

Competence Sharing Between the ECB and the National Competent Supervisory Authorities Within the Single Supervisory Mechanism (SSM)

Christos V. Gortsos^{1,2,3}

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Abstract Within the framework of the newly established Single Supervisory Mechanism (SSM), which has been in operation since 4 November 2014, the European Central Bank (ECB) cooperates with the national competent authorities (NCAs) of euro area Member States as regards the specific (supervisory) tasks conferred upon it concerning policies relating to the prudential supervision of credit institutions and other supervised entities. This Article briefly presents the SSM framework (see below under 1) and then analyses the sharing of competences between the ECB and NCAs with regard to ‘significant’ and ‘less significant’ credit institutions, financial holding companies and mixed financial holding companies (under 2). This presentation and analysis are based on the provisions of the legal acts which govern the SSM’s operation.

Keywords Single Supervisory Mechanism (SSM) · European Central Bank (ECB) · Participating Member States · National competent authorities · Micro-prudential supervision · Specific (supervisory) tasks · Significant supervised entities · Less significant supervised entities · Joint Supervisory Teams (JSTs)

C. V. Gortsos: Professor of International Economic Law, Visiting Professor, Law Faculty.

✉ Christos V. Gortsos
cgortsos@hba.gr

¹ Department of International, European and Area Studies, Panteion University of Athens, Athens, Greece

² Europa-Institut, Universität des Saarlandes, Saarbrücken, Germany

³ Law Faculty, National and Kapodistrian University of Athens, Athens, Greece

1 The SSM Framework

1.1 Legal Acts

Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM Regulation)¹ is the main legal source of the Single Supervisory Mechanism (SSM). It was adopted by the ECOFIN Council in October 2013 within 14 months from the submission of the European Commission's proposal. The adoption of this Regulation is a major leap towards the creation of the European Banking Union (EBU).²

On the basis of Article 6 of the SSM Regulation, the ECB adopted, on 16 April 2014, Regulation (EU) No 468/2014 establishing the framework for cooperation within the SSM between the European Central Bank (ECB) and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17)³ (ECB Framework Regulation).⁴ Its purpose is to lay down rules on several aspects, including a framework to organise the practical arrangements concerning cooperation within the SSM. The institutional and regulatory framework pertaining to the SSM is further specified in several other ECB legal acts, containing provisions on the detailed operational arrangements for the implementation of the tasks conferred upon the ECB by the SSM Regulation.⁵

Of relevance are also the Interinstitutional Agreement between the European Parliament and the ECB, signed in October 2013, 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,⁶ and the Memorandum of Understanding (MoU) between the Council and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM) of December 2013.⁷

1.2 Main Aspects

The SSM Regulation confers on the ECB specific tasks 'concerning policies relating to the prudential supervision of credit institutions' (Article 127, paragraph 6 of the Treaty on the Functioning of the European Union⁸ (TFEU)) with a view to

¹ OJ L 287, 29.10.2013, pp 63–89.

² For the other legal acts which constitute the sources of the three main pillars of the EBU, see Gortsos (2015), at pp 15–28.

³ OJ L 141, 14.5.2014, pp 1–50.

⁴ The author prefers to refer to this Regulation in this way in order to help the reader to clearly distinguish it in the text from the SSM Regulation.

⁵ For a general overview of these legal acts, see Gortsos (2015), at pp 77–80.

⁶ OJ L 320, 30.11.2013, pp 1–6.

⁷ For a compendium of all legal acts pertaining to the SSM as well as to the Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF), which constitute the second main pillar of the EBU, with a brief introduction, see Binder and Gortsos (2015).

⁸ OJ C 326, 26.10.2012, pp 47–390.

contributing to the safety and soundness of credit institutions and the stability of the financial system within the EU and each Member State, which is the objective of the ECB under the SSM Regulation, and preventing regulatory arbitrage, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions.⁹ Obviously, this ECB objective is different from the primary objective of the European System of Central Banks (ESCB) under the TFEU, i.e., maintaining price stability.¹⁰

The new EU institutional architecture for banking prudential supervision within the context of the EBU is based on four main elements:

- conferring specific tasks on the ECB for the micro-prudential supervision of certain types of financial firms, transferred from national competent (supervisory) authorities, and establishing a Single Supervisory Mechanism in relation to the exercise of the specific tasks conferred on the ECB;
- specifying the financial firms, mainly (but not exclusively) credit institutions, with regard to which these specific tasks are conferred on the ECB;
- incorporating the SSM into the European System of Financial Supervision (ESFS), without, in principle, touching upon the current tasks of the European Banking Authority (EBA) and the other components of the ESFS; and
- creating ‘Chinese walls’ within the ECB in order to ensure the effective separation of its monetary policy and other tasks from its (new) supervisory tasks.¹¹

The provisions of the SSM Regulation and the ECB Framework Regulation on the functioning of the SSM and the sharing of competences between the ECB and the national competent authorities therein are presented in detail below, under Sect. 2.

1.3 Specific Supervisory Tasks in Relation to Credit Institutions and Other Supervised Entities Incorporated in Participating Member States¹²

(a) The SSM Regulation confers on the ECB an extensive range of ‘specific tasks’ in relation to credit institutions and other supervised entities incorporated in

⁹ SSM Regulation, Article 1, first sub-paragraph.

¹⁰ TFEU, Article 127, paragraph 1, first sentence, *inter alia*. On this Article (*ex* Article 105, paragraph 1, of the Treaty establishing the European Community (OJ C 321, 29.12.2006, pp 37–186—TEC)), see indicatively Smits (1997), at pp 184–187, and Louis (2009), at pp 150–151.

