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Accountability of the European Banking Union

Accountability in Banking Supervision and Banking Resolution under Review

EGOV

BANKING UNION

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Abstract

The European Banking Union has marked a substantial transfer of powers for banking supervision and resolution from the national to the supranational arena. With power and independence comes accountability to ensure that the competences are exercised in accordance with their legal framework. This paper analyses existing accountability mechanisms and concludes that accountability should be strengthened in light of the relevance of supervisory and resolution decisions both on an individual fundamental rights level and at the global policy level.

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LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
AP	Appeal Panel
Art.	Article
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht
BCCI	Bank of Credit and Commerce International
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CJEU Statute	Statute of the Court of Justice of the European Union
EBU	European Banking Union
ECA	European Court of Auditors
ECB	European Central Bank
ECJ	European Court of Justice
ECON	Committee on Economic and Monetary Affairs
EMU	Economic and Monetary Union
EP	European Parliament
ESCB	European System of Central Banks
EU	European Union
GC	General Court
IIA	Interinstitutional Agreement
MEPs	Members of the European Parliament
MoU	Memorandum of Understanding
Para.	Paragraph
Paras.	Paragraphes

SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRMR	SRM Regulation
SSM	Single Supervisory Mechanism
SSMFR	SSM Framework Regulation
SSMR	SSM Regulation
Subpara.	Subparagraph
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

The European Banking Union (EBU) celebrates its 10-year anniversary in 2024. Responsibility for banking supervision and banking resolution has been transferred from national entities to supranational authorities. With independence and power comes accountability and responsibility.

- **Accountability is an elusive concept, with philosophical, legal, political, economic and sociological connotations**. The advent of independent central banks and independent regulatory and supervisory agencies has ignited a debate on how to reconcile the needs of technocratic entities populated by unelected officials with the demands of democratic legitimacy. The answer is: through accountability, transparency and adequate communication.
- **The question of legitimacy pre-exists and is a prerequisite of accountability**. Transparency is the degree to which information on the actions and decisions of an independent agency is available.
- **The nature of monetary policy and the nature of [micro-prudential] supervision are different**. This implies that supervisory independence is not the same as monetary independence and that monetary accountability is not the same as supervisory accountability. A fundamental principle in the SSM Regulation (SSMR) is the principle of separation between monetary policy and banking supervision in accordance with Art. 25 of the SSMR.
- **Bank supervisors should be endowed with immunity and adequate legal protection**, as recognised in Principle 2 of the Basel Core Principles of Banking Supervision.
- The European Central Bank (ECB) enjoys independence in the performance of all its functions. **Independence in monetary policy** is a cornerstone of the Economic and Monetary Union (EMU). **Independence in its supervisory responsibilities** is also necessary to protect it against political influence.
- The Single Resolution Board (SRB) has also been given statutory, formal independence (Art. 47 of the SRM Regulation (SRMR)). Since the **justification for independence in supervision and resolution is different** (and typically more limited**) than independence in monetary policy the accountability mechanisms in the European Banking Union (EBU) are conceptualized differently from those in the monetary policy realm**. Control and scrutiny of the ECB is explicitly provided for vis-à-vis the European Parliament (EP) and the Council in the SSMR and of the SRB in the SRMR.
- The **Banking Dialogue[1] is an important tool for the EP to scrutinise the actions of the authorities in the Banking Union**. However, the thoroughness of scrutiny could and should be enhanced in order to ensure that decision and practices by supervisory authorities and authorities acting within banking resolution are truly challenged.
- **Accountability is also provided by administrative and judicial review** within the Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM). Administrative review is crucial for ensuring accountability at an early stage within the administrative process itself.

[1] In the course of the creation of the Banking Union, the ECB was given new responsibilities – together with a new accountability framework vis-à-vis the European Parliament and national parliaments, in the form of the so-called Banking Dialogue (see in detail see further down below 2.1.1).

- **The Court of Justice of the European Union (CJEU) has continuously strengthened the role of the ECB and the importance of direct supervision**, thus affirming the uniformity of application of supervisory standards throughout the EBU.
- This paper concludes that notwithstanding the existing mechanisms of parliamentary accountability, administrative and judicial review, **accountability of the Banking Union institutions should be strengthened** in light of the principle of democratic legitimacy.

1. THE CONCEPT OF ACCOUNTABILITY[2]

1.1. Introduction to accountability, transparency and legitimacy

Accountability is an elusive concept, with philosophical, legal, political, economic and sociological connotations. The approach we take in this paper is legal cum economic. The advent of independent central banks and independent regulatory and supervisory agencies in developed as well as developing countries has ignited a debate on how to reconcile the needs of technocratic entities populated by unelected officials with the demands of democratic legitimacy. The answer is: through accountability, transparency and adequate communication.

First of all, it is important to point out that authority is not given away, but 'delegated'. A clearly specified mandate is typically given by parliament (sometimes the mandate is enshrined in a Constitution or Treaty) and the agency to whom the mandate is given, be it the central bank or another supervisory or regulatory agency, is then left to carry it out within the limits of the mandate.

Independent agencies can be looked upon from the traditional agency theory, whereby an agent must undertake the tasks in order to achieve the objectives required by the principal, entails that the principal (society through its elected representatives) may choose to retain the decision-making rights and delegate only the execution, or may also choose to delegate the decision-making process.

The model of independent agencies, based on the administrative/functional decentralisation of the State has an established and long history (including legal debates) in the United States (US), since it provides an effective way for the government to deal with the regulation of economic realities – money, banking and finance – as well as energy, transport, telecommunications, the environment and other technical matters. Technocrats, includingcentral bankers, supervisors, regulators and others,have typically greater skills, expertise and qualifications than politicians and because of the limits of the mandate can focus on it without distraction from the broader and at times competing demands to which politicians are exposed.

Agency independence gives officials discretion in the pursuit of their delegated mandate, subject to a framework of rules.

Drawing on earlier publications,[3] we define accountability as an obligation owed by one person to another according to which the former must give account of, explain and justify his actions or decisions against criteria of some kind,[4] and take responsibility for any fault or damage.

There are four elements in this definition:

The 'accountable', the holder of the power. "Responsibility should, indeed, be commensurate with the extent of the power possessed."[5] Accountability is often categorised with reference to 'the accountable'. Thus, we talk about individual accountability, ministerial accountability, central bank accountability, corporate accountability and market accountability.

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[2] See generally Lastra and Amtenbrink (2008); Lastra and Miller (2001); Lastra and Bodellini (2022); Garicano and Lastra (2010); Lastra and Shams (2001); Goodhart and Lastra (2018); Lastra (2012) and Lastra (2020); see also Lastra (2006), chapters 2, 7 and 11; Lastra (1996), chapter 1; Lastra (1992).

