



Concluding Remarks

10.1 ON THE EVOLUTION OF EUROPEAN CENTRAL BANKING LAW

The evolution of European central banking law, which has gradually developed since the beginning of Stage Three of EMU, has been impressive and has led, in particular, to the European Central Bank (ECB)'s enhanced role, which, apart from its initial tasks, was given new tasks and powers. Currently, the ECB and the national central banks (NCBs) participate in and have been assigned tasks and powers within two systems, that is the European System of Central Banks (ESCB) (and, mainly, the Eurosystem) and the European System of Financial Supervision (ESFS), and in two mechanisms, that is the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), which were established over a period of 20 years. In particular:

(1) The ESCB/Eurosystem was established by virtue of the Treaty on European Union (TEU) (1992) and the Treaty Establishing the European Community and started operating on 1 January 1999. The treaties assigned to the ECB four basic tasks, which the latter is exercising within the Eurosystem, assisted by NCBs on the basis of the principle of decentralisation. The ECB also has powers in relation to the issuance of euro-denominated banknotes and coins since the outset. However, the micro-prudential supervision of credit institutions did not form part of the ECB's initial tasks, since the relevant Article 105(6) was only subsequently

activated. This had been one of the main two asymmetries of the EMU. The remaining (previously second) asymmetry is that whereas the EU has exclusive competence on monetary policy for the euro area Member States within the framework of the ‘monetary union’, the same does not hold for fiscal policy within the framework of the ‘economic union’, since EU Member States must (simply) coordinate their economic policies. Europeanisation in this field has thus progressed significantly, albeit asymmetrically.

The primary objective of the Eurosystem is to maintain price stability. The ECB and the NCBs of the Member States whose currency is the euro are, therefore, competent, within the Eurosystem, for defining and implementing monetary and exchange-rate policy for price stability purposes. Without prejudice to the primary objective, the Eurosystem must: *first*, support the general economic policies in the EU, in order to contribute to the achievement of its objectives as laid down in Article 3 TEU; *in addition*, it must act according to the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119 TFEU.

(2) The ESFS is a ‘child’ of the recent (2007–2009) international financial crisis and a by-product of the 2009 *De Larosière Report*, which laid down the foundations for reshaping (and further deepening the institutionalisation of) arrangements at European level with regard to the financial system’s micro-prudential supervision, and establishing for the first time a European framework for the financial system’s macro-prudential oversight. It was established by virtue of four Regulations of the European Parliament and of the Council of 2010, operates since January 2011 and consists of two pillars: the *first pillar* of the ESFS comprises the three European Supervisory Authorities (ESAs) [European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and European Insurance and Occupational Pensions Authority (EIOPA)], which are *mainly* regulatory authorities composed of national supervisory authorities, one of their main tasks being to contribute to the establishment of high-quality common regulatory and supervisory standards and practices.

The *second pillar* is the European Systemic Risk Board (ESRB), which is responsible for the macro-prudential oversight of the European finan-

cial system, while NCBs have been designated by Member States entrusted with the conduct of macro-prudential policy in national legislation. Even though a key conclusion of the *De Larosière Report* was that the setting up of supranational supervisory authorities at the European level was neither necessary nor feasible and, in any case, the micro-prudential supervision of credit institutions should not be assigned to the ECB, it pointed out that specific tasks concerning the macro-prudential oversight of the financial system should be conferred upon it. Subsequently, in connection to the operation of the ESRB, specific tasks have been conferred on the ECB, which became part of the ESFS upon its establishment. The legal basis of the relevant Council Regulation was the enabling clause of Article 127(6) TFEU, which was activated for the first time in this case.

(3) Finally, the SSM and the SRM are ‘children’ of the fiscal crisis in the euro area and constitute the two of the three main pillars of the Banking Union (BU). The SSM was established by a 2013 Council Regulation (SSMR), by virtue as well of the enabling clause of Article 127(6) TFEU, and the SRM by a Regulation of the European Parliament and of the Council of 2014 [Single Resolution Mechanism Regulation (SRMR)]. The SSMR conferred upon the ECB-specific tasks concerning, for the first time, policies relating to the prudential supervision of (mainly) euro area credit institutions (in accordance with Article 127(6) TFEU) with a view to contributing to the safety and soundness of credit institutions and the stability of the EU financial system and to preventing regulatory arbitrage.

On the other hand, the objective of the SRMR was the establishment of *uniform rules and a uniform procedure* for the (orderly) resolution of (mainly) euro area credit institutions without recourse to taxpayers’ money (including public financial assistance by EU facilities) for their recapitalisation. These uniform rules and uniform procedure must be applied by the Single Resolution Board (Board), which was established by the SRMR, together with the Council, the Commission and the national resolution authorities (NRAs) within the framework of the SRM. The SSM constitutes the first main pillar of the BU and the SRM, supported by the SRF, its second main pillar.

10.2 ON THE INSTITUTIONAL ASPECTS OF THE SYSTEMS AND MECHANISMS OF THE EUROPEAN CENTRAL BANK AND NCB

10.2.1 The ESCB and the Eurosystem

General Remarks

The ESCB consists of 29 central banks, that is the ECB (acting as a ‘hub’) and the NCBs of all Member States, whether they are Member States whose currency is the euro or Member States with a derogation. The ESCB does not have a legal personality; the same applies to the Eurosystem, which consists of the ECB and the NCBs of the Member States whose currency is the euro. The primary objective of the ESCB (more accurately the Eurosystem) is to maintain price stability; without prejudice to this primary objective, the Eurosystem must support the general economic policies in the EU, in order to contribute to the achievement of its objectives and act according to the principle of an open market economy with free competition, favouring an efficient allocation of resources.

The Role of the NCBs

(1) The NCBs of the Member States whose currency is the euro are legal persons governed by their respective national laws and, concurrently, constitute an integral part of the ESCB, fully bound by all legal acts adopted by the ECB decision-making bodies with respect to the duties conferred upon the ESCB/Eurosystem. The relation between the ECB and these NCBs is governed by the ‘principle of decentralisation’, according to which, to the extent deemed possible and appropriate, the ECB has recourse to NCBs to carry out operations forming part of the tasks of the ESCB/Eurosystem. These NCBs may perform other functions on top of the ones provided for by the ESCB/ECB Statute, including granting liquidity assistance to solvent credit institutions faced with severe liquidity problems according to the terms of the Emergency Liquidity Assistance (ELA) mechanism. An NCB may, however, be required to cease the performance of such functions if the Governing Council (GC) decides that they interfere with the objectives and tasks of the ESCB. The safeguarding of the institutional and personal independence of their Governors is granted by EU law.