¹¹ Several aspects of this Regulation (and the corresponding proposal) are analysed in d’Ambrosio (2013) and Deutsche Bundesbank (2013), at pp 26–36, Ferran and Babis (2013), Ferrarini and Chiarella (2013), Huber and von Pförtl (2013), Tröger (2013), Verhelst (2013), Brescia Morra (2014), Dietz (2014), Gandrud and Hallerberg (2014), Moloney (2014) and Thiele (2014), at pp 519–525, Wymeersch (2014), Wiggins et al. (2015), Wissink et al. (2014), Alexander (2015), at pp 163–175, and Binder (2015), at pp 4–11. For a detailed analysis of the entire legal framework pertaining to the SSM, see also Gortsos (2015).

¹² On the specific supervisory tasks concerning branches in participating Member States established by credit institutions which are incorporated in non-participating Member States, see Articles 13–16 of the ECB Framework Regulation.

participating Member States,¹³ covering principal areas of micro-prudential supervision. These tasks are laid down exhaustively in Article 4, paragraph 1 and Article 5 of the SSM Regulation.¹⁴

The ECB is assigned tasks in relation to such supervised entities in accordance with the provisions of the following three legal acts of the European Parliament and of the Council, which are an integral part of the EBU: Regulation (EU) No 575/2013 (CRR),¹⁵ Directive 2013/36/EU (CRD IV)¹⁶ and Directive 2014/59/EU (BRRD),¹⁷ specifically its provisions on recovery planning and early intervention measures (Articles 5–9 and 27–30, respectively).

(b) With regard to this conferral of specific tasks upon the ECB, the SSM Regulation provides that when carrying out its tasks under the SSM Regulation, and without prejudice to the objective of ensuring the safety and soundness of credit institutions, the ECB must have full regard to the different types, business models and sizes of credit institutions, as well as the systemic benefits of diversity in the banking industry of the EU.¹⁸ In addition, no action, proposal or policy of the ECB should, directly or indirectly, discriminate against any Member State or group of Member States as a venue for the provision of banking or financial services in any currency.¹⁹

The provisions of the SSM Regulation are without prejudice to the responsibilities and related powers of the national competent authorities of participating Member States to carry out supervisory tasks not conferred on the ECB.²⁰ In this context, Recital 28 of the SSM Regulation provides that supervisory tasks not conferred on the ECB remain with the national competent authorities. These tasks include indicatively the power to receive notifications from credit institutions in relation to the right of establishment and the freedom to provide services, to supervise bodies not covered by the definition of credit institutions under EU law but supervised as credit institutions under national law, and credit institutions from

¹³ ‘Participating Member States’ are defined (SSM Regulation, Article 2, point (1)) as meaning both the Member States whose currency is the euro (in the ECB Framework Regulation also called ‘euro area participating Member States’), and the Member States with a derogation which have established a close cooperation in accordance with Article 7 of the SSM Regulation (in the ECB Framework Regulation also referred to as ‘non-euro area participating Member States’). ‘Non-participating Member States’ are those which do not meet the above criteria (*ibid.*, Article 2, point (13)).

¹⁴ For an overview, see Wymeersch (2014), at pp 37–39, and analytically Gortsos (2015), at pp 137–163.

¹⁵ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, pp 1–337).

¹⁶ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (...), OJ L 176, 27.6.2013, pp 338–436.

¹⁷ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (...), OJ L 173, 12.6.2014, pp 190–348.

¹⁸ SSM Regulation, Article 1, third sub-paragraph, and Recital 17. On the various banks’ business models (such as investment, wholesale, focused retail, and diversified retail banking) in the current EU financial system, see Ayadi et al. (2012).

¹⁹ *Ibid.*, Article 1, fourth sub-paragraph.

²⁰ *Ibid.*, Article 1, fifth sub-paragraph.

third (non-EU) countries having established branches or providing cross-border services in the EU, to supervise (retail) payments services,²¹ to carry out day-to-day verifications of credit institutions, and to carry out, where applicable, depending on the national law of each Member State, the function of competent authorities over credit institutions in relation to markets in financial instruments, the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and consumer protection.²²

(c) Of particular importance is the fact that the SSM Regulation established a ‘two-tier system’ with regard to the distribution of powers within the SSM, distinguishing between ‘significant’ and ‘less significant’ credit institutions, financial holding companies and mixed financial holding companies.²³ The relevant provisions of Article 6 of the SSM Regulation are further specified in the detailed provisions of Articles 39–72 of the ECB Framework Regulation (Part IV). A supervised entity is classified as significant upon notification of a reasoned ECB decision to this effect, according to Articles 43–49 of the ECB Framework Regulation, and ceases to be classified as significant if the ECB determines, also in a reasoned decision notified to the entity, that it is either a less significant supervised entity or no longer a supervised entity.²⁴

1.4 Structure of the SSM

1.4.1 *The Two Components of the SSM*

The specific tasks conferred on the ECB are carried out within the framework of the Single Supervisory Mechanism, the SSM. This mechanism is neither an authority nor an agency and has no legal personality. It is defined as meaning the ‘system of financial supervision’ composed, as described in Article 6 of the SSM Regulation, of the ECB and the national competent (supervisory) authorities of participating Member States, including those of Member States with a derogation, if the latter have established ‘close cooperation’ according to Article 7 of the SSM Regulation. Such cooperation is established by an ECB decision, provided that the requirements laid down in Article 7, paragraph 2 are met.²⁵

²¹ See on this Gortsos (2015), at p 139, footnote 507.

²² With regard to the last two aspects, however, Recital 29 provides that the ECB must fully cooperate, as appropriate, with the national authorities which are competent to ensure a high level of consumer protection and combat money laundering.

²³ The terms ‘credit institution’ and ‘financial holding company’ are defined in Article 2, points (3)–(4) of the SSM Regulation with reference to Article 4, paragraph 1, points (1) and (20), respectively, of the CRR, while the term ‘mixed financial holding company’ is defined in Article 2, point (5) with reference to Article 2, point (15) of Directive 2002/87/EC of the European Parliament and of the Council of 11 February 2003 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (...), OJ L 35, 11.2.2003, pp 1–27), as in force.