[3] See generally Lastra and Amtenbrink (2008); Lastra and Miller (2001); Lastra and Bodellini (2022); Garicano and Lastra (2010); Lastra and Shams (2001); Goodhart and Lastra (2018); Lastra (2012) and Lastra (2020); see also Lastra (2006), chapters 2, 7 and 11; Lastra (1996), chapter 1; Lastra (1992).

[4] This usage is borrowed from Oliver (1994), p. 248.

[5] Turpin (1994), p. 111.

The 'accountee', the authority to whom accountability is owed. Who guards the guardians? There are various types of accountabilities according to the authority that exacts it. From a legal perspective the institutional articulation of accountability – in line with the *trias politica* – is fundamental, in particular parliamentary accountability; in the euro area judicial review is key, too. [6]

The content of the obligation. The holder of the power must give account – explain and justify – the decisions or actions taken. A distinction is often made between 'explanatory accountability' and 'amendatory accountability', as well as between 'ex ante' and 'ex post' accountability. For instance, the appointment procedures of central bank and supervisory officials, when such procedures require parliamentary approval, and the parliamentary debate of inflation targets (if such a parliamentary debate is required) can be regarded as ways of exercising accountability *ex ante* or through scrutiny. Reporting requirements and testifying in front of parliamentary committees are ways of exercising accountability *ex post* or through control.

The criteria of assessment. Accountability implies an obligation to comply with certain standards in the exercise of power or to achieve specific goals. The more complex the activity, the more difficult it is to establish clear standards of conduct and specific outcomes. The more specific the goals and standards the more effective the accountability. The notion of performance accountability refers to the measurement of predetermined criteria of performance.

Transparency is the degree to which information on the actions and decisions of an independent agency is available. This involves the nature of the function (transparency in monetary policy is different from transparency in supervision, given the nature of bank runs and the relationship between supervision and crisis management), the 'quantum' of information and the timing of its disclosure, the nature of the disclosure and the destinatary, to whom such information ought to be made available (Parliament, Courts of Justice, market participants, the public in general, the press). "The provision of information is clearly an element of accountability. But accountability is not merely about giving information. It must involve defending the action, policy, or decision for which the accountable is being held to account. The provision of information (transparency) is hardly ever a neutral account of what happened or of what is happening; hence the need for an explanation or justification of the agency's actions or decisions (i.e., accountability)."[7] Some of the 'new paradigms' of accountability - including consultations with consumers, industry groups, or the public in general, or proportionality assessments - contribute to transparency, though they must be channelled through adequate institutional mechanisms.

Finally, "the question of legitimacy pre-exists and is a prerequisite of accountability. The creation of an independent agency must be the fruit of a democratic act (an act of the legislator, a constitutional decision, or a treaty provision). This first source of legitimization is fundamental in a democratic society. However, while this legal basis legitimises the establishment of the independent agency, it cannot by itself legitimize on a continuous basis the exercise of the powers delegated to such agency. It is then in the continuing life of that entity that accountability becomes necessary to ensure legitimacy: accountability is thus the process of bringing back (by giving account, explaining, justifying, or taking measures of amendment or redress) that independent entity to the procedures and processes of a democratic society. This is, for instance, the basic rationale of judicial review of the agency's actions or

[6] See generally Lastra and Amtenbrink (2008); Lastra and Miller (2001); Lastra and Bodellini (2022); Garicano and Lastra (2010); Lastra and Shams (2001); Goodhart and Lastra (2018); Lastra (2012) and Lastra (2020); see also Lastra (2006), chapters 2, 7 and 11; Lastra (1996), chapter 1; Lastra (1992).

[7] Lastra (2015), para. 2.185.

decisions: in a democracy no institution or individual can be above the law[8]. However, accountability also encompasses other 'technical' elements that are not related to the 'political' legitimacy of the institution, such as performance control. Accountability per se does not politicize a central bank. Conversely, while accountability is needed to ensure ongoing democratic legitimacy, legitimacy has two aspects: a formal, normative one which refers to legality of the political system and a societal or empirical one, which is determined by the acceptance of or loyalty to the system".[9]

1.2. The nature of monetary policy and supervision and its impact on independence and accountability

The nature of monetary policy and the nature of [micro-prudential] supervision are different. This implies that supervisory independence is not the same as monetary independence and that monetary accountability is not the same as supervisory accountability.[10] The central bank is the only agency in charge of monetary policy. In the euro area that is the ECB. Supervision can be the responsibility of central banks (though not all central banks have formal supervisory responsibilities) and can be the responsibility (it typically is) of other agencies, with a scope of entities and objectives that fall within the supervisory mandate of such agencies that varies greatly across jurisdictions. Supervision involves several authorities nationally and supranationally.

Furthermore, monetary independence is different from supervisory independence in terms of the objectives, the tools, the nature of the tasks and the staffing requirements. Supervisory authorities typically must pursue several goals (financial stability, depositor or investor protection, conduct of business, prevention of money laundering), and their tasks are intimately related to other functions such as macro-prudential policy, competition/antitrust, crisis management, emergency liquidity assistance or lender of last resort, recovery and resolution). Monetary policy by definition is more focused in line with its primary and secondary mandate (Article 127(1) TFEU).

If public funds are at stake, the exercise of supervision is limited by the government's necessary involvement in the destiny of the financial institutions that receive any government assistance (though the trend after the global financial crisis is to limit bail-out packages). This requires a different model of accountability, with adequate institutional and procedural arrangements. Monetary accountability is typically 'output-driven' (central banks are generally given clear performance objectives such as an inflation target), while supervision is 'input-driven' (since outputs on the supervisory activity are often hard to measure.[11]

While central bank accountability with regard to monetary policy is typically 'explanatory', the accountability of the central bank or the supervisory agency in the field of prudential supervision and regulation is sometimes 'explanatory' and sometimes 'amendatory'.

As part of amendatory accountability, judicial review must be considered.[12]

Courts should be able to review whether and to what extent the agency has observed the rule of law. However, the degree of review will be limited in areas where the agency exercises discretion in the exercise of regulatory and supervisory functions. In such cases the review is limited to observing whether and to what extent the agency has observed the limits of its discretion. In order to establish a

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[8] Lastra (2015), para. 2.163.
[9] Verhoeven (2002), p. 10 f.
[10] See Lastra (2015), paras. 2.187-2.193.
[11] See Garicano and Lastra (2010).
[12] See Hüpkes, Taylor and Quintyn (2006), p. 6, 8; Lastra and Shams (2001).

breach of the rule of law the supervisory authority must be shown to have (manifestly) disregarded the limits of its discretion.[13]

A fundamental principle in the working of the ECB, reflected in Art. 25(2) of the SSMR is the principle of separation between monetary policy and banking supervision. According to this principle of separation, the ECB must carry out its supervisory tasks without prejudice to and separately from its tasks related to monetary policy and any other tasks. The ECB's supervisory tasks should neither interfere nor be determined by its tasks relating to monetary policy.

