



Please enter a search term to begin your search.

- [About IJPL](#)
- [Current Issue](#)
- [Archive](#)
- [Editors](#)
- [News](#)
- [Links](#)
- [Contact Us](#)

[Home](#) » [Archive](#) » The ECB's Banking Supervision And European Administrative Integration: Organisation, Procedures And Legal Acts

Sandra Antoniazzi

The ECB's Banking Supervision And European Administrative Integration: Organisation, Procedures And Legal Acts

[Comments \(3\)](#)

The paper analyses the organisation, proceedings and legal acts of the ECB in the banking supervision after the new specific tasks assigned to it in 2013, according to Regulation (EU) no.1024/2013. Furthermore, it examines the implementation of this Regulation both on the Single Supervisory Mechanism (SSM) in national banking systems and on the Single Resolution Mechanism (SRM) for crisis of bank by showing all the difficulties of harmonisation and of administrative integration. It concludes with a reflection on the necessity of resolving the issue of democratic legitimacy, of transparency and accountability of the new system.

[download this article in PDF format >](#)

[download IJPL volume 2 2015 in PDF format >](#)

© 2009 - 2017 I.J.P.L - All rights reserved · ISSN: 2239-8279 Italian Journal of Public Law [Online] - redazione.ijpl@gmail.com

THE ECB'S BANKING SUPERVISION AND EUROPEAN
ADMINISTRATIVE INTEGRATION:
ORGANISATION, PROCEDURES AND LEGAL ACTS

*Sandra Antoniazzi**

Abstract

The paper analyses the organisation, proceedings and legal acts of the ECB in the banking supervision after the new specific tasks assigned to it in 2013, according to Regulation (EU) no. 1024/2013. Furthermore, it examines the implementation of this Regulation both on the Single Supervisory Mechanism (SSM) in national banking systems and on the Single Resolution Mechanism (SRM) for crisis of bank by showing all the difficulties of harmonisation and of administrative integration. It concludes with a reflection on the necessity of resolving the issue of democratic legitimacy, of transparency and accountability of the new system

TABLE OF CONTENTS:

1. Introduction: the legal framework and the object of the paper.....	319
2. Prudential supervision and regulation: separation in the SSM.....	322
3. Regulation (EU) no. 1024/2013: principles of administrative organisation, tasks and the independence of the ECB.....	330
4. Administrative proceedings and legal acts.....	338
5. Critical considerations on administrative procedures and legal acts.....	348
6. The implementation of Regulation (EU) on SSM in national banking systems and the difficulties of harmonisation and administrative integration.....	354
7. Conclusions on requirements of democratic legitimacy and accountability.....	361

* Assistant Professor of Administrative Law, University of Rome "Tor Vergata".

1. Introduction: the legal framework and the object of the paper

This paper analyses the organisation, proceedings and legal acts of the ECB in the banking supervision after the new specific tasks assigned to it in 2013, clearly different from the role exercised on monetary policy¹, after a rapid evolution because of the complexity of the economic and financial crisis that required the Banking Union; the new legal framework has led to a significant contribution to the *administrative integration* for the Member States participating in the Monetary Union.

As is widely known, the primary objective of the European System of Central Banks (ESCB) is *price stability*; the main activities consist of defining and implementing the monetary policy of the EU, conducting foreign-exchange operations, holding and managing the official foreign reserves of the Member States and promoting the smooth operation of the payment system²; in addition the ECB shall have the exclusive task of authorising the issue of Euro banknotes³. In order to carry out the tasks entrusted to the ESCB, the ECB has *regulatory powers* and may adopt legal acts⁴, regulations and recommendations, deliver opinions and take decisions, and issue guidelines and instructions⁵; these legal and administrative acts are intended to establish rules for the ESCB or addressed to third parties and they are particular measures of primary level in comparison with the other instruments of the EU law⁶, because the ECB does not have legislative power. In fact regulations are general in their application, binding in their entirety and directly applicable in all Euro-area Member States without the need for implementation in national law; however, the ECB may be involved in legislative procedures as the proposer or adviser in emending certain provisions of the Statute⁷ and in drafting EU and national legal acts⁸.