(2) The NCBs of Member States with a derogation have, like the Member States whose currency is the euro, a legal personality in accordance with national law and are members of the ESCB. However, given that these Member States have not adopted the euro, the position of their NCBs within the ESCB is significantly different to that of the NCBs of Member States whose currency is the euro. On that basis, the TFEU and the Statute have established a series of derogations applicable to these NCBs for the duration of the derogation regime.

10.2.2 *The Two Main Pillars of the BU*

The Single Supervisory Mechanism (SSM)

The specific supervisory tasks conferred on the ECB are carried out within the framework of the SSM, which has no legal personality and is defined as the ‘system of financial supervision’ composed, as described in Article 6 SSMR, of the ECB, and participating Member States’ NCAs (which in some cases are the NCBs), including those of Member States with a derogation, if the latter have established a ‘close cooperation’ (under Article 7). The SSM has a different institutional architecture from the Eurosystem, to the extent that members of the latter are the ECB and (exclusively) the NCBs of the Member States whose currency is the euro.

The SSM is governed by four key elements: *first*, the conferral on the ECB of the ‘specific tasks’ set out in Articles 4(1) and 5(2) SSMR concerning policies relating to the prudential supervision of certain types of financial firms, which are exercised within the SSM; *second*, the establishment, *in principle*, of a ‘two-tier system’ with regard to the distribution of powers within the SSM, distinguishing between two groups of supervised entities: the first comprises the significant ones, which are directly supervised by the ECB and the second the less significant ones, which are directly supervised by the NCA, both within the SSM; *third*, the incorporation of the SSM within the ESFS, without in principle touching upon the tasks of the EBA and the other components of the ESFS; and, *finally*, the creation of ‘Chinese walls’ within the ECB in order to ensure the effective separation of its monetary policy and other tasks from its supervisory tasks.

The Single Resolution Mechanism (SRM)

(1) The Board, established by the SRMR and operational since 1 January 2015, is responsible for the effective and consistent functioning of the SRM, like the ECB for the SSM. Unlike the ECB which is an EU institution, the Board is an EU agency with a specific structure corresponding to its specific tasks. It has legal personality and must act in compliance with EU law (since it is not an EU institution and does not have the power to take final binding decisions), that is with the Council and Commission decisions, in accordance with the SRMR.

(2) The Board is composed of a Chair, four other full-time members and a member appointed by each participating Member State, representing their NRAs. The Commission and the ECB also designate a representative each, which are entitled to participate in the meetings of the Board's Plenary and Executive Sessions as permanent observers, entitled to participate in the debates and having access to all documents. The NRAs, which in several participating Member States are the NCBs, have also been assigned significant tasks and powers within the SRM. Even though the ECB is not the competent resolution authority, its powers as a supervisory authority in recovery planning, (to a certain extent) resolution planning, early intervention and resolution action, especially for the determination of whether a credit institution is failing or likely to fail, are significant.

(3) For this reason, of relevance to the ECB are several other provisions of the SRMR as well. In particular, in relation to the obligation to cooperate on the basis of the 'principle of sincere cooperation' in the exercise of their respective responsibilities under the SRMR, the Board, the Council, the Commission, the ECB, the NRAs and the NCAs must at each stage (resolution planning, early intervention and resolution action) cooperate closely and provide each other with all information necessary for the performance of their tasks. *In addition*, for the purposes of the SRMR, the ECB may invite the Board's Chair to participate as an observer in its Supervisory Board. The SRB-ECB MoU of 22 December 2015 governs several aspects of cooperation and information exchange. In addition, for the purposes of consultation and cooperation with non-participating Member States or third countries, the Board, the ECB, as well as the resolution and competent authorities of the non-participating Member States must conclude MoUs describing in general terms the way in which they cooperate in the performance of their tasks under the Bank Recovery and Resolution Directive (BRRD).

10.2.3 *The ESFS*

The EBA

(1) The EBA is a union body with legal personality. Its objective consists in protecting the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the EU economy, its citizens and its businesses. Its strategic management body is the Board of Supervisors, composed of its Chairperson, the heads of the NCAs (be they NCBs or other independent administrative authorities) and one representative of the Commission, the ECB's Supervisory Board, the ESRB, the ESMA and the EIOPA; only the heads of NCAs have voting rights. The operational management body is the Management Board.

(2) The EBA must act within the powers conferred upon it pursuant to its statutory Regulation, within the scope of specific, exhaustively listed, legislative acts. Its tasks include the contribution to the establishment of high-quality common regulatory and supervisory standards and practices, to the consistent application of legally binding EU acts, to the consistent and coherent functioning of colleges of supervisors and to the monitoring, assessment and measurement of systemic risk. In this respect, the EBA has extensive regulatory powers (development of Guidelines, Recommendations, draft regulatory and implementing technical standards, and other measures based on the relevant legislative acts). *In addition*, in the cases laid down in Articles 17–19 (breach of EU law, action in emergency situations and settlement of disagreements between NCAs in cross-border situations) of its statutory Regulation, the EBA has the right to substitute NCAs if the latter fail to comply with the Commission's formal opinions or EBA's decisions. *Furthermore*, the EBA has been given the power to issue Opinions addressed to the European Parliament, the Council or the Commission on all issues related to its area of competence, either upon a request of these institutions or on its own initiative. The EBA's tasks also include the promotion of transparency, simplicity and fairness in the market for consumer financial products or services across the internal market.

(3) In light of the wide scope of tasks assigned to the EBA, it was deemed necessary to lay down provisions ensuring its integration in the EU institutional framework, providing for the independence of the EBA, its bodies and their members, the EBA's obligation to accountability *vis-à-vis* EU institutions and other bodies and the judicial review of the EBA's Decisions.