1.3. Liability and Immunity within Banking Supervision

The liability of financial regulatory and supervisory authorities is a contentious issue. The issue of (State) liability for loss caused by the inadequate supervision of banks, in the context of the damages action against the Bank of England for the failure of Bank of Credit and Commerce International (BCCI)[14] and in the context of the *Peter Paul* case,[15] has raised much controversy.

Given that supervisors can be made 'scapegoats' by political authorities on the one hand and that they can be subject to litigation and arbitration by disgruntled shareholders or creditors, it is fundamental to endow them with immunity and legal protection. The latter is actually recognised in the Basel Core Principles of Banking Supervision where it is clearly stated in Principle 2 on Independence, Accountability, Resourcing, and Legal Protection for Supervisors[16]:

> *The supervisor possesses operational independence, transparent processes, sound governance, processes that do not undermine autonomy, and adequate resources, and is accountable for the discharge of its duties and use of its resources. The legal framework for banking supervision includes legal protection for the supervisor.*

And in the explanation of the principle, it is further clarified[17]:

> *Laws provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith. The supervisor and its staff are adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith.*
>
> [The term "supervisor and its staff" is to be understood as covering the head of the authority, the governing body, employees and any professional service providers who carry out tasks for the supervisory authority. As the protection is provided in respect of actions taken and/or omissions made while discharging duties in good faith, it is not removed when the term of appointment, engagement or employment is ended].

Goodhart observes that providing accountability and transparency for banking supervisors is particularly difficult, since the information that they get is frequently confidential and since 'success' is often measured by the absence of financial failures (considering also that the optimal number of failures is not zero!). Supervisory failures have to become public, but supervisory successes often have to remain secret.[18]

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[13] See Andenas (2001), p. 226; see also Andenas and Fairgrieve (2000).

[14] The case against the Bank of England – *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220; [2000] 3 All ER 1; [2000] Lloyd's Rep Bank 235, HL—was abandoned on 2 November 2005, when BCCI liquidators Deloitte Touche Tohmatsu dropped their claim (against the Bank of England), after receiving a legal ruling that it would not be in the best interests of BCCI's creditors to continue with the lawsuit.

[15] ECJ, Judgement of the Court of 12 October 2004, Case C-222/02, Peter Paul and others v Bundesrepublik Deutschland, ECLI:EU:C:2004:606.

[16] Basel Committee on Banking Supervision (2024).

[17] Basel Committee on Banking Supervision (2024).

[18] See Goodhart (2001), p. 162 f.

2. ACCOUNTABILITY MECHANISMS WITHIN THE BANKING UNION

The ECB enjoys independence in the performance of all its functions. Independence in monetary policy is a cornerstone of the EMU. Independence in its supervisory responsibilities is also necessary to protect it against political influence. The SRB has also been given statutory, formal independence (Art. 47 of the SRMR).[19]

Since the justification for independence in supervision and resolution is different (and typically more limited) than independence in monetary policy the accountability mechanisms in the EBU are conceptualized differently from those in the monetary policy realm. This is in line with the nature of the supervisory and resolution tasks and the rationale of Banking Union,[20] with the transfer of responsibilities from the national to the supranational arena.

Control and scrutiny of the ECB is explicitly provided for vis-à-vis the European Institutions – the EP and the Council in the SSMR and of the SRB in the SRMR, as outlined in this section.[21]

2.1. Single Supervisory Mechanism (SSM)

The SSMR sets out an accountability framework which is directed both to the union and national level with the union level being the primary focal point of democratic accountability for the ECB as a European institution.[22]

2.1.1. Union level

Pursuant to Art. 20 (1) SSMR, the ECB shall be accountable to the EP and to the Council for the implementation of the SSMR. For that purpose, the ECB has to submit a report on the execution of the tasks conferred on it by the SSMR on an annual basis to the EP, the Council, the Commission and the Eurogroup (Art. 20 (2) SSMR). The Supervisory Board has to participate in hearings on the execution of its supervisory tasks at the request of the Eurogroup (Art. 20 (4) SSMR) and the EP (Art. 20 (5) SSMR) and the ECB has to reply to questions by MEPs and the Eurogroup (Art. 20 (6) SSMR). In addition, the ECB is obliged to cooperate with any investigations by the EP and the ECB. The EP is tasked to conclude appropriate arrangements on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks of the ECB within its Banking supervisory mandate (see Art. 20 (9) SSMR).

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[19] See Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010, OJ L 225, 30.07.2014, pp. 1–90 and see also Spitzer and Magnus (2024).
Art. 47 of the SRMR reads as follows:
"1. When performing the tasks conferred on them by this Regulation, the Board and the national resolution authorities shall act independently and in the general interest.
2. The Chair, the Vice-Chair and the members referred to in Article 43(1)(b) shall perform their tasks in conformity with the decisions of the Board, the Council and the Commission. They shall act independently and objectively in the interest of the Union as a whole and shall neither seek nor take instructions from the Union's institutions or bodies, from any government of a Member State or from any other public or private body.
In the deliberations and decision-making processes within the Board, they shall express their own views and vote independently.
3. Neither the Member States, the Union's institutions or bodies, nor any other public or private body shall seek to influence the Chair, the Vice-Chair or the members of the Board".

[20] See generally Lastra (2015), chapter 10.

[21] See Ceyssens (2013), p. 3704. See also Smits (2020).

[22] See Ceyssens (2013), p. 3704.

The Interinstitutional Agreement (IIA) between the EP and the ECB on the practical modalities of the exercise of democratic accountability and oversight[23] and the Memorandum of Understanding (MoU) between the Council of the European Union and the ECB on the cooperation on procedures related to the SSM[24] explain how supervisory accountability is put into practice. The more detailed and elaborate supervisory accountability framework contrasts with the more limited monetary policy accountability framework.[25]

Several authors have compared the Monetary Dialogue with the Banking Dialogue. *Fromage and Ibrido* focused on the role of the EP and the national parliaments. The SSMR was the first one to formally include the national parliaments in the accountability mechanism,[26] thus increasing legitimacy by giving parliaments "legally anchored mechanisms"[27] to rely on and strengthen transparency by allowing for parliamentary debates. They also proposed the remodeling of the ECB's Executive Board's appointment procedure following the example of the Banking Dialogue's framework:[28] Whereas in the Monetary Dialogue's framework a consultative procedure is foreseen, the appointment of the ECB's Supervisory Board requires the EP's approval during a public hearing of the candidates proposed by the ECB.[29] Making the EP's opinion binding for the ECB instead of limiting its role to a mere consultation this suggestion aims for the strengthening of the parliaments position and thus for further improvement of the ECB's legitimacy.[30]

Akbik has analyzed the Monetary and the Banking Dialogue focusing on the EP's accountability instruments in the SSM comparing them to the arrangements in monetary policy. She concluded that the SSM's accountability framework could serve as a model for monetary policy "to the extent that the ECB's obligations and the EP's powers are expressly spelled out in a document that is signed by both institutions (an IIA)"[31].