²⁴ ECB Framework Regulation, Article 39, paragraphs 1 and 2, respectively. On the criteria for the classification of supervised entities as significant or less significant, see Wymeersch (2014), at pp 28–32, and Gortsos (2015), at pp 101–119.

²⁵ SSM Regulation, Article 2, point (9), and Article 6, paragraph 1, first sentence. On the close cooperation procedure, see Gortsos (2015), at pp 183–193.

Accordingly, the SSM has a different institutional architecture from the Eurosystem, to the extent that members of the latter are the ECB and (exclusively) the national central banks of the Member States whose currency is the euro,²⁶ operating under the principle of decentralisation.²⁷ National competent authorities other than national central banks are not members of the Eurosystem. The same holds for central banks of Member States with a derogation, which, nevertheless, are members of the ESCB (unlike national competent authorities).²⁸

1.4.2 *The ECB as the Main Actor*

The SSM Regulation introduces a ‘vertical’ transfer, from the Member States to the EU level, of specific tasks concerning policies relevant to the direct micro-prudential supervision of (mainly) significant credit institutions and other supervised entities with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the EU and each Member State. Among various alternative options that could have been adopted, the Commission proposed and then the Council decided to confer the relevant specific tasks on the ECB.²⁹

The alternative options were either assigning the micro-prudential supervision of credit institutions to one or more of the European Supervisory Authorities’ members of the ESFS, and mainly to the EBA, or creating a new pan-European banking supervisory authority. In practice, however, the European Commission did not have any choice but to opt for this latter solution, since the Euro Area Summit of 29 June 2012 decided that ‘the Commission will present proposals on the basis of Article 127(6) for a single supervisory mechanism shortly’,³⁰ thus clearly identifying the ECB as the main actor.³¹ This decision was also confirmed by the European Council of the same day.³²

In light of the above, as of 4 November 2014, the scope of the ECB’s tasks has been significantly broadened, since its tasks consist of the following:

(a) The first group comprises the ECB’s ‘basic tasks’ set out in Article 127, paragraph 2 TFEU, i.e., the definition and implementation of the euro area monetary policy, the conduct of foreign-exchange operations consistent with the provisions of Article 219 TFEU, the holding and management of Member States’ official foreign reserves, and the promotion of the smooth operation of payment systems.³³

²⁶ TFEU, Article 282, paragraph 1, second sentence.

²⁷ This principle is analysed in Priego and Conlledo (2005).

²⁸ On the decentralised structure of the ESCB and the Eurosystem, see Smits (1997), at pp 92–94, Hadjiemmanuil (2006), at pp 551–554, and Louis (2009), at pp 135–148.

²⁹ SSM Regulation, Article 1, first sub-paragraph.

³⁰ Euro Area Summit Statement, 29 June 2012, first paragraph, second sentence.

³¹ For a detailed analysis of this Article, see Smits (1997), at pp 355–360, and Lastra and Louis (2013), at pp 82–94.

³² European Council Conclusions, 28/29 June 2012, paragraph 4(b), *in finem*.

³³ On these tasks, see indicatively Smits (1997), at pp 193–202 (with further references), Louis (2009), at pp 152–162, and Lastra and Louis (2013), at pp 79–81.

(b) The second group contains the other ECB tasks set out in the TFEU, such as the exclusive right to authorise the issue of banknotes denominated in euro according to Article 128, paragraph 1 TFEU, the approval of the volume of euro coins issued by Member States according to Article 128, paragraph 2 TFEU, the contribution to the smooth conduct of policies pursued by the (national) competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system according to Article 127, paragraph 5 TFEU, and the collection of statistical information according to Article 5 of the Statute of the ESCB and of the ECB.³⁴

(c) The third group consists of the specific tasks conferred on the ECB under Article 2 of Council Regulation (EU) No 1096/2010 (which is based on Article 127, paragraph 6 TFEU).³⁵ These tasks concern the macro-prudential oversight of the EU financial system in the context of the functioning of the European Systemic Risk Board (established by Regulation (EU) No 1092/2010),³⁶ one of the components of the ESFS.

(d) Finally, the fourth group comprises the specific tasks conferred on the ECB under the SSM Regulation concerning the micro-prudential supervision, within the SSM, of certain types of financial firms and predominantly credit institutions, also based, as already mentioned,³⁷ on Article 127, paragraph 6 TFEU.

1.4.3 The National Competent Authorities

The national competent authorities are an integral part of the SSM. They are defined in Article 2, point (2) of the SSM Regulation as meaning the authorities designated as such by the participating Member States in accordance with the CRR. The latter provides³⁸ that a competent authority is a public authority or body officially recognised and empowered by national law to supervise credit institutions (and investment firms) as part of the supervisory system in operation in the Member State concerned.

A participating Member State's national competent authority may be the national central bank, i.e., its former monetary authority if it is a euro area Member State, and its monetary authority if it is a Member State with a derogation and has established a close cooperation with the ECB. Nevertheless, in order to separate monetary policy from banking supervisory tasks, eight participating Member States have assigned, by law, micro-prudential banking supervision to independent national administrative authorities other than the central bank. In some participating

³⁴ Protocol (No 4) attached to the EU Treaties on the Statute of the European System of Central Banks and of the European Central Bank, OJ C 326, 26.10.2012, pp 230–250. For more details on all these tasks, see Smits (1997), at pp 202–221, Louis (2009), at pp 162–173, and Lastra and Louis (2013), at pp 81–95

³⁵ Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ L 331, 15.12.2010, pp 162–164.

³⁶ Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331, 15.12.2010, pp 1–11.