The European Systemic Risk Board

(1) The ESRB's objective is the macro-prudential oversight of the European financial system in order to contribute to the prevention or mitigation of systemic risks to financial stability in the EU arising from developments within the financial system and taking into account macroeconomic developments, in order to avoid periods of widespread financial distress. It must also contribute to the smooth functioning of the internal market and thereby ensure a sustainable contribution of the financial sector to economic growth. The General Board is the ESRB's strategic management body, composed of the President and the Vice-President of the ECB, the Governors of the NCBs—Members of the ESCB, a member of the Commission, the Chairpersons of the ESAs, the Chair and the two Vice-Chairs of the Advisory Scientific Committee, as well as the Chair of the Advisory Technical Committee. This composition ensures a clear majority for members from NCBs. The Steering Committee is the operational management body. The ESRB is chaired by the President of the ECB, who presides at the General Board and Steering Committee meetings and represents the ESRB externally. The ESRB also has two Vice-Chairs, the first elected by and among the members of the ECB General Council and the second being *ex officio* the Chair of the ESAs' Joint Committee.

(2) In order to fulfil its above-mentioned objective, the ESRB carries out several tasks, which include, *inter alia*, the collection and analysis of all relevant and necessary information; the identification and prioritisation of systemic risks and the issuance of warnings, where systemic risks are deemed to be significant, and of Recommendations for remedial action in response to the risks identified and, finally, monitoring of the follow-up.

In Particular: The SSM as Part of the ESFS

Apart from its involvement in the ESRB, the ECB has become part of the ESFS also with regard to the tasks conferred upon it by virtue of the SSMR. In this respect, it is called upon to cooperate closely with the ESAs, the ESRB and the NCAs. In addition, for the purposes of the SSMR, it participates in the EBA's Board of Supervisors by one representative nominated by the ECB Supervisory Board, which is a *non-voting* member and in this respect its position is subordinated to that of the NCAs—members of Board of Supervisors. The ECB must carry out its tasks under the SSMR without prejudice to the competence and the tasks of the ESAs and the ESRB and, in particular, it is not permitted to take on the EBA's tasks (nor the tasks of the other ESFS components).

10.3 ON THE INSTITUTIONAL ASPECTS OF THE ECB

The ECB became an EU institution by virtue of the Treaty of Lisbon. The TFEU, the ESCB/ECB Statute, the ECB Rules of Procedure, the Rules of Procedure of the Supervisory Board and secondary law (including since 2014 the SSMR and the SSM Framework Regulation) contain provisions with respect to several institutional aspects.

10.3.1 *The Bodies*

(1) The TFEU and the ESCB/ECB Statute established three decision-making bodies. The supreme body is the GC, which comprises the six members of the Executive Board and the Governors of the NCBs of the Member States whose currency is the euro, which are appointed from among persons of recognised standing and professional experience in monetary or banking matters and participate as a majority in the GC (*in personam* and not as representatives of their NCBs). The Executive Board comprises six members, that is the President (who is concurrently the GC's President), the Vice-President and four other members. Its main responsibility is the implementation of the single monetary policy on the basis of the GC's Guidelines and Decisions, giving the necessary instructions to NCBs. Finally, as long as there are Member States with a derogation [which are not represented in the (above-mentioned) permanent ECB bodies], the General Council was established as a transitional decision-making body, comprising the ECB President and Vice-President, as well as the Governors of the NCBs of all Member States. Its (limited) responsibilities are listed in Article 46 ESCB/ECB Statute.

(2) The SSMR also established three internal, not decision-making ECB bodies for the purpose of the specific tasks conferred upon the ECB. The first is the Supervisory Board, which is responsible for the planning and execution of these tasks and is composed of its Chair and Vice-Chair (appointed by the Council) four representatives of the ECB (appointed by its GC), and one NCA representative in each participating Member State. Its duties consist in carrying out preparatory works regarding the supervisory tasks conferred upon the ECB, and proposing to the GC, the ultimate decision-making body, complete draft Decisions for adoption. The GC has the power either to adopt a draft Decision or to object to it in accordance with a 'no-objection procedure'. The Administrative Board of Review was established for the purposes of

carrying out an internal administrative review of the Decisions taken by the ECB in the exercise of its powers under the SSMR, after a request for review pertaining to the procedural and substantive conformity of such ECB Decisions with the SSMR. It is composed of five members, which are appointed by the GC, must be of high repute, be nationals of Member States, have a proven record of relevant knowledge and professional experience and act independently, in the public interest. Finally, the ECB established a Mediation Panel in order to comply with the principle of separation of its monetary policy and specific supervisory tasks. The task of this internal body, composed of one member per participating Member State, chosen by each of the members of the GC and the Supervisory Board, is the resolution of differences of views on the part of interested participating Member States' NCAs, regarding an objection of the GC to a draft Decision by the Supervisory Board.

10.3.2 *Regulatory Powers*

(1) In order to accomplish its duties within the ESCB, the ECB was granted autonomous regulatory powers, its bodies being competent to issue Regulations, Decisions, Recommendations and Opinions. Furthermore, the Statute confers on the ECB the power to issue Guidelines, Instructions and internal Decisions, which are internal Eurosystem legal instruments exclusively addressed to and legally binding for the NCBs of the Member States whose currency is the euro.

(2) For the purpose of carrying out its tasks under the SSMR, the ECB must apply all relevant legal acts which constitute sources of EU banking law and to the extent that this law is composed of Directives or Regulations, it must apply the *national legislation* either transposing Directives or implementing Member States' options available under Regulations. To that effect, the ECB has been granted the power to adopt Guidelines and Recommendations and take Decisions (subject to and in compliance with the relevant EU banking law) and adopt Regulations limited to the extent necessary in order to organise or specify the modalities for carrying out its tasks. Before taking supervisory Decisions, the ECB must give to any person-subject of the proceedings the right to be heard, unless urgent action is needed in order to prevent significant damage to the financial system, in which case the ECB may adopt a 'provisional Decision' and give the persons concerned the opportunity to be heard as soon as possible after its Decision is taken. The persons involved in proceedings are entitled

to have access to the ECB's files, with the exception of confidential information. ECB supervisory Decisions must be reasoned, be accompanied by a statement of reasons, contain the material facts and the legal reasons on which it is based and be based only on facts and objections on which the parties concerned have been able to comment.