However, the use of an IIA was limited to the formalization aspect: The EP's accountability instruments in the SSM are considered "almost identical to those available in monetary policy"[32] and therefore an IIA between the ECB and the EP "unlikely to create a radically different accountability relationship between the two agencies."[33] Furthermore, her research finds, that the impact of such an IIA largely depends on the MEPs' activity that tends to intensify with the "level of diversity surrounding the banking sector at any given time"[34].

Akbik also questioned the effectiveness of public hearings in the SSM[35] – a problem we can also witness in the Monetary Dialogue.[36] Questions addressed to the ECB during such hearings may be categorized in 'initial' questions bringing up an issue for the first time in a hearing and 'follow-up' questions

[23] 2013/694/EU: Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, pp. 1–6.

[24] Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), MOU/2013/12111, December 2013, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=IMMC:MOU/2013/12111.

[25] See Lastra (2020), p. 25.

[26] See Fromage and Ibrido (2018), p. 305 f.

[27] Fromage and Ibrido (2018), p. 306.

[28] See Fromage and Ibrido (2018), p. 306 f.

[29] See Fromage and Ibrido (2018), pp. 302, 303.

[30] See Fromage and Ibrido (2018), p. 306 f.

[31] Akbik (2022), p. 30.

[32] Akbik (2022), p. 29.

[33] Akbik (2022), p. 30, see also p. 29.

[34] Akbik (2022), p. 30.

[35] See Akbik (2022), pp. 30, 24 f.

[36] See Akbik (2022), p. 12 with further references; Whelan (2022), p. 17.

referring to an earlier question.[37] The latter allow for MEPs to improve the discussion by diving deeper into a certain topic. However, procedural obstacles and the format of public hearings on the ECON committee – especially the short duration of public hearings of 90 to 120 minutes – tend to prevent MEPs from asking follow-up questions to their initial ones.[38]

The Banking Dialogue is an important tool for the EP to scrutinize the actions of the authorities in the Banking Union. However, the thoroughness of scrutiny could and should be enhanced in order to ensure that decision and practices by supervisory authorities and authorities acting within banking resolution are truly challenged.

In addition to parliamentary accountability, the ECB is subject to audit control. On a first level of scrutiny, the accounts of the ECB and national central banks shall be audited by independent external auditors pursuant to Art. 27.1 ESCB Statute.[39] On a second level, the European Court of Auditors (ECA) may carry out audits on the operational efficiency of the management of the ECB's supervisory tasks (see Art. 27.2 ESCB Statute). The ECB's replies to the observations in the audit report are published in an annex to the audit report (see Art. 20 (7) SSMR). The accountability mechanisms between the ECA and the ECB are further clarified in the MoU between the ECA and the ECB regarding audits on the ECB's supervisory tasks[40].

On a third level, pursuant to Art. 9b of the Rules of Procedure of the ECB, the Governing Council established a high-level Audit Committee in order to enhance the corporate governance of the ECB and the SSM, covering both central banking and banking supervisory functions, and the Eurosystem.[41]

The European Ombudsman investigates instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, except for the CJEU acting in its judicial role.[42] Pursuant to Art. 228 (1) Treaty on the Functioning of the European Union (TFEU) and Art. 13 Treaty on European Union (TEU), this includes complaints about the activities of the ECB.[43]

2.1.2. National level

Similarly to the accountability mechanisms vis-à-vis the European institutions and, in particular, the EP, the SSMR establishes an accountability framework with regard to national parliaments in order to satisfy democratic accountability requirements with national parliaments.[44]

National parliaments receive the annual report prepared for the EP (Art. 21 (1) SSMR) and can request the ECB to reply in writing to any observations or questions submitted by them to the ECB in respect of the tasks of the ECB under this Regulation (Art. 21 (2) SSMR). The SSMR also provides for the possibility of an exchange of views between the national parliament and the Supervisory Board in

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[37] See Akbik (2022), p. 24.
[38] Akbik (2022), pp. 30, 19 f., 24 f.
[39] The ECB external auditor is Baker Tilly, see recommendation on its appointment.
[40] Memorandum of Understanding between the ECA and the ECB regarding audits on the ECB's supervisory tasks, MOU/2019/10091, October 2019, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=IMMC:MOU/2019/10091. The ECB describes the MoU as an instrument that establishes practical information-sharing arrangements between the two institutions. These arrangements will allow the ECA to seek and obtain all the documents and information that it needs to audit ECB Banking Supervision. Highly confidential documentation will be fully protected, and access to sensitive bank-specific information will be granted in a controlled environment on-site at the ECB. (ECB (2019)).
[41] See Lastra (2020), p. 23.
[42] See Art. 228 (1) TFEU.
[43] See Hölscheidt (2024), para. 12.
[44] Pursuant to Art. 21 (4) SSMR, the Regulation is without prejudice to the accountability of national competent authorities to national parliaments in accordance with national law for the performance of tasks not conferred on the ECB by this Regulation and for the performance of activities carried out by them in accordance with Art. 6 of the SSMR.

relation to the supervision of credit institutions in that Member State together with a representative of the national competent authority (Art. 21 (3) SSMR).

2.2. Single Resolution Mechanism (SRM)

Decisions by the SRB, which enjoys independence in its resolution decisions[45] are subject to the accountability framework set out in the SRMR.[46]

2.2.1. Union level

Pursuant to Art. 45 (1) SRMR, the SRB shall be accountable to the EP, the Council and the Commission for the implementation of the SRMR. It has to submit an annual report[47] to the EP, the Council, the Commission and the ECA on the performance of the tasks conferred on it by the SRMR, which shall also be published on the SRB's website (Art. 45 (2) SRMR). The report has also to be presented to the EP and the Commission (Art. 45 (3) SRMR).[48]

Furthermore, hearings by the Committee on Economic and Monetary Affairs (ECON) on the performance of the resolution tasks by the SRB may take place at the request of the EP with the SRB's Chair (Art. 45 (4) SRMR). On its request, the Chair may also be heard on that topic by the Council (Art. 45 (5) SRMR).

Pursuant to Art. 45 (6) SRMR, the SRB shall reply orally or in writing to questions by the EP or the Council.[49] In addition, the Chair shall hold confidential oral discussions with the Chair and Vice-Chairs of the competent committee of the EP where such discussions are required for the exercise of the EP's powers under the TFEU (Art. 45 (7) SRMR). Finally, the Board shall cooperate with the EP during investigations subject to the TFEU and especially the regulations referred to in Art. 226 thereof (Art. 45 (8) SRMR).