³⁷ See above, under 1.4.2.

³⁸ CRR, Article 4, paragraph 1, point (40).

Member States, however, national law has conferred on the national central bank (NCB) certain banking (or, in general, financial) supervisory tasks, even though the NCB is not designated as a national competent authority.

In view of this situation, national central banks of participating Member States must carry out these specific tasks within the framework set out in national law and the ECB Framework Regulation. In addition, reference to a national competent authority in that Regulation applies, as appropriate, also to the national central bank for the tasks assigned to it by national law.³⁹

2 Cooperation Within the SSM

2.1 General Principles and Obligations Applying to the Operation of the SSM

2.1.1 *The Main Principles*

The specific tasks conferred on the ECB by the SSM Regulation must be exercised, according to Article 6, within the framework of the SSM, which consists of the ECB and the national competent authorities of the participating Member States (not necessarily, as already mentioned,⁴⁰ their national central banks). In this respect, the ECB has been assigned the responsibility for the ‘effective and consistent functioning of the SSM’.⁴¹ In addition, both the ECB and the national competent authorities are subject to two obligations: a ‘duty of cooperation in good faith’, and an obligation to exchange information.⁴²

2.1.2 *Other Aspects*

(a) The national competent authorities must provide the ECB, in a timely and accurate manner, with all information necessary for the purposes of carrying out its tasks under Articles 4 and 5 of the SSM Regulation. This is without prejudice to the ECB’s power to receive directly or to have direct access to information reported, on an ongoing basis, by supervised entities, in accordance with the provisions of ECB Decision 2014/477/EU.⁴³ Such information must include information arising from the national competent authorities’ verification and on-site activities.⁴⁴

³⁹ ECB Framework Regulation, Article 2, point (9), third and fourth sentences.

⁴⁰ See above, under 1.4.3.

⁴¹ SSM Regulation, Article 6, paragraph 1.

⁴² *Ibid.*, paragraph 2, first sub-paragraph, and ECB Framework Regulation, Article 20.

⁴³ Decision 2014/477/EU of the European Central Bank of 2 July 2014 on the provision to the ECB of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014 (ECB/2014/29), OJ L 214, 19.7.2014, pp 34–37.

⁴⁴ SSM Regulation, Article 6, paragraph 2, second sub-paragraph, and ECB Framework Regulation, Article 21, paragraph 1.

If the ECB obtains information directly from the legal or natural persons referred to in Article 10, paragraph 1 of the SSM Regulation, it must provide the national competent authorities concerned with such information in a timely and accurate manner. Such information must include, in particular, information necessary for the national competent authorities to carry out their role in assisting the ECB. Without prejudice to this provision, the ECB must ensure that national competent authorities have regular access to updated information necessary for them to carry out their tasks related to micro-prudential supervision.⁴⁵

(b) If appropriate, national competent authorities are responsible for assisting the ECB, under the conditions laid down in the ECB Framework Regulation, with the preparation and implementation of any acts relating to its tasks under Article 4 of the SSM Regulation with regard to all supervised entities, including assistance in verification activities. This is without prejudice to the responsibility and accountability of the ECB with regard to its tasks under Articles 4-5. In addition, national competent authorities must follow the instructions given by the ECB when performing its tasks under Article 4.⁴⁶ To the extent that the ECB is assisted by national competent or designated authorities in exercising its tasks under the SSM Regulation, the ECB and the national competent authorities must comply with the provisions set out in European banking law (notably the CRD IV) as far as the allocation of responsibilities and cooperation between competent authorities from different Member States are concerned.⁴⁷

(c) To the extent necessary to carry out its tasks under the SSM Regulation, the ECB may require, by way of instructions, the national competent and/or designated authorities⁴⁸ to make use of their powers, under and in accordance with the conditions set out in national law and as provided for in Article 9 of the SSM Regulation, where the latter does not confer such powers on the ECB. The national competent authorities and/or, in respect of Article 5, the national designated authorities must inform the ECB about the exercise of these powers without undue delay.⁴⁹

2.2 Micro-Prudential Supervision of Significant Supervised Entities and Groups

2.2.1 Joint Supervisory Teams

(a) In principle, the ECB is responsible for the direct micro-prudential supervision of significant supervised entities and groups in participating Member States.⁵⁰ For

⁴⁵ ECB Framework Regulation, Article 21, paragraphs 2–3.

⁴⁶ *Ibid.*, Article 6, paragraph 3.

⁴⁷ *Ibid.*, Article 6, paragraph 8.

⁴⁸ ‘National designated authorities’ are defined (ECB Framework Regulation, Article 2, point (11), with reference to Article 2, point (7) of the SSM Regulation) as those within the meaning of European banking law, such as Article 458 of the CRR on macro-prudential or systemic risk identified at the level of a Member State, and Article 128, point (8) of the CRD IV on the definition of buffers.

⁴⁹ ECB Framework Regulation, Article 22.

⁵⁰ *Ibid.*, Article 39, paragraph 4.

the supervision of each of them a joint supervisory team must be established. The term ‘joint supervisory team’ (JST) is defined as meaning a team of supervisors in charge of the supervision of a significant supervised entity or a significant supervised group.⁵¹ Each JST must be composed of staff members from the ECB and from the national competent authorities appointed in accordance with Article 4 of the ECB Framework Regulation, and working under the coordination of a designated ECB staff member (JST coordinator) and one or more national competent authority sub-coordinators, as laid down in Article 6.⁵²

The ECB is responsible for the establishment and composition of JSTs. Staff members from national competent authorities are appointed to JSTs by those authorities.⁵³ If a participating Member State’s national law confers specific supervisory tasks on the national central bank which is not the national competent authority, that central bank may also appoint staff members to a JST.⁵⁴ In this case, the relevant authorities must coordinate their participation within the JSTs.⁵⁵ The ECB and the national competent authorities must consult with one another and agree on the use of the latter’s resources with regard to the JSTs.⁵⁶