10.3.3 Sanctioning Powers

(1) According to primary EU law, if an undertaking seated in a Member State whose currency is the euro fails to comply with the obligations arising from the provisions of ECB Regulations or Decisions, adopted in relation to the Eurosystem's basic tasks, the ECB has the power to impose fines and/or periodic penalty payments. The limits of, and the conditions for, their imposition are laid down in a Council Regulation.

(2) In relation to its supervisory tasks under the SSMR and notwithstanding its general powers to impose sanctions, the ECB has been granted by the SSMR specific powers to impose administrative penalties on supervised entities in two cases of breaches: breach of regulatory requirements under directly applicable EU legal acts and breach of ECB legal acts. In addition, procedures for cooperation between the ECB and the NCAs have been instituted with regard to other cases of breaches of EU banking law.

10.3.4 Independence

(1) In order to ensure that the ESCB is in a position to efficiently pursue its primary objective, the ECB was granted institutional independence, meaning that the ECB and the members of its decision-making bodies are not allowed to seek or receive, when exercising powers and carrying out tasks and duties, instructions from EU institutions, bodies, offices and agencies, from any government of a Member State or from any other national body; the obligation to respect the above-mentioned principle and to abstain from seeking to influence the members of the decision-making bodies of the ECB is also imposed upon the above-mentioned entities when carrying out their tasks. The ECB is also operationally independent to the extent that it has all the means required for definition and implementation of the single monetary policy, while the personal independence of members of the Executive Board is granted as well, since their term of office is eight years (but not renewable), in order not to

coincide with the political cycle of any Member State and are retired by the ECJ, on application by the GC or the Executive Board, only if they no longer fulfil the conditions required for the performance of their duties or they have been guilty of serious misconduct.

Finally, the ECB's financial independence is guaranteed by the fact that it has its own capital, with resources coming exclusively from the NCBs—members of the ESCB. The subscription of the ECB's capital follows a specific key; the weightings assigned to NCBs in this key are equal to the sum of two factors (50% of the share of the respective Member State in the population of the EU and 50% of the share of the respective Member State in the gross domestic product of the EU at market prices); these weightings are adjusted every five years. The GC determines the extent and the form in which the capital must be paid by the NCBs of the Member States whose currency is the euro. *On the other hand*, the NCBs of the Member States with a derogation have, in principle, no obligation to pay up their subscribed capital; the General Council may, nevertheless, impose on them the obligation to pay up a minimal percentage “*as a contribution to the operational costs of the ECB*”.

(2) All aspects of ECB independence in relation to the basic tasks of the ESCB also pertain to its specific supervisory tasks. The SSMR reaffirms the independence of the ECB, as laid down in the TFEU and the Statute, and enhances its accountability *vis-à-vis* not only the EU institutions (and in particular the European Parliament on the basis of the provisions of the relevant EP-ECB Interinstitutional Agreement) but also the national parliaments.

10.3.5 *Accountability and Transparency*

(1) In order to compensate its independence, the ECB is accountable to EU institutions; this accountability requirement mainly consists in publishing an annual report on the ESCB's activities and the monetary policy of both the previous and the current year. The accountability requirement is further strengthened by the stipulation that the ECB President and the other Executive Board members may, at the request of the European Parliament, be heard by its competent committees. This possibility may also arise on the initiative of the ECB President and the other members of the ECB Executive Board. Specific rules are also laid down in the ESCB/ECB Statute.

(2) The ECB is accountable to the European Parliament and to the Council for the implementation of the SSMR as well, and notably in an enhanced way. In this respect, it must, *inter alia*, submit to various EU institutions an annual report on the execution of its specific supervisory tasks and reply orally or in writing to questions posed to it by the European Parliament or by the Eurogroup. In relation to its accountability as far as its regulatory powers are concerned in particular, it must duly inform the European Parliament's competent committee of the procedures it has instituted for adopting legal acts which are subject to public consultation. Unlike in relation to its basic tasks, the ECB is also accountable to the national parliaments of participating Member States in relation to its specific tasks under the SSMR. In this respect, and *inter alia*, it must forward its annual report on the execution of these tasks directly to the national parliaments of the participating Member States, which may address to the ECB their reasoned observations thereon.

10.3.6 *Communication of the ECB with Other EU Institutions: Judicial Control—Liability Issues*

Council and Commission representatives may participate in the meetings of the GC, while also ECB representatives may take part in Council meetings. The acts and/or omissions of the ECB (and the NCBs) are subject to judicial control and ECB acts or omissions are open to review or interpretation by the ECJ in the cases and under the conditions laid down in the TFEU, while the ECB may also institute proceedings in such cases and under these conditions upon a Decision taken by the GC.

The ECJ has jurisdiction to give judgment pursuant to any arbitration clause contained in a contract, governed by either public or private law, which was concluded by or on behalf of the ECB. It also has jurisdiction in disputes concerning the fulfilment by an NCB of obligations under the Treaties and the Statute. Finally, the ECB is liable according to the regime provided for in Article 340 TFEU, whereas the NCBs' liability falls under their respective national legislation. This covers contractual liability, governed by the law applicable to the contract in question, non-contractual liability, whereby the ECB must make good any damage caused by it or by its servants in the performance of their duties, and the personal liability of its servants towards the EU, governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them. Nevertheless, an issue relevant for supervisory liability is that the judicial

review of acts adopted by the ECB and by NCAs is likely to be governed by different procedural rules. Review of NCAs is governed by national law, while EU law applies to the ECB. This discrepancy could give rise to undesirable differences in outcomes across jurisdictions.

10.4 ON THE TASKS AND POWERS OF THE ECB AND THE NCBs

10.4.1 A Classification of the ECB's Tasks: Division of Objectives and Allocation of Tasks of the ECB, the EBA and the ESRB

(1) Since 4 November 2014, the ECB's tasks consist of the following¹:

The *first group* comprises the ECB's 'basic tasks' within the Eurosystem as set out in Article 127(2) TFEU (under the primary objective of pursuing the maintenance of price stability), that is the definition and implementation of the euro area monetary policy, the conduct of foreign exchange operations consistent with Article 219 TFEU, the holding and management of Member States' official foreign reserves and the promotion of the smooth operation of payment systems.