With the Agreement between the EP and the SRB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the SRB within the framework of the SRM[50], the EP and the SRB fulfilled their legal obligations[51] to conclude agreements on the detailed modalities of organising discussions within in the meaning of Art. 45 (7) SRMR and on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Board (Art. 45 (8) SRMR). Additionally, several Memoranda of Understanding regulate details on information exchange and cooperation with the ECB and the European Commission and on the sharing of confidential data with the ECB.[52]

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[45] On the SRB's independence see Art. 47 SRMR. It is also emphasized in recital 39 of that regulation.

[46] See Zagouras (2022), para. 74; in general, on the SRB's accountability arrangements see Spitzer and Magnus (2024), pp. 2 ff.

[47] The interinstitutional agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism, OJ L 399, 24.12.2015, pp. 58–65, gives further details on what the annual report has to cover (see also Spitzer and Magnus (2024), pp. 2 f.).

[48] See generally Spitzer and Magnus (2024).

[49] As of today, only 16 correspondences with MEPs are available.

[50] Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism, OJ L 399, 24.12.2015, pp. 58–65.

[51] See Art. 45 (7) and (8) SRMR.

[52] Memorandum of Understanding between the Single Resolution Board and the European Central Bank in respect of cooperation and information exchange, MOU/2018/05301, May 2018, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=IMMC:MOU/2018/05301; Memorandum of Understanding between the Single Resolution Board and the European Central Bank in respect of cooperation and information exchange, May 2018 and December 2022, available at https://www.srb.europa.eu/system/files/media/document/ECB-SRB_MoU2022_final.pdf; Memorandum of Understanding between the Commission and the Single Resolution Board in respect of certain elements of cooperation and information exchange pursuant to the Single Resolution Mechanism Regulation, August 2019, available at

2.2.2. National level

Art. 46 SRMR regulates the SRB's accountability towards the national parliaments of the participating Member States. In accordance with Art. 46 (1) SRMR, national parliaments may request the SRB to reply, and the SRB is obliged to reply in writing to any observations or questions submitted by them to the SRB in respect of the functions of the SRB. Also, the SRB's annual report (Art. 45 (2) SRMR) shall simultaneously be submitted directly to the national parliaments of the participating Member States (Art. 46 (2) SRMR). The parliaments then may address to the SRB their reasoned observations which shall be replied to orally or in writing (Art. 46 (2) SRMR).

The national parliaments furthermore may invite the Chair to participate in an exchange of views in relation to the resolution of entities referred to in Art. 2 SRMR in that Member State together with a representative of the national resolution authority. Such an invitation is binding for the Chair (Art. 46 (3) SRMR).

3. ADMINISTRATIVE REVIEW WITHIN EBU

Administrative review (and judicial review, see below section 4.) within the SSM and SRM enhance the accountability mechanisms described above. Administrative review is important for ensuring accountability at an early stage within the administrative process itself.[53]

3.1. Role of Financial Appeal Bodies

3.1.1. Legal framework of the administrative review in the SSM

The administrative review mechanism under the SSM is governed by Art. 24 of the SSMR, establishing an Administrative Board of Review (ABoR) to handle internal administrative reviews of ECB decisions.

The ABoR consists of five members of high reputation, appointed for their relevant knowledge and professional experience in the field of banking and financial services (Art. 24 (2) SSMR). They must act independently, free from influence by ECB or any national authority, and serve the public interest. Members are appointed for a five-year term, renewable once, following a public call for expressions of interest (Art. 24 (2), (4) SSMR).[54]

The ABoR reviews the ECB's supervisory decisions upon request from affected parties, focusing on procedural and substantive conformity with the SSMR (Art. 24 (1) SSMR). Requests for review must be lodged within one month of notification of the decision and must include a statement of grounds (Art. 24 (6) SSMR). The ABoR assesses the admissibility of the request, and if admissible, issues an opinion within two months. The review does not have suspensory effect unless specifically decided by the ECB's Governing Council (Art. 24 (7), (8) SSMR).

The ABoR can recommend the abrogation, amendment, or replacement of the contested decision. The Supervisory Board must consider the ABoR's opinion and promptly submit a new draft decision to the Governing Council, which is adopted unless objected to within ten working days (Art. 24 (7) SSMR). The

https://www.srb.europa.eu/system/files/media/document/mou_between_the_ec_and_the_srb.pdf; Memorandum of Understanding on the exchange of certain confidential statistical information between the European Central Bank and the Single Resolution Board, July 2023, available at https://www.srb.europa.eu/system/files/media/document/2023%2008%2003%20SRB%20ECB%20MoU%20on%20the%20exchange%20of%20certain%20confidential%20statistical%20information%20FINAL.pdf.

[53] As to the character of the institutions of administrative review within the EBU as "administrative tribunals", see Cassese (2018), p. 13 f.

[54] Members until September 2024 included Pentti Hakkarainen (Chair), former Deputy Governor of the Bank of Finland, F. Javier Arístegui Yáñez, former Deputy Governor of the Banco de España, André Camilleri, former Director General of the Malta Financial Services Authority, René Smits, Professor of Law and former General Counsel of De Nederlandsche Bank, and Christiane Campill, former official of the Luxembourg Financial Supervisory Authority, see ECB (2024).

review process aims to provide a rapid and cost-effective remedy, enhancing procedural efficiency and legal protection without precluding judicial proceedings before the CJEU (Art. 24 (11) SSMR).

3.1.2. Legal framework of the administrative review in the SRM

Art. 85 of the SRMR establishes an Appeal Panel (AP) to handle internal administrative reviews of decisions made by the SRB.

The legal framework of the AP is similar to the ABoR's: it is composed of five members of high reputation, appointed for reasons of knowledge and professional experience in the field of finance and banking, specifically in the field of resolution (Art. 85 (2) SRMR). Like the ABoR under the SSM, members must act independently, free from SRB or national authority influence, and serve the public interest. They, too, are appointed for once-renewable five-year terms (Art. 85 (2) SRMR).[55]

The AP allows any natural or legal person, including resolution authorities, to appeal SRB decisions that directly and individually affect them (Art. 85 (3) SRMR). Appeals must be filed within six weeks of the decision notification and must include grounds for the appeal (Art. 85 (3) SRMR). The Panel issues its decision on the admissibility of the appeal within one month. Like the ABoR within the SSM, the AP's review process does not automatically suspend the contested decision, unless the Panel decides otherwise (Art. 85 (6) SRMR).