(b) Without prejudice to other provisions of the ECB Framework Regulation, the JST must perform the ‘supervisory review and evaluation process’ (SREP) referred to in Article 97 of the CRD IV for the significant supervised entity or group that it supervises.⁵⁷ According to paragraph 1 of this Article of the CRD IV, taking into account the technical criteria set out in Article 98, the national competent authorities must review the arrangements, strategies, processes and mechanisms implemented by credit institutions (and investment firms) to comply with the CRD IV and the CRR and evaluate several risk aspects. Taking into account the SREP, it must also participate in the preparation of a supervisory examination programme to be proposed to the ECB Supervisory Board,⁵⁸ including an ‘on-site inspection plan’, as laid down in Article 99 of the CRD IV, for such a significant supervised entity or group.⁵⁹

The JST must also supplement the supervisory examination programme approved by the ECB and any ECB supervisory decisions with respect to the significant

⁵¹ Ibid, Article 2, point (6).

⁵² Ibid, Article 3, paragraph 1 (see below, under 2.2.1.2).

⁵³ Ibid, Article 4, paragraph 1. The appointment conditions are laid down in paragraphs 2–3.

⁵⁴ Ibid, Article 5, paragraph 1.

⁵⁵ Ibid, Article 4, paragraph 4.

⁵⁶ Ibid, Article 4, paragraph 5.

⁵⁷ See on this also European Banking Authority (2014) Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP), EBA/GL/2014/13, available at [https://www.eba.europa.eu/documents/10180/935249/EBA-GL-2014-13+\(Guidelines+on+SREP+methodologies+and+processes\).pdf](https://www.eba.europa.eu/documents/10180/935249/EBA-GL-2014-13+(Guidelines+on+SREP+methodologies+and+processes).pdf).

⁵⁸ On the ECB Supervisory Board, which is governed (mainly) by Article 26 of the SSM Regulation, see Gortsos (2015), at pp 240–254.

⁵⁹ According to paragraph 1 of this Article, the national competent authorities must, at least annually, adopt a supervisory examination programme for the institutions they supervise, containing, *inter alia* (point (c)), a plan for inspections at the premises used by an institution, including its branches and subsidiaries established in other Member States according to Articles 52, 119 and 122 of the CRD IV.

supervised entity or group that it supervises, ensure coordination with the on-site inspection team referred to in Articles 138-146 of the ECB Framework Regulation on the implementation of the on-site inspection plan, and liaise with national competent authorities, where relevant.⁶⁰

(c) The work within the JST is coordinated by the 'JST coordinator'. For this purpose, JST members must follow the JST coordinator's instructions as regards their tasks in the JST, without prejudice to their tasks and duties with their respective national competent authority. Each national competent authority appointing more than one staff member to the JST must designate a national competent authority sub-coordinator who must assist the JST coordinator as regards the organisation and coordination of the tasks in the JST, and may give instructions to the members of the JST appointed by the same national competent authority, provided that these do not conflict with the instructions given by the JST coordinator.⁶¹

2.2.2 Procedures for Micro-Prudential Supervision

2.2.2.1 Micro-Prudential Supervision of Significant Supervised Entities and Assistance by National Competent Authorities (a) The ECB must perform the direct supervision of significant supervised entities according to the procedures set out in the ECB Framework Regulation, in particular in respect of the tasks and composition of JSTs.⁶²

(b) In respect of significant supervised entities established in participating Member States, the national competent authorities must assist the ECB in the performance of its tasks under the conditions set out in the SSM Regulation and the ECB Framework Regulation. In particular, they must submit draft decisions to the ECB, in accordance with Article 91 of the ECB Framework Regulation, which provides that, pursuant to Article 6, paragraphs 3 and 7 (point (b)) of the SSM Regulation, the ECB may request a national competent authority to prepare a draft decision regarding the exercise of its tasks referred to in Article 4 of the SSM Regulation for its consideration. A national competent authority may also, on its own initiative, submit a draft decision in respect of a significant supervised entity to the Micro-Prudential Supervision ECB for its consideration through the JST.⁶³

National competent authorities must also assist the ECB, following its instructions, in preparing and implementing any acts relating to the exercise of the tasks conferred on the ECB by the SSM Regulation, including assistance in verification activities and the day-to-day assessment of the supervised entities' situation, and in enforcing its decisions, using, if necessary, the powers referred to in Articles 9 (paragraph 1, third sub-paragraph) and 11 (paragraph 2) of the SSM Regulation.⁶⁴

⁶⁰ ECB Framework Regulation, Article 3, paragraph 2.

⁶¹ Ibid, Article 6.

⁶² Ibid, Article 89 (on the JSTs, see above, under 2.2.1).

⁶³ Ibid, Articles 90–91.

⁶⁴ These Articles of the SSM Regulation are analysed in Gortsos (2015), at pp 202–203 and 207–208, respectively.