The *second group* contains the other ECB tasks set out in the TFEU, such as *first*, the exclusive right to authorise the issue of banknotes denominated in euro and the approval of the volume of euro coins issued by Member States (Article 128 TFEU); *second*, the contribution to the smooth conduct of policies pursued by the NCAs relating to the prudential supervision of credit institutions and the stability of the financial system (Article 127(5) TFEU); and *third*, the collection of statistical information, assisted by NCBs (Article 6 ESCB/ECB Statute).

The *third group* consists of the specific tasks conferred on the ECB under Article 2 of Council Regulation (EU) No 1096/2010 (based on Article 127(6) TFEU) concerning the macro-prudential oversight of the EU financial system in the context of the functioning of the ESRB (established by Council Regulation (EU) No 1092/2010), which is one of the components of the ESFS.

Finally, the *fourth group* comprises the specific tasks conferred on the ECB in 2014 under the SSMR concerning the micro-prudential supervision, within the SSM, of certain types of financial firms and predominantly credit institutions, based on Article 127(6) TFEU as well.

¹For a summary, see Table 10.1.

Table 10.1 The tasks conferred upon the ECB

<i>Category of ECB tasks</i>	<i>Legal basis</i>	<i>Application to euro area Member States</i>	<i>Application to Member States with a derogation</i>
1. Basic tasks within the Eurosystem <ul style="list-style-type: none"> • Definition and implementation of monetary policy • Conduct of foreign exchange operations consistent with Article 219 TFEU • Holding and management of Member States' official foreign reserves • Promotion of the smooth operation of payment systems 	Article 127(2) TFEU	Yes	No
2. Other tasks , for example: <ul style="list-style-type: none"> • Issue of euro banknotes • Contribution to the smooth conduct of policies <i>pursued by the (national) competent authorities</i> relating to the prudential supervision of credit institutions and the stability of the financial system • Collection of statistical information 	Article 128(1) TFEU Article 127(5) TFEU Statute, Article 5	Yes Yes Yes	No No Yes
3. Specific tasks on the macro-prudential oversight of the EU financial system	Council Regulation (EU) No 1096/2010 (based on Article 127(6) TFEU)	Yes	Yes
4. Specific tasks on the micro-prudential supervision over credit institutions, financial holding companies and mixed financial holding companies (<i>new</i>)	Council Regulation (EU) No 1024/2013 (SSMR, based on Article 127(6) TFEU)	Yes	Under the conditions of the 'close cooperation' procedure

(2) In light of the above-mentioned, the division of objectives and the allocation of tasks of the ECB, the ESRB and the EBA is the following:

The ECB is responsible, within the SSM and with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the EU as a whole and in each Member State, for the micro-prudential supervision of credit institutions and some other

types of supervised entities (financial holding companies and mixed financial holding companies) with regard to the specific tasks conferred on it.

The ESRB, supported by the ECB (to which specific tasks have been assigned), is responsible (according to Article 3(1) of its statutory Regulation) for the macro-prudential oversight of the European financial system with the objective of contributing to the prevention or mitigation of systemic risks to financial stability in the EU arising from developments within the financial system.

Finally, the EBA, whose objective (according to Article 1(5) of its statutory Regulation) is the protection of the public interest by contributing to the stability of the financial system, for the EU economy, its citizens and businesses and is definitely not a supervisory authority, continues to have the tasks and powers conferred on it by Articles 8–9, which have nevertheless been enhanced with the entry into force of Regulation (EU) No 1022/2013.

This Regulation, along with the SSMR, also lays down the relationship, the new *modus operandi*, between the ECB and the EBA after the establishment of the SSM, in order in particular to take account of the fact that the ECB is also a competent authority. Finally, it amends the EBA's governance, especially taking into account the different position of the two groups of NCAs—members of the EBA's Board of Supervisors after the establishment of the SSM: those of participating and those of non-participating Member States.²

Table 10.2 A comparison: ECB (as a supervisory authority), EBA and ESRB

	<i>ECB</i>	<i>EBA</i>	<i>ESRB</i>
Objective	Contribution to the safety and soundness of credit institutions and the stability of the financial system within the EU and each Member State (SSMR, Article 1)	Protection of the public interest by contributing to the stability of the financial system, for the EU economy, its citizens and businesses (EBA Regulation, Article 1(5))	Contribution to the prevention/mitigation of systemic risks to financial stability in the EU arising from developments within the financial system (ESRB Regulation, Article 3(1))
Tasks	Micro-prudential supervision of credit institutions (SSMR, Articles 4 and 5)	Various (EBA Regulation, Articles 8–9), but <i>not a supervisory authority</i>	Macro-prudential oversight of the financial system (ESRB Regulation, Article 3(1)1)
Seat	Frankfurt	Paris	Frankfurt

²For a summary, *see* Table 10.2.

10.4.2 *Definition and Implementation of the Single Monetary Policy*

(1) The first basic task of the ECB within the Eurosystem is the definition and implementation of the single monetary policy. Its strategy for the definition of the single monetary policy is premised on two pillars, namely an *economic analysis*, which seeks to assess the short-term determinants of price developments, focusing on both real economic activity and financial conditions in the economy, and a *monetary analysis*, which assesses with a medium to long-term perspective, the indications for monetary policy drawn from the economic analysis.

(2) Implementation of the single monetary policy is based on the following instruments: conduct of open market operations, offering of standing facilities to eligible counterparties and requiring the latter to hold minimum reserves on accounts with the Eurosystem. Eligible counterparties are those which are subject to the Eurosystem's minimum reserve system, are subject to prudential supervision by NCAs, are financially sound and fulfil all operational requirements specified in the contractual or regulatory arrangements applied by the home NCB or ECB with respect to the specific instrument or operation. The instruments for the implementation of monetary policy are open market operations, a marginal lending facility and a deposit facility and, finally, minimum reserve requirements. The purpose of open market operations, the prominent instrument, is to steer interest rates, manage the liquidity situation in the financial market and signal the stance of monetary policy. Depending on their specific purpose, they include main refinancing operations (MROs), longer term refinancing operations (LTROs), fine-tuning operations and structural operations. Their conduct is based on reverse transactions (which are used in all categories of open market operations), foreign exchange swaps for monetary policy purposes, the collection of fixed-term deposits, the issuance of ECB debt certificates and outright transactions.