As a result of the appeal procedure, the AP can either confirm the SRB's decisions or remit the case back to the SRB for reconsideration. The SRB is obligated to comply with the AP's decision and must amend its original decision accordingly (Art. 85 (8) SRMR). All decisions by the AP are reasoned and communicated to the involved parties (Art. 85 (9) SRMR). While being similar to the ABoR within the SSM in terms of appointment, tenure, and independent operation, there are two important distinctions.Firstly, the binding character of the AP's decisions and, secondly, the fact that undergoing the complaint procedure is a necessary prerequisite for a subsequent action before the General Court (GC) or the Court of Justice (ECJ) (Art. 86 (1) SRMR).[56]

Given the complex structure and differing remit of administrative review within EBU, some ideas have been brought forward regarding possible future reform and consolidation: the AP of the SRB could, e.g., be merged with the Joint Board of Appeal of the European Supervisory Authorities outside the EBU to create a single "quasi-judicial" body for public law disputes dealing with the specialized review of EU financial agencies' decisions.[57] Also, the enhancement of the ABoR, the AP and the Joint Board of Appeal and their conversion into specialized administrative judges or into a special chamber of the CJEU have been discussed.[58]

3.2. The right of parties to be heard

The right to be heard is a fundamental aspect of both the initial decision-making process and the review process under the SSM. Regarding the initial supervisory decision by the ECB, Art. 31 (1) SSM Framework Regulation (SSMFR) and 22 (1) SSMR stipulate that the persons subject to the proceedings must have the opportunity to be heard before the decision is taken. Art. 31 (4), (5) SSMFR and 22 (1) subpara. 2 SSMR waive this obligation if urgent action is needed to prevent severe damage to the

[55] The current members are Christopher Pleister (Chair), Luis Silva Morais (Vice-Chair), Kaarlo Jännäri, Marco Lamandini, and Helen Louri-Dendrinou, see SRB (2024).

[56] As to the question whether the AP itself should be allowed to make preliminary references to the CJEU, see Bodellini and Lastra (2022), p.10f..

[57] See Lamandini and Ramos (2020), p. 159.

[58] See Cassese (2018), p. 16; also see the suggestion by Bodellini and Lastra, referenced below in Fn. 79.

financial system. In this case, the ECB may only adopt a provisional decision and must give the persons concerned the opportunity to be heard as soon as possible.[59]

With a view to the review process, according to Art. 24 (6) SSMR, any natural or legal person directly affected by an ECB decision can request a review, and this request must be accompanied by a statement of grounds. This ensures that the addressee has the opportunity to present its arguments and evidence in the review process. The ABoR must consider these grounds and any additional evidence submitted by the applicant. During the review process, the ABoR may conduct a hearing if deemed necessary for a fair evaluation, allowing the affected party to present their case orally (Art. 14 (1) Decision ECB/2014/16)[60].

Regarding the SRM, the explicit individual right of the addressee of a resolution measure to be heard during the initial decision process of the SRB is limited to the procedure that leads to the imposition of a fine and/or a periodic penalty payment under Art. 38 and 39 SRMR (Art. 40 SRMR).[61] Various other provisions of the SRMR oblige the SRB to consult with other institutional actors (particularly the national resolution authorities) in the processes of drafting and/or modifying resolution plans (Art. 8 (2), 9 (2), and 10 (1) SRMR), of assessing the resolvability of an institution (Art. 10 (7), (10) SRMR), and of determining the minimum requirement of own funds (Art. 12 (1), (2), (8), and (11) SRMR). While these rules do not entail an explicit right of the entity concerned by the resolution measure to be heard, the rights of defense enshrined in Art. 41 (2) lit. a Charter of Fundamental Rights (CFR), i.e. the right to be heard before any individual measure which would affect the person adversely is taken, apply also in the absence of a specific rule governing the procedure in question.[62] This means, that in order to comply with this essential procedural requirement[63], the affected entity must be given the opportunity to present its views before the relevant resolution measure is taken.

During the appeal process, Art. 85 (7) SRMR grants the parties the right to file observations on the AP's notifications or on communications from the other parties. The parties have the right to make oral representations.

[59] See to further detail Kaufhold (2022).

[60] Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16), OJ L 175, 14.06.2014, pp. 47–53.

[61] See Lackhoff (2021), para. 10.13.

[62] See Lackhoff (2021), para. 10.26 f., p. 161 f.

[63] See Nowak (2014), para. 7.161.

4. JUDICIAL ACCOUNTABILITY WITHIN EBU

4.1. Legal Framework

The EBU is an example of a composite administrative system ("Verwaltungsverbund"), consisting of national and European authorities.[64] Hence, the judicial review of decisions taken by the institutions within the EBU is characterized by the principle of separation: it depends on the acting authority and the nature of the measure in question, whether judicial review can be sought before national courts or the courts of the European Union (EU).[65] As a general rule, decisions by national authorities (e.g., the German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)) can be challenged (only) before national (administrative) courts while decisions by the ECB and other EU institutions are to be challenged in front of the CJEU (GC and/or ECJ).[66]

Protection against measures by the national supervisory authorities is governed by the respective national procedural and administrative law.[67] If the national measure is determined by EU law, the domestic judge may be compelled to refer the question to the CJEU for a preliminary ruling[68] (Art. 267 TFEU). Given the interdependence of laws, authorities, and procedures in the EBU, situations may arise where the person or institute concerned must even seek parallel judicial protection before both national and Union courts.[69] The following paragraphs primarily address legal protection at EU level, i.e. against measure taken by the ECB before the EU courts.

Judicial proceedings generally are not subsidiary to administrative legal protection. As stated in Art. 24 (11) SSMR, the possibility to request a review by the ABoR does not preclude the right to bring proceedings before the CJEU.[70] Regarding the SRM, however, decisions by the SRB that are subject to the (limited) review of the AP must be challenged before that panel before being admissible for judicial appeal (Art. 86 (1) SRMR) while all other decisions might be challenged directly before of the CJEU[71]. The SSM and SRM Regulations do not provide for specific judicial remedies but refer to the general procedures under the TFEU.

The most important instrument of legal review in the ambit of the EBU with regards to both its quantitative relevance and its legal consequences is the action for annulment according to Art. 263 TFEU. Any measure of the ECB that produces external legal effects can be contested.[72] This includes the granting and withdrawal of banking licenses (Art. 14 SSMR), the assessment of acquisitions of qualifying holdings in credit institutions (Art. 15 SSMR), the measures taken to ensure compliance with EU prudential rules, to carry out supervisory reviews, evaluations, stress tests etc. (Art. 4, 16 SSMR) as well as administrative penalties (Art. 18 SSMR). Regarding the SRM, it comprises the decisions to initiate

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[64] See Thiele (2015), p. 159.; see generally Zilioli and Wojcik (2021); see also Lamandini and Ramos Muñoz (2023).

[65] See Berger (2016), p. 2367 f.; Glos and Benzing (2020), para. 235.

[66] See Berger (2016), p. 2367 f.; Glos and Benzing (2020), para. 237, more comprehensive.