(c) The ECB and the national competent authorities must, without undue delay, exchange information relating to significant supervised entities if there is a serious indication that such entities can no longer be relied on to fulfil their obligations towards their creditors and, in particular, can no longer provide security for the assets entrusted to them by their depositors. The same applies if there is a serious indication of circumstances that could lead to a determination that the credit institution's deposits, as referred to in Article 1, paragraph 3, point (i) of Directive 94/19/EC of the European Parliament and of the Council on deposit guarantee schemes,⁶⁵ are unavailable. The ECB and the national competent authorities must do so prior to a decision relating to such a determination.⁶⁶

2.2.2.2 Compliance with Fit and Proper Requirements for Managers In order to ensure the existence of robust governance arrangements, a significant supervised entity must notify, without undue delay, the relevant national competent authority of any change in the membership of its management bodies as far as managerial and supervisory functions ('managers') are concerned, within the meaning of Article 3, paragraphs 1 (point 7) and 2 of the CRD IV,⁶⁷ including the renewal of their term of office. The ECB must be notified by the relevant national competent authority, without undue delay, of the timeframe within which a decision has to be taken, in accordance with relevant national law. This is without prejudice to relevant EU and national law and Articles 73–88 of the ECB Framework Regulation, specifying the provisions of Articles 14–15 of the SSM Regulation on the granting and withdrawal of credit institutions' authorisations and the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions.⁶⁸ In order to assess the suitability of managers, the ECB has the supervisory powers that competent authorities have under the relevant EU and national law.⁶⁹

A significant supervised entity must also inform the relevant national competent authority of any new facts that may affect an initial assessment of suitability or any other issue which could impact on the suitability of a manager without undue delay once these facts or issues are known to the supervised entity or the relevant manager. The relevant national competent authority must notify the ECB of such new facts or issues without undue delay. The ECB may initiate a new assessment, either based on new facts or issues, or if it becomes aware of any new facts that may

⁶⁵ OJ L35, 31.5.1994, pp 5–14.

⁶⁶ ECB Framework Regulation, Article 92. This provision of Directive 94/19/EC is repeated in Article 2, paragraph 1, point (8) of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast), OJ L 173, 12.6.2014, pp 149–178, which applies from 4 July 2015 and constitutes one of the main legal acts pertaining to the EBU. See on this, Gortsos (2014), at pp 125–126.

⁶⁷ Article 3, paragraph 1, point (7) of the CRD IV defines the term 'management body'. According, then, to Article 3, paragraph 2, where the CRD IV refers to the management body and, pursuant to national law, its managerial and supervisory functions are assigned to different bodies or different members within one body, the Member State must identify the bodies or members of the management body responsible in accordance with its national law, unless otherwise specified therein.

⁶⁸ On Articles 14–15 of the SSM Regulation, see Gortsos (2015), at pp 212–222.

⁶⁹ ECB Framework Regulation, Article 93.

have an impact on the initial assessment of the relevant manager or any other issue which could impact on the suitability of a manager. It must then decide on the appropriate action in accordance with the relevant EU and national law, and accordingly inform the relevant national competent authority without undue delay.⁷⁰

2.2.2.3 Other Procedures Without prejudice to the specific procedures provided for in the (above-mentioned) Articles 73–88 of the ECB Framework Regulation⁷¹ and to its ordinary interaction with its national competent authority, a significant supervised entity must address to the ECB all its requests, notifications or applications relating to the exercise of the tasks conferred on it. The ECB must make any such request, notification or application available to the relevant national competent authority and may request the latter to prepare a draft decision in accordance with Article 91.⁷²

2.3 Micro-Prudential Supervision of Less Significant Supervised Entities and Groups

2.3.1 The Provisions of the SSM Regulation

2.3.1.1 Powers and Responsibilities of the ECB (a) With regard to less significant supervised entities and taking into account the provisions of the ECB Framework Regulation,⁷³ the ECB has also been granted a wide range of powers, even though, in principle, these are subject to the direct supervision of national competent authorities. In particular, it can issue regulations, guidelines or general instructions addressed to national competent authorities, in order for the latter to perform their tasks under Article 4, paragraph 1 of the SSM Regulation, and adopt supervisory decisions.⁷⁴

Excluded are points (a) and (c) of Article 4, paragraph 1 on the granting and withdrawal of authorisation of credit institutions and the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions. In such cases, the relevant supervisory tasks are performed by the ECB itself for all supervised entities, be they significant or less significant, according to the provisions of Articles 14–15 of the SSM Regulation.

In order to ensure consistency of supervisory outcomes within the SSM, general instructions may refer to the ECB's specific supervisory powers under Article 16, paragraph 2 of the SSM Regulation for groups or categories of supervised entities.⁷⁵

In addition, the ECB exercises oversight over the functioning of the SSM, on the basis of the responsibilities and procedures set out in Article 6 of the SSM

⁷⁰ Ibid, Article 94.

⁷¹ See above, under 2.2.2.2.

⁷² ECB Framework Regulation, Article 95.

⁷³ See below, under 2.3.2.

⁷⁴ Supervisory decisions are governed by Article 22, paragraph 2 of the SSM Regulation and Articles 33–34 of the ECB Framework Regulation. See on this, Gortsos (2015), at pp 282–283.

⁷⁵ Article 16 of the SSM Regulation is analysed in Gortsos (2015), at pp 222–224.

Regulation and in the ECB Framework Regulation. It may at any time make use of its investigatory powers referred to in Articles 10–13 of the SSM Regulation,⁷⁶ and may request, on an ad hoc or continuous basis, information from the national competent authorities on the performance of their tasks.⁷⁷

(b) If necessary in order to ensure consistent application of ‘high supervisory standards’, the ECB may, at any time, decide to exercise directly the supervision of a less significant supervised entity or group. This decision may be taken either on its own initiative after consulting with national authorities, or upon request by a national competent authority.⁷⁸ Before taking the decision, the ECB must take into account, in particular, any of the following six factors:

- whether the less significant supervised entity or group is close to meeting one of the criteria contained in Article 6, paragraph 4 of the SSM Regulation;
- its interconnectedness with other credit institutions;
- whether the less significant supervised entity concerned is a subsidiary of a supervised entity with its head office in a non-participating Member State or a third country, and has established one or more subsidiaries, which are also credit institutions, or one or more branches in participating Member States, of which at least one is significant;
- the fact that the ECB’s instructions have not been followed by the national competent authority;
- the fact that the national competent authority has not complied with the acts referred to in the first sub-paragraph of Article 4, paragraph 3 of the SSM Regulation;
- the fact that the less significant supervised entity has requested or received indirectly public financial assistance from the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM).⁷⁹

In the latter case (if public financial assistance has been requested or received indirectly from the EFSF or ESM),⁸⁰ the national competent authority must inform the ECB as soon as it becomes aware of the possible need for such assistance, and submit its assessment of the financial situation of the less significant supervised entity to the ECB, for its consideration, before submitting it to the ESM, except in duly justified cases of urgency.⁸¹

2.3.1.2 Responsibilities of National Competent Authorities With regard to less significant supervised entities, taking into account the provisions of the ECB

⁷⁶ On these Articles, see *ibid.*, at pp 204–212.