Under the Eurosystem monetary policy framework in force, all Eurosystem credit operations are governed by a single framework for eligible assets. In order to participate in such operations, counterparties must provide the Eurosystem with assets that are eligible as collateral for such operations. Eligible assets must be provided by counterparties either by ownership transfer in the form of a repurchase agreement or by the creation of a security interest in the form of a collateralised loan. Specific rules govern the Eurosystem credit assessment framework.

(3) Under the extraordinary circumstances arising from the need to bolster the European banking system following the recent (2007–2009) international financial crisis and the subsequent fiscal crisis in the euro area, the ECB adjusted its monetary policy in order to address the problem of low inflation. In this respect, it gradually cut the rate for its MROs from 4.5% to 0%, extended the maturity of LTROs, set the interest rate on the deposit facility in negative territory, provided liquidity in foreign currencies, carried out massive purchases of covered bonds denominated in euro and markedly broadened the pool of assets eligible by the Eurosystem as collateral in the conduct of its credit transactions in the context of its single monetary policy.

Recourse to quantitative easing, containing unconventional monetary policy instruments (‘temporary’ monetary policy instruments in the jargon of the ECB) and mainly asset purchase programmes, is still being made. Of particular importance in this respect are the ECB’s outright monetary transactions, consisting in purchases of sovereign bonds of individual euro area Member States without access to the markets. Even though this programme, which has given rise to intense debate as to its compatibility with EU law (which the ECJ rules to the affirmative in the case “Peter Gauweiler and others v Deutscher Bundestag” (albeit under certain framework conditions), has not yet been activated, several other (corporate and sovereign) bond purchase programmes are currently under way (included in the so-called expanded asset purchase programme) to address the risks of a prolongation of the low-inflation period in the euro area.

(4) It is also worth noting that, in July 2019, the ECB adopted a Guideline governing the euro short-term rate (€STR), which is an interest rate benchmark to be established in order to prevent the risk of the existing euro overnight index average not being permitted for use in new financial instruments or contracts given the applicable (strict) regulatory framework on financial benchmarks.

10.4.3 *The Other Basic Tasks*

(1) According to Article 127(2) TFEU, the Eurosystem’s second basic task consists in the conduct of foreign exchange operations in consistency with Article 219 TFEU. The legal framework governing this aspect distinguishes between two alternative regimes: *first*, the case in which (as is the case today) the euro freely floats in the markets as part of an interna-

tional (non-)system of floating exchange rates; and *second*, the case in which the euro may in future take part in an international system of either fixed exchange rates (such as, for instance, the Bretton Woods system which was in operation from 1945 until 1971 within the framework of the IMF) or managed floating exchange rates. Member States maintain their power to independently negotiate in international bodies and to conclude international agreements, subject to the competence and the agreements of the EU in relation to the EMU.

(2) The third basic task of the Eurosystem under Article 127(2) indent TFEU (closely related to the second) consists in holding and managing the official foreign reserves of the Member States. The NCBs of the Member States whose currency is the euro have transferred to the ECB foreign reserve assets up to an amount equivalent to 50 billion euros and denominated in any freely traded currency, other than Member States' currencies, euro, IMF reserve positions and Special Drawing Rights. The ECB has the full right to hold and manage these foreign reserves and use them for the purposes set out in the ESCB/ECB Statute and may request the provision of further foreign reserve assets within the limits and under the conditions laid down by a Council Regulation. Operations in foreign reserve assets remaining with NCBs (following the above-mentioned transfers to the ECB) are not subject to restrictions, provided that they are aimed at the fulfilment of obligations undertaken by NCBs towards international bodies pursuant to the Statutes' provisions on the ECB's and NCBs' external relations.

(3) Pursuant to Article 127(2) TFEU, the Eurosystem's fourth basic task relates to the promotion of the smooth operation of payment systems in the euro area. This provision confirms the importance that central banks across all advanced economies attribute (at least over the last few years) to overseeing the operation of small-value payment systems and large-value payment systems. Of particular importance is the regulatory competence assigned to the ECB under Article 22 ESCB/ECB Statute, based on which it is entitled to lay down Regulations to ensure efficient and sound clearing and payment systems within the EU as well as with other countries, while, to this end, the ECB and NCBs may provide facilities. The oversight requirements for systemically important payment systems are laid down in an ECB Regulation of July 2014, which, *inter alia*, lays down rules relating to legal soundness and governance issues, the management of risks access and participation criteria, and the power of the ECB to impose sanctions in the case of infringements.

(4) In this context, the TARGET2 system and the TARGET2-Securities system were also set up. TARGET2 is structured as a multiplicity of RTGS systems and provides RTGS for payments in euro, with settlement in central bank money across several accounts, including the so-called payments module accounts, which must always be used by NCBs for open market monetary policy operations, the settlement of transactions with ancillary systems and payments between credit institutions. Each NCB—member of the Eurosystem, which is a direct participant of the system, operates its own TARGET2 component, which is a system designated as such by the relevant national legislation. The system’s members may process, *inter alia*, transactions directly resulting from or made in connection with Eurosystem monetary policy operations and various types of liquidity transfer orders.

On the other hand, the T2S is a service provided by the Eurosystem to CSDs allowing core, neutral and borderless security settlement in central bank money to be carried out, with delivery *versus* simultaneous payment. It is mainly available for settlement in euro but may also be used by non-euro area NCBs and any other central bank wishing to participate by making their currency available for central bank money settlement therein.

10.4.4 Powers of the ECB in Relation to the Issuance of Banknotes and Coins

(1) The authorisation of banknotes issue is an exclusive right of the ECB, performed by its GC. Without prejudice to this, such notes may be issued the ECB and the NCBs of the Member States whose currency is the euro. The banknotes issued by the ECB and the NCBs are the only such notes to have the status of legal tender within the EU. The total value of euro banknotes in circulation is allocated to the Eurosystem members, that is the ECB and the NCBs of Member States whose currency is the euro, by application of the ‘banknote allocation key’.