[67] See Glos and Benzing (2020), para. 239.

[68] See Glos and Benzing (2020), para. 236; from 2024, also the GC will be competent to hear and decide certain preliminary ruling cases, see Recitals (2) and (3) and Art. 1 of the Regulation of the European Parliament and of the Council amending protocol No 3 on the Statute of the Court of Justice of the European Union (Draft Regulation), 11 April 2024, available at https://www.parlament.gv.at/dokument/XXVII/EU/180171/imfname_11361657.pdf.

[69] See Berger (2016), p. 2368. This might, e.g., be the case where the ECB issues a specific instruction to the national supervisory authority: In this case, the person or institute concerned would have to proceed both against the measure taken by the national authority and the instruction by the ECB (provided that the instruction is of direct and individual concern to that person, Art. 263 para. 4 TFEU) to prevent the respective legal acts from becoming final. To the problem of resulting legal uncertainty see also Bodellini and Lastra (2022), p. 9.

[70] See Recital 60 SSMR. This also derives from the provision in Art. 263 para. 5 TFEU which allows for a mandatory administrative review only regarding measures taken by bodies, offices, and agencies of the EU, but not regarding measures of the institutions according to Art. 263 para. 1 TFEU like the ECB, see Heitzer and Kaufhold (2023), p. 199.

[71] In more detail to the interplay between administrative and judicial review see Bodellini and Lastra (2022), p. 9 f.

[72] See Glos and Benzing (2020), para. 264.

a resolution procedure (Art. 18 SRMR), to develop resolution plans (Art. 8 SRMR), the use of the Single Resolution Fund (SRF) (Art. 76, 77 SRMR) etc.

Decisions by the bodies of administrative review (the ABoR within the SSM and the AP within the SRM) can be contested in the same way. The action for annulment must be brought before the GC at first instance (Art. 256 (1), 263 (4) TFEU, Art. 51 Statute of the Court of Justice of the European Union (CJEU Statute)) within two months from the publication of the measure (Art. 263 (6) TFEU). Since the application for the administrative review procedure does not suspend this time limit, it may be necessary for the addressee of an ECB supervisory decision to file an action even before the administrative review procedure is concluded.[73] The subject and aim of judicial review under Art. 263 TFEU are the procedural and material conformity of the contested act with the SSM and/or SRM Regulations.[74] In accordance with Art. 263 (2) TFEU, the reasons for a violation may be a lack of competence of the ECB, the infringement of essential procedural requirements, the violation of the Treaties or any rule of law relating to their application, or the misuse of the ECB's discretionary powers.[75] Against the decision of the GC, in general, the parties concerned have the right to appeal to the ECJ (Art. 256 (1) subpara. 2 TFEU, Art. 56, 58 CJEU Statute).

In April 2024, the EP and the Council amended Art. 58a of the CJEU Statute, restricting the possibility of appealing against a decision of the GC when the decision was preceded by a decision of an independent review body (such as the ABoR or the AP).[76] One major intention behind this was to alleviate the workload of the ECJ.[77]

In case where the ECB fails to take action that it is obliged to take, an action for failure to act under Art. 265 TFEU is also possible. This is admissible if the ECB has not taken action by issuing a statement or decision within two months following the request to act. The time limit for bringing the action is then another two months.[78]

Art. 278 and 279 TFEU provide for interim measures. Additionally, under Art. 278, 340 (2) TFEU, actions for damages for harm caused in the performance of the ECB's duties are possible under general principles of law.

Marco Bodellini and and one of the authors of this papers (Lastra) have advocated the establishment of a specialized court (rectius a specialized section within the CJEU) to adjudicate complex cases concerning monetary policy, bank supervision and resolution.[79]

4.2. Statistical Data

The number of cases brought before the GC and the ECJ in the context of banking supervision seems manageable. In the official statistics of the CJEU, cases related to the Banking Union are not listed separately but fall under the category 'economic and monetary policy'. Since the introduction of the Banking Union in 2014, the number of new cases in this category has been in the mid-double digits (most recently in 2023: 56 new cases). Annually, the total number of cases pending in the 'economic and monetary policy' category has been in the low triple digits, with a slight upward trend (end of 2017:

[73] See Berger (2016), p. 2368.
[74] The same scope as the administrative review, see Art. 24 (1) SSMR.
[75] See Glos and Benzing (2020), para. 271.
[76] See Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending protocol No 3 on the Statute of the Court of Justice of the European Union, available at https://eur-lex.europa.eu/eli/reg/2024/2019/oj.
[77] See Recital 22 of the Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending protocol No 3 on the Statute of the Court of Justice of the European Union, available at https://eur-lex.europa.eu/eli/reg/2024/2019/oj.
[78] See Berger (2016), p. 2369.
[79] See Bodellini and Lastra (2022), p. 4 f.

116 - end of 2018: 127 - end of 2019: 138 - end of 2020: 156 - end of 2021: 179 - end of 2022: 204 - end of 2023: 238).[80] These numbers are lower than, e.g., the number of cases pending in the field of 'intellectual property' (end of 2023: 330) or the 'law governing the institutions' (end of 2023: 543). According to the Registrar of the GC, a decrease in the number of cases in the banking field is expected in the coming years, as most of the current cases concern banks' annual contributions to the SRF and the eight-year initial contribution period is coming to an end.[81] The number of cases resolved in the 'economic and monetary policy' category ranged from 11 to 24 per year between 2019 and 2023.[82] The relatively low number of cases (compared to the total number of decisions by the ECB in this field: 2582 in 2022 alone) may in part be explained by the general reluctance of the institutions in the banking sector to initiate public litigation due to the reputationally sensitive nature of their businesses that favors discrete conflict resolution.[83]

4.3. Relevant cases and trends in judicial review

Over the ten years of their existence, the SSM and SRM have produced several rulings by both the GC and the ECJ which have significantly shaped the Banking Union.

Notably, three landmark cases decided by the ECJ – C-450/17 P (L-Bank), C-152/18 P (Arkea), and C-219/17 (Berlusconi and Fininvest) – have provided crucial clarifications on the allocation of supervisory responsibilities and the scope of judicial review.

