrative decentralism is warranted by *an enduring degree of legal heterogeneity* in the EBU. Although the Single Rulebook has exponentially evolved in the past decade, national rules transposing the Union's directives can still create divergencies in the legal framework applicable to both SIs and LSIs, thus somewhat necessitating a country-by-country approach to interpreting rules and executing banking supervision across participating Member States. In this sense, the dynamic subsidiarity embedded in the SSM ensures output efficiency despite the reality of the Union's multi-level legal system, maintaining NCAS' operational capacity and «on-the-ground» national expertise of Member States.

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[148] S. CASSESE, *La nuova architettura finanziaria europea*, in *Quaderni di ricerca giuridica della consulenza legale della Banca d'Italia*, 2014, no. 75, 15 ff. (especially 18).

[149] *European Banks - How Have They Coped with the Crisis and What Lies Ahead?*, speech by Kerstin af Jochnick, Member of the Supervisory Board of the ECB, at the Handelsblatt Banking Summit 2021, available at *www.bankingsupervision.europa.eu/press/speeches/date/2021/html/ssm.sp210908~81ac33e0a2.en.html.*

Second, an extent of administrative decentralism is warranted by an *enduring degree of heterogeneity in the public interests* governing the EBU. Although the SSMR has codified the protection of the stability of the Union's banking and financial system as a public interest for which the ECB is responsible [150], the latter is hardly the only public authority with a say in matters of financial stability in the Union. In particular, as long as the Union legislator does not establish a supranational deposit guarantee scheme to complete the EBU [151], financial losses arising from a bank's failure would be, first, mutualised within the boundaries of national deposit guarantee schemes and, ultimately, paid for by the government of the Member States where the credit institution is incorporated. The SSM, thus, flexibly recognises the institutional weight of NCAS as the institutions with more skin in the game to protect the fiscal interests of their respective Member States. However, the possible establishment of a European deposit guarantee scheme [152] in the future would reshuffle the balance of supranational and national public interests in the EBU, providing additional institutional legitimacy to the supranational layer of the SSM.

Lastly, a more realistic approach to the SSM also highlights how the balance between unity and differentiation — between Article 4(1) SSMR and Article 6(4)-(6) SSMR — provides a level of *constructive ambiguity* that enables the SSM to evolve beyond formal rules, through informal and soft-power dynamics between the ECB and NCAS, as a functionally unitary administration.

A telling example can be provided in this respect. In the Recommendation of 27 March 2020 (ECB/2020/19) [153], the ECB stated that its expec-

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[150] Article 1 SSMR.

[151] At the time of writing, progress in the completion of the EBU is still centred on the resolution pillar. See the latest Eurogroup's statement on the subject, available at *www.consilium.europa.eu/nl/press/press-releases/2022/06/16/eurogroup-statement-on-the-future-of-the-banking-union-of-16-june-2022/.*

[152] *How can we make the most of an incomplete banking union?*, speech by Andrea Enria, Chair of the Supervisory Board of the ECB, at the Eurofi Financial Forum, available at *www.bankingsupervision.europa.eu/press/speeches/date/2021/html/ssm.sp210909~18c3f8d609.en.html.*

[153] See Article III of Recommendation of the European Central Bank of 27 March 2020 on dividend distributions during the Covid-19 pandemic and repealing Recommendation ECB/2020/1 (ECB/2020/19) 2020/C OJ C102I/1, reading «[t]his Recommendation is also addressed to the national competent authorities with regard to less significant supervised entities and less significant supervised groups as defined in points (7) and (23) of Article 2 of Regulation (EU) No 468/2014 (ECB/2014/17). The national competent authorities are expected

tations that credit institutions would not pay out dividends in the face of the unprecedented Covid-19 crisis extended to *both* SIs and LSIs. Regardless of the lack of formal bindingness of the recommendation to LSIs pursuant to the SSMR, the ECB's request for its application by NCAs paved the way for a single coordinated response to the crisis. With the absolute majority of NCAs publicly declaring to adhere to the Recommendation [154], the ECB's initiative reached the desired effect of signalling the SSM's readiness to set new supervisory expectations and to prompt credit institutions to do their part during a moment of potential market panic.

Rather than a unified system of banking supervision, the SSM could perhaps be better rationalised as a *unifying* system of banking supervision, in which the shift from administrative pluralism [155] to administrative monism in the EBU is likely to occur progressively rather than immediately. Milestones in such a process of administrative unification will be the SSM's institutional evolution through formal and informal mechanisms between the ECB and NCAs, as well as the incremental legislative harmonisation of the Single Rulebook, and the formation of an fully-fledged and overriding European public interest in the stability of the Union's banking sector upon completion of the EBU.

to apply this Recommendation to such entities and groups, as deemed appropriate». The Recommendation was updated by Recommendation of the European Central Bank of 27 July 2020 on dividend distributions during the Covid-19 pandemic and repealing Recommendation ECB/2020/19 (ECB/2020/35) OJ C251/1 and later revised by Recommendation of the European Central Bank of 15 December 2020 on dividend distributions during the Covid-19 pandemic and repealing Recommendation ECB/2020/35 (ECB/2020/62) OJ C437/1.

[154] Notably, the *Bundesanstalt für Finanzdienstleistungsaufsicht* (German NCA) adopted for some time a case-by-case approach without banning dividend distribution, but requiring LSIs under its direct supervision to notify it in advance in case they were planning to proceed to distributions. See *www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2021/fa_bj_2108_Interview_EDBA_Lage_Banken_en.html.*

[155] A reconstruction of the concept of administrative pluralism can be found in M. AVBELJ, *Constitutional and Administrative Pluralism in the EU System of Banking Supervision*, in 17 *German Law Journal* (2016), 779 ff.