(2) As opposed to the issue of banknotes, the ECB is not competent to issue coins denominated in euro, which still is the exclusive competence of the Member States whose currency is the euro under their domestic legislation. Nevertheless, the volume of the issue of euro coins in circulation in the euro area is subject to approval by the ECB, which could not remain uninvolved, given that the volume of the issue of euro coins is, just like that of euro banknotes, part of the monetary base and affects money supply and, as a result, the single monetary policy of the EU.

10.4.5 *The Specific (Supervisory) Tasks of the ECB and Its Cooperation with NCAs in the Context of the SSM*

(1) On the basis of the SSMR, an extensive range of specific tasks in relation to the supervision of credit institutions and other categories of supervised entities incorporated in participating Member States has been conferred upon the ECB. When carrying out these tasks, the ECB must have full regard to credit institutions' different types, business models and sizes, as well as the systemic benefits of diversity in the banking industry of the EU in accordance with the proportionality principle. This applies without prejudice to the responsibilities and related powers of participating Member States' NCAs to carry out supervisory tasks not conferred on the ECB, and the responsibilities and related powers of NCAs or NDAs to apply macro-prudential tools not provided for in EU banking law. Tasks not specifically conferred on the ECB remain with NCAs.

(2) The specific tasks conferred on the ECB with regard to supervised entities incorporated in participating Member States are laid down in Articles 4(1) and 5 SSMR. The specific tasks under the first article include the granting and withdrawal of authorisation to credit institutions, the performance of tasks which fall upon the NCA of the home Member State for credit institutions and other supervised entities incorporated in a participating Member State, if they intend either to establish a branch or to exercise the freedom to provide services in a non-participating Member State, the acquisition and disposal of qualifying holdings, the ensuring of compliance with micro-prudential regulations, the conduct of supervisory reviews and imposition of *ad hoc* additional requirements, the micro-prudential supervision of banking groups on a consolidated basis and the supplementary supervision of financial conglomerates, as well as specific supervisory tasks in relation to recovery plans and early intervention.

On the other hand, Article 5 SSMR governs macro-prudential tasks and macro-prudential tools used by national authorities (NCAs and NDAs) and the ECB. The ECB is required to apply the macro-prudential tools in accordance with that Article and, where those are provided for in a Directive, subject to implementation of that legislative act into national law. In particular, the ECB may substitute to the NCA or the NDA of the participating Member State and, if deemed necessary, apply higher requirements for capital buffers than those applied by national authorities to be held by supervised entities at the relevant level in accordance with EU banking law, apply more stringent measures aimed at addressing systemic or macro-prudential

risks at the level of supervised entities and set a buffer requirement if an NDA has not set a buffer rate. An NCA or NDA may also propose to the ECB to use macro-prudential tools in order to address the specific situation of the financial system and the economy in its Member State.

(3) The specific tasks conferred on the ECB must be exercised within the framework of the SSM. Article 6 SSMR established, *in principle*, a ‘two-tier system’ with regard to the distribution of powers within the SSM in relation to these tasks, distinguishing between two groups of supervised entities: significant supervised entities, which are, in principle, directly supervised by the ECB, within the SSM and less significant entities, which are directly supervised by NCAs, within the SSM as well.³ The criteria for determining significance in relation to one or more supervised entities, which are part of a supervised group, are set at the highest level of consolidation within participating Member States; these are the size criterion, the economic importance criterion, the cross-border activities criterion, the direct public financial assistance criterion and the fact that it is one of the three most significant credit institutions (groups) in each participating Member State. In this respect, in its judgment of 16 May 2017 in Case T-122/15 “Landeskreditbank Baden-Württemberg—Förderbank v ECB”, the ECJ held that the prudential supervision of less significant credit institutions by NCAs within the SSM is not the exercise of an autonomous competence, but rather a decentralised implementation of an ECB’s exclusive competence. It further pointed out that a credit institution’s classification as significant may be avoided only if there are specific, factual circumstances entailing that the direct prudential supervision by NCA is better able to attain the objective of financial stability protection and to ensure the consistent application of high supervisory standards.

(4) In relation to the micro-prudential supervision of significant supervised entities and groups, significant is the role of joint supervisory teams, which are established by the ECB, are composed of staff members from the ECB and from the NCAs and, *inter alia*, perform the Supervisory Review and Evaluation Process for those entities or groups. The procedures for the micro-prudential supervision of significant supervised entities and groups are based on a close cooperation between the ECB and

³This distinction does not apply to the granting and withdrawal of authorisation of credit institutions, to the acquisition and disposal of qualifying holdings in credit institutions, which are ECB competences for all credit institutions, and the macro-prudential tasks conferred on the ECB by virtue of Article 5 SSMR.

NCA, especially in terms of assistance provided by the latter to the former and information exchange, while compliance with fit-and-proper requirements for managers is governed by specific rules.

(5) The ECB has also been granted a wide range of powers in relation to the micro-prudential supervision of less significant supervised entities and groups, which are under the direct supervision of NCAs. It can issue Regulations, Guidelines or general instructions addressed to NCAs and adopt supervisory Decisions, it exercises oversight over the SSM's functioning and it may, at any time, make use of its investigatory powers and may request, on an *ad hoc* or on a continuous basis, information from the NCAs on the performance of their tasks. In addition, if necessary in order to ensure consistent application of 'high supervisory standards', the ECB may, at any time, decide to exercise directly itself the supervision of a less significant supervised entity or a less significant supervised group. This Decision may be taken either on its own initiative after consulting with NCAs or upon request by an NCA.

(6) The ECB has been granted extensive powers in order to pursue its objectives and fulfil its tasks under the SSM Regulation. These include investigatory powers, specific supervisory powers with regard to the authorisation of credit institutions and the assessment of acquisitions of qualifying holdings in them, supplementary supervisory powers and the power to impose administrative sanctions.