In the L-Bank case, the GC had addressed the classification of L-Bank as a "significant institution" subject to direct supervision by the ECB. L-Bank argued that it should be supervised by the national competent authority (in this case the German BaFin), due to its low risk profile and limited cross-border activities. Qualifying it as a "significant institution" would, i.e., violate the principles of proportionality and subsidiarity. The ECJ, upon appeal against the GC's ruling, upheld the ECB's decision. It ruled that the ECB, within the framework of Art. 6 SSMR, is exclusively competent to carry out the tasks of prudential supervision listed in Art. 4 (1) SSMR in relation to all credit institutions established in the participating Member States, without drawing a distinction between significant institutions and less significant institutions.[84] The role of national authorities is to act in the decentralized implementation due to the exclusive competence of the Union and not because of a domestic competence.[85] Thus, the ECJ emphasized the importance of applying supervisory standards uniformly across the EBU. This ruling underscored the ECB's discretion in defining significant institutions, promoting a consistent supervisory approach and, with it, reducing the risk of regulatory fragmentation within the EU.[86]

In the Arkea case, the French bank Crédit Mutuel Arkéa challenged the ECB's direct supervisory role, arguing that it should be supervised by the national competent authority (the Autorité de Contrôle Prudentiel et de Résolution), since the central body which controls the decentralized crédit mutuel banks (a specific organizational model under French national law), did not have the status of a "credit institution" in terms of the SSMR. In 2019, the ECJ ruled in favor of the ECB, highlighting the need for centralized supervision to ensure uniformity and prevent discrepancies in the application of regulatory

[80] See In-depth statistics for 2018 available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf; for 2017 under https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ra_pan_2018.0421_en.pdf.

[81] See Di Bucci (2024).

[82] See ECJ five-year statistics available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/en_ra_2023_tribunal_stats_web_bat_22042024.pdf.

[83] See Heitzer and Kaufhold (2023), p. 203.

[84] See ECJ, Judgement of the Court of 8 May 2019, Case C-450/17 P, Landeskreditbank Baden-Württemberg v. ECB, ECLI:EU:C:2019:372, para. 37.

[85] Slightly different view by Lastra (2015), p. 363.

[86] See the analysis in Riso (2021); see further to the judgements of the GC Hanten and Bracht (2017).

standards. This decision further solidified the ECB's authority in supervising significant banks in line with the L-Bank case.[87]

The Berlusconi and Fininvest case dealt with questions concerning the qualifying holding assessment under Art. 15 SSMR. The case was brought before the ECJ as a preliminary reference by the Italian Consiglio di Stato which essentially asked whether national or European courts were competent to assess the legality of preparatory acts by the respective national supervisory authority. The ECJ confirmed that the qualifying holding assessment was a single administrative procedure under the supervision of the ECB and thus, solely the European courts had jurisdiction over both the preparatory activities by the national authorities as well as the final decision by the ECB. The judgment, too, emphasized the importance of centralized supervision and jurisdiction within the SSM and SRM framework.[88]

4.4. Concluding remarks

These and several other rulings by the GC and ECJ have some implications for the Banking Union:

1. **Centralized Supervision**: The affirmation of the ECB's role in directly supervising significant institutions ensures a cohesive supervisory framework, reducing the potential for divergent national practices.
2. **Consistency and Uniformity**: By upholding the ECB's discretion in classifying significant institutions and assessing fit and proper requirements, the courts have ensured that supervisory standards are uniformly applied, enhancing the stability of the banking sector.
3. **Judicial Oversight**: The rulings illustrate the European courts' role in providing a check on the ECB's powers while simultaneously endorsing its central role in banking supervision.
4. **Harmonization of Practices**: The decisions emphasize the importance of harmonizing supervisory practices across the EU.

The rulings have reinforced the centralized supervisory model under the SSM and SRM, ensuring that the ECB can effectively oversee the stability and integrity of the EU's banking sector. As the Banking Union continues to evolve, these judicial precedents will serve as foundational pillars guiding the balance between EU-level oversight and national supervisory roles.

Regarding the SSM framework, it remains uncertain whether the administrative procedure before the ABoR leads to a significant alleviation of the workload of the courts since it is not a mandatory prerequisite for judicial proceedings. Some argue that such alleviation could already be seen in theway that the opinions of the ABoR pre-structure the subsequent court decisions, as seen in the Arkéa case, where the GC's reasoning closely followed the structure of the ABoR's opinion.[89] The abovementioned amendment to Art. 58a CJEU Statute might at least bring about some reduction in the number of cases for the ECJ as court of appeal, although the extent of this relief remains yet to be seen.

In the SRM context, the decisions of the AP – which, unlike the opinions of the ABoR, are binding on the SRB – would generally be better suited to reducing the burden on the courts. However, the AP suffers from a narrowly defined scope of review:[90] for instance, it is not allowed to review resolution plans or control the setting of regular contributions to the SRF. While this may be understandable given

[87] See Martucci (2021); see further to the judgements of the GC Smits (2018).
[88] See the detailed analysis in Bassani (2021); Dermine and Eliantonio (2019).
[89] See Heitzer and Kaufhold (2023), p. 203 f.; Koupepidou (2021), p. 41 f.
[90] See Bodellini and Lastra (2022), p. 7 f., 10 f.

the time pressure in resolution decisions, it prevents the proceedings before the AP from forming a solid foundation for a subsequent court decision, as essential SRB decisions in the context of resolution are not reviewed and can only be challenged before the courts.[91]

Setting aside the aspect of the courts' workload, it becomes evident that judicial protection adds significant value compared to administrative (pre-)procedures: courts guarantee a comprehensive and legally binding resolution of the often very complex issues in the Banking Union and establish reliable guidelines for handling future cases.

[91] See Heitzer and Kaufhold (2023), p. 210.

5. FINAL CONCLUSION

Given the relevance of supervisory and resolution decisions both on an individual fundamental rights level and with regard to financial stability considerations on a macro level on the one hand and independence of the relevant bodies on the other hand, ensuring adequate and sufficient accountability of such decisions is essential to ensure democratic legitimacy of these decisions and the institutions as required by the EU treaties for all Union institutions.

Accountability in the Banking Union relies on multiple pillars. While both the ECB (within the SSM) and the SRB (within the SRM) are obliged to report annually to the EP and the national parliaments, with the details being laid down in interinstitutional agreements and memoranda of understanding, the parliaments are not in a position to second-guess the substance of the individual decisions taken by the ECB or the SRB. This task is reserved for administrative bodies like the ABoR and the AP and, ultimately, the independent courts, which ensure legal accountability *ex post*; through those, the explanatory accountability vis-à-vis the EP and national parliaments is complemented by instruments of amendatory accountability.

The experience from the past ten years shows that effective accountability can only be achieved via the interplay of various mechanisms of which parliamentary scrutiny is only one – albeit essential – pillar. Specialised procedures of administrative review and comprehensive judicial protection are equally necessary to provide a stable foundation for the extensive powers of the Banking Union and could be further strengthened, e.g., by an extention of the scope of review of administrative bodies like the AP and/or further specialisation of the judiciary.

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The European Banking Union has marked a substantial transfer of powers for banking supervision and resolution from the national to the supranational arena. With power and independence comes accountability to ensure that the competences are exercised in accordance with their legal framework. This paper analyses existing accountability mechanisms and concludes that accountability should be strengthened in light of the relevance of supervisory and resolution decisions both on an individual fundamental rights level and at the global policy level.
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