⁷⁷ SSM Regulation, Article 6, paragraph 5, points (a) and (c)–(e), respectively.

⁷⁸ *Ibid.*, point (b), and ECB Framework Regulation, Articles 67–69.

⁷⁹ ECB Framework Regulation, Article 67, paragraph 2.

⁸⁰ SSM Regulation, Article 6, paragraph 5, point (b). On the differences between direct (under the new Direct Recapitalisation Instrument (DRI)) and indirect financial assistance provided by the ESM, see Gortsos (2015), at pp 29–32.

⁸¹ ECB Framework Regulation, Article 62.

Framework Regulation, subject to the procedures provided therein, and without prejudice to the above responsibilities of the ECB, the national competent authorities must carry out and be responsible for the tasks referred to in Article 4, paragraph 1 of the SSM Regulation, with the exception of points (a) and (c), as already mentioned⁸² (on the granting and withdrawal of authorisation of credit institutions and the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions), and point (h) on the supplementary supervision of financial conglomerates,⁸³ and adopt all relevant supervisory decisions.

On the other hand, with regard to all supervised entities, significant and less significant, the national competent and designated authorities maintain their powers, in accordance with national law, to obtain information from such entities and undertakings included in their consolidated financial situation, and perform on-site inspections thereof. This is without prejudice to Articles 10–13 of the SSM Regulation on the ECB's investigatory powers. In addition, the national competent authorities must inform the ECB, in accordance with the ECB Framework Regulation, of the measures taken, and closely coordinate those measures with the ECB. They must also report to the ECB on a regular basis on the performance of their activities under Article 6 of the SSM Regulation.⁸⁴

2.3.2 *The Provisions of the ECB Framework Regulation: Procedures for Micro-Prudential Supervision*

2.3.2.1 Notification to the ECB of Material Supervisory Procedures and Material Draft Supervisory Decisions of National Competent Authorities (a) If the situation of any less significant supervised entity deteriorates 'rapidly and significantly', national competent authorities must inform the ECB. This applies especially if such deterioration could lead to a request for direct or indirect financial assistance from the ESM, without prejudice to the application of Article 62 of the ECB Framework Regulation.⁸⁵

(b) National competent authorities must provide the ECB with information relating to their 'material supervisory procedures' concerning less significant supervised entities in order to enable it to oversee the functioning of the SSM in accordance with Article 6, paragraph 5, point (c) of the SSM Regulation.⁸⁶ Such procedures concern the removal of members of the management board of a less significant supervised entity and the appointment of special managers, and procedures having a significant impact on such an entity. In this respect, the ECB must define 'general criteria', taking into account, in particular, the risk situation

⁸² See above, under 2.3.1.1 (a).

⁸³ The term 'financial conglomerate' is defined in Article 2, point (6) of the SSM Regulation with reference to Article 2, point (14) of Directive 2002/87/EC.

⁸⁴ SSM Regulation, Article 6, paragraph 6.

⁸⁵ ECB Framework Regulation, Article 96.

⁸⁶ See above, under 2.3.1.1.

and the potential impact of the less significant supervised entity concerned on the domestic financial system in order to determine the information to be notified.⁸⁷

In addition, the ECB may, at any time, request from national competent authorities information on the performance of their tasks in respect of less significant supervised entities. The national competent authorities must, on their own initiative, notify the ECB of any other supervisory procedure which they consider material or may negatively affect the reputation of the SSM. If the ECB requests a national competent authority to further assess specific aspects of its material supervisory procedures, the request must specify the aspects concerned. In this case, the ECB and the national competent authority must respectively ensure that the other party has sufficient time to enable the efficient functioning of the procedure and the SSM as a whole.⁸⁸

(c) Article 98 of the ECB Framework Regulation lays down the concept of ‘material draft ECB supervisory decisions’. This term is used for draft ECB supervisory decisions concerning the less significant supervised entities regarding which the ECB considers that, based on the above-mentioned ‘general criteria’,⁸⁹ the relevant information must be notified to it. This is required in order to enable the ECB to exercise oversight over the functioning of the SSM according to Article 6, paragraph 5, point (c) of the SSM Regulation. Such material draft ECB supervisory decisions, fulfilling the specific criteria laid down in paragraphs 2–3 of Article 98 of the ECB Framework Regulation, must be sent to the ECB by the national competent authority concerned.⁹⁰ This must occur at least ten days in advance of the planned date of their adoption, and the ECB must express its views within a reasonable time before its planned adoption.⁹¹

2.3.2.2 Ex-Post Reporting by National Competent Authorities to the ECB In order to enable the ECB to exercise oversight over the functioning of the SSM pursuant to Article 6, paragraph 5, point (c) of the SSM Regulation, the ECB may require national competent authorities to report to it, on a regular basis, on the measures they have taken and on the performance of the tasks they carry out in accordance with Article 6, paragraph 6 of the SSM Regulation. Furthermore, the ECB must inform them annually of the categories of less significant supervised entities and the nature of the information required. These requirements are without prejudice to the ECB’s right to make use of the investigatory powers referred to in Articles 10–13 of the SSM Regulation in respect of less significant supervised entities.⁹² In addition, national competent authorities must submit to the ECB an annual report on less significant supervised entities, less significant supervised groups or categories of less significant supervised entities in accordance with the ECB’s requirements.⁹³

⁸⁷ ECB Framework Regulation, Article 97, paragraphs 1–2.