10.4.6 Other Specific Tasks and Competences Relating to Financial Stability

The Specific Tasks of the ECB in the Context of the ESRB

In connection to the operation of the ESRB, specific tasks have been conferred on the ECB under Council Regulation (EU) No 1096/2010. In this respect, the ECB is represented both in the ESRB's General Board and in its Steering Committee: its President and Vice-President are members of the General Board and, respectively, Chair and first Vice-Chair, while five other members of the General Board who are also members of the ECB General Council are members of the Steering Committee. *In addition*, the ECB has been assigned the specific task to provide to the ESRB analytical, statistical, logistical and administrative support by ensuring its Secretariat. In fulfilling this task, the ECB must provide sufficient human and financial resources and appoint the Secretariat's head, in consultation with the ESRB's General Board.

ECB Competences within the SRM

(1) Even though the ECB is called upon to carry out supervisory tasks, *inter alia*, in relation to recovery plans if a credit institution or group, in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable micro-prudential supervision requirements, resolution powers are explicitly excluded, since those are being exercised by the Board, the Council, the Commission, and, if relevant, the NRAs as to their respective responsibilities. Nevertheless, the ECB must cooperate closely with the Board or the NRAs in resolution planning in accordance with specific rules. The ECB is also called upon to carry out supervisory tasks, *inter alia*, in relation to early intervention, if a credit institution or group, in relation to which it is the consolidating supervisor, does not meet or is likely to breach the applicable micro-prudential supervision requirements. Under the SRMR, the Board must be informed by the ECB or the NCAs of any measure that these require an institution or a group to take or that they themselves take in relation to their supervisory powers under the SSMR or the CRD IV or on early intervention and notify the Commission of any information received. If the ECB or the NCA intend to impose on an institution or a group any additional measure under the (just) above-mentioned provisions of EU banking law before that has fully complied with the first measure notified to the Board, they must inform the Board before its imposition.

(2) The adoption of a resolution scheme in relation to designated entities and groups is also a competence of the Board, exercised (only) when it assesses that the conditions for resolution (the failing or likely-to-fail criterion, the criterion of the reasonable prospect for effective alternative private sector measures or supervisory action, and the ‘public interest’ criterion) are met cumulatively. Nevertheless, the role of the ECB in relation to the two first resolution conditions is very important. In particular, in relation to the determination that the entity (typically but not exclusively a credit institution) is failing or likely to fail, the assessment must, in principle, be made by the ECB after consulting the Board (which may also make such an assessment, provided that it has informed the ECB of its intention and that the ECB does not make such an assessment). The ECB must, without delay, provide the Board with any relevant information that the Board may request in order to inform its assessment. In addition, the ECB is also actively involved in the process for the determination of provision to a credit institution of extraordinary public financial support, which does not activate the resolution regime.

Furthermore, even though the assessment of the second resolution condition must be made by the Board, or, if applicable, by the NRAs, in close cooperation with the ECB, the latter may also inform the Board or the NRAs concerned that it considers this condition fulfilled. On the other hand, the ECB is not involved in the determination of the public interest criterion, upon which a resolution action is deemed to be in the public interest if it is necessary for the achievement of, and is proportionate to, at least one resolution objective and the winding up of the credit institution under normal insolvency proceedings would not meet these resolution objectives to the same extent.

(3) The role of the ECB is also important in relation to the exercise by the Board of the power to write down or convert ‘relevant capital instruments’ in relation to designated entities and groups on the basis of an assessment that any of the five conditions laid down in the SRMR is met. The assessment of three of these conditions can also be made by the ECB, after consulting the Board, while the assessment of whether the entity or group is viable (one of these conditions) can be made by the Board only after informing the ECB of its intention and the ECB does not make such an assessment.

The Role of the ECB in the ELA Mechanism

(1) The ECB is not a lender of last resort in the euro area. The ECB Agreement (2017) presents a definition of ELA and describes the allocation of responsibilities, costs and risks for ELA operations, as well as a framework for the provision and exchange of information, and the control of liquidity effects to prevent any provision of ELA from interfering with the objectives and tasks of the ESCB. The provision of ELA is not considered to be part of the single monetary policy in the euro area. In both cases, the central bank provides liquidity to the banking system, but in the case of monetary policy actions the objective is not to ensure the stability of the financial system, but to maintain price stability; the liquidity granted is not of an emergency nature, but rather permanent; and liquidity is provided to the banking system as a whole, rather than to individual credit institutions.

(2) The provision of ELA falls under the *main* responsibility of the NCB concerned. As a result, the provision of such assistance is at the sole discretion of NCBs, on condition of course that the ECB has not prohibited it. The NCB concerned incurs any costs and risks that may arise from the provision of ELA. Nevertheless, NCBs may provide ELA unless the GC, pursuant to Article 14.4 ESCB/ ECB Statute, finds that its provi-

sion interferes with the ESCB objectives and tasks. In relation to that aspect, the ECB Agreement (2017) provides also that the violation of the prohibition of monetary financing under Article 123 TFEU may constitute such an interference with the objectives and tasks of the ESCB. In principle, the solvency of credit institutions is being assessed by the authorities competent for their micro-prudential supervision (i.e. in the euro area the ECB for significant credit institutions and the NCAs, for less significant ones).⁴

Table 10.3 The allocation of tasks and competences between the ECB and the NCBs in the euro area in the context of European central banking law

<i>Task or competence</i>	<i>ECB</i>	<i>NCBs</i>	
		<i>As monetary authorities</i>	<i>As NCAs</i>
Authorisation of banknote issue	✓		
Issue of banknotes	✓	✓	
Definition and implementation of monetary policy	✓		
Oversight of payment systems—operation of the TARGET2 system	✓		
Granting and withdrawal of authorisation to credit institutions	✓		
Acquisition and disposal of qualified holdings in credit institutions	✓		
Micro-prudential supervision in relation to the specific tasks laid down in Article 4 SSMR	✓ (for significant supervised entities)		✓ (for less significant supervised entities)
Micro-prudential supervision in relation to other aspects			✓
Use of macro-prudential tools	✓ (exceptionally)		✓ (in principle)
Resolution planning	✓ (for significant credit institutions)		✓ (for less significant credit institutions)
Early intervention	✓ (for significant credit institutions)		✓ (for less significant credit institutions)
Lending of last resort (ELA mechanism)	Powers under Article 14.4 ESCB/ ECB Statute	✓	

⁴On the allocation of competences between the ECB and the NCBs, see Table 10.3.