⁸⁸ *Ibid.*, Article 97, paragraphs 3–5.

⁸⁹ See above, under (b).

⁹⁰ ECB Framework Regulation, Article 98, paragraph 1.

⁹¹ *Ibid.*, Article 98, paragraph 4.

⁹² *Ibid.*, Article 99.

⁹³ *Ibid.*, Article 100.

3 Concluding Remarks

(a) The framework established by the SSM Regulation and the ECB Framework Regulation with regard to the micro-prudential supervision of credit institutions (and other supervised entities) in participating Member States constitutes a *novum* in European banking law. A major component of the ‘bank safety net’⁹⁴ has been Europeanised by means of a ‘vertical’ transfer, from the Member States to the EU level, of specific tasks relevant to the micro-prudential supervision of credit institutions with a view to bolstering the safety and soundness of credit institutions and the stability of the financial system both within the EU and in each participating Member State.⁹⁵ Of particular importance is also the fact that credit institutions and other supervised entities and groups incorporated in a non-participating Member State may become subject to the ECB’s supervisory authority under the provisions of the SSM Regulation once a ‘close cooperation’, as set out in Article 7, has been established.⁹⁶

The division of competences between the ECB and the national competent authorities of Member States participating in the SSM reflects the decision to create a ‘hub’ (i.e., the ECB), without doing away with the ‘spokes’ (i.e., the national competent authorities).⁹⁷ This hub-and-spoke structure is designed comprehensively. The ECB has been assigned specific micro-prudential supervisory tasks and has also been equipped with certain macro-prudential tools and powers, exhaustively listed in Articles 4 and 5 of the SSM Regulation with regard to the significant supervised entities and groups, as defined in Article 6 of the SSM Regulation. Tasks not mentioned in these Articles remain with the national competent authorities.⁹⁸

In addition, the ECB has quite a substantial range of powers and responsibilities with regard to less significant supervised entities and groups, still supervised by national competent authorities, including the power to decide to exercise directly the supervision of a less significant supervised entity or group, if deemed necessary in order to ensure the consistent application of ‘high supervisory standards’ according to Article 6, paragraph 5 of the SSM Regulation.⁹⁹

For both the ECB and the national competent authorities the SSM Regulation prescribes a ‘duty of cooperation in good faith’ and an obligation to exchange information.¹⁰⁰ These are two fundamental obligations which introduce a new qualitative element in the relations of national competent authorities, traditionally reluctant to cooperate and exchange information about their domestic credit institutions. The ECB Framework Regulation lays down further general principles

⁹⁴ For an overview of the components of the ‘bank safety net’, aimed at contributing to the stability of the banking system, see Guttentag and Herring (1986), Demirgüç-Kunt and Huizinga (1999) and Gortsos (2012), at pp 90–106 (with further references).

⁹⁵ See above, under 1.4.2.

⁹⁶ See above, under 1.4.1.

⁹⁷ On this terminology, see Carletti and Dell’Ariccia (2015).

⁹⁸ See above, under 1.3 (b).

⁹⁹ See above, under 2.3.1.1 (b).

¹⁰⁰ See above, under 2.1.1.

and obligations pertaining to the operation of the SSM,¹⁰¹ as well as specific procedures for the micro-prudential supervision of significant and less significant supervised entities and groups, necessitating cooperation between the ECB and the national competent authorities, including information sharing.¹⁰²

(b) The resilience of this new supervisory framework will have to be tested. In this respect, it should be taken into account that the ECB, as an institution, is (thus far) deemed both highly efficient and credible by market participants on account of its successful conduct of monetary policy and management of the recent (2007–2009) international financial crisis. This ‘accumulated’ credibility should, at least initially, breathe into the conduct of its new supervisory tasks, even though ‘reasoning by analogy’ is not always efficient.

It is also expected that the risk of ‘national capture’ in supervision will be lower.¹⁰³ In any event, the smoothness of the interaction between the national competent authorities and the ECB, especially within the context of JSTs, will definitely determine the success of the SSM.¹⁰⁴

There is no doubt that, in order to adequately fulfil its tasks within the SSM, the ECB will have to develop a ‘supervisory culture’. In constructing this new culture, it is necessary to guarantee the transmission of know-how to the new ECB staff with a background as national supervisors, take into consideration the particularities of the different national banking systems, as well as develop and maintain a solid relationship with national competent authorities.

Finally, it should be noted that, because of the sharing of supervisory competences between the ECB and the national competent authorities within the SSM, even where direct supervision is at stake, there is a certain lack of clarity on the allocation of liability between them, especially in borderline and concurrent supervisory competence cases.¹⁰⁵ This lack of clarity will also crucially determine the future success of the close cooperation procedure under Article 7 of the SSM Regulation.¹⁰⁶

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¹⁰¹ See above, under 2.1.2.

¹⁰² See above, under 2.2.2 and 2.3.2, respectively.

¹⁰³ See, nevertheless, the article of Carletti and Dell’Ariccia (2015), who are sceptical about this, premised on a model which explores how a supranational institutional design affects the incentives of national supervisory authorities to appropriately collect information on behalf of the supranational supervisor.

¹⁰⁴ See above, under 2.2.1.

¹⁰⁵ As regards national banking supervisors’ liability in the EU, see Rini (2008) (also drawing a comparison with Swiss law), Würmli (2010) and Athanassiou (2011).

¹⁰⁶ For a more detailed evaluation of the SSM framework, from the author’s perspective, see Gortsos (2015), at pp 307–314.

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