¹ For organisational principles and legal acts see: S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria* (2013), 1, 49.

² Art. 127 TFEU.

³ Art. 128 TFEU.

⁴ Art. 132 TFEU.

⁵ Art. 14.3 Statute ESCB-ECB.

⁶ Art. 288-298 TFEU.

⁷ Art. 40-41.

⁸ Arts 127.6, 133, 289.4, 292, 294.15 TFEU.

Since January 1999, the ECB has had exclusive competence on monetary policy and it did not exercise direct supervision on credit institutions until the Council Regulation⁹ (EU) no. 1024/2013. In fact, the ESCB and the ECB shall only contribute “to the smooth conduct of policies pursued by the competent Authorities relating to the prudential supervision of credit institutions and the stability of the financial system”¹⁰; indeed, the complexity of the economic and financial crisis¹¹ has led to a rapid

⁹ 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”. It has been legally binding since 3rd November 2013, and the ECB started to exercise its duties since 4th November 2014.

¹⁰ Art. 127.5 TFEU. On the cooperation system between national authorities for the integration of the banking and financial sectors before the recent innovation: G.A. Walker, *European Banking Law, Policy and Programme Construction* (2007), 233; M. van Empel, *Financial Services in the EU: Harmonization and Liberalization*, in Id (ed.), *Financial Services in Europe* (2008), 25 ss.

¹¹ About the causes of the crisis, the possible remedies and consequences on the current framework of European institutions: J.C. Rochet, *Why Are There So Many Banking Crises?* (2008), 21; on the legal constitution of markets and reasons for crisis: T.C. Halliday and B.C. Carruthers, *Bankrupt, Global Lawmaking and Systemic Financial Crisis* (2009); A.E. Goodhart, *The Regulatory Response to the Financial Crisis* (2009), at 45 ss.; D. De Figueiredo Moreira Neto, *Crisis y regulación de mercados financieros. La autorregulación regulada: ¿Una respuesta posible?*, *Revista de Administración Pública* 9 (2009); N. Moloney, *EU Financial Market Regulation After the Global Financial Crisis: “More Europe” or More Risks?*, *Common Market Law Review* 1383 (2010); P.D. Amri-B.M. Kocher, *The Political Economy of Financial Sector Supervision and Banking Crises: A Cross-Country Analysis*, *Eur. L. J.* 24 (2012). On the economic and not financial nature of the crisis as caused by the securitisation of the credit risk see J. Black, *The Rise, Fall and Fate of Principles-Based Regulation*, in A. Kern and M. Niamh (eds.), *Law Reform and Financial Markets* (2011) 3; F. Giavazzi-A. Giovannini, *Central Banks and the Financial System*, in S. Eijffinger and D. Mascianduro (eds.), *Handbook of Central Banking, Financial Regulation and Supervision After the Financial Crisis* (2011), 3; A. Singh, *The Economic and Financial Crisis of 2008-2010: The International Dimension* in M. H. Wolfson and G.A. Epstein (eds.), *The Political Economy of Financial Crises* (2013), 213; F. Merusi, *Il sogno di Diocleziano. Il diritto nelle crisi economiche* (2013), 53; O. Butzbach and K. von Mettenheim (eds.), *Alternative Banking and Financial Crisis* (2014); E.G. Tsionas, *The Euro and International Financial Stability* (2014); M. Liberati, *La crisi del settore bancario tra aiuti di Stato e meccanismi di risanamento e risoluzione*, *Riv. it. dir. pubbl. com.* 1339 (2014); D. Wydra and H. Pülzi, *Solidarity Discourse in National Parliaments: The European Crisis Hits Home!*, *Archiv des Völkerrechts* 92 (2014); G. Bocuzzi,

evolution of a new role¹² for the ECB, albeit one clearly different from the activity exercised in monetary policy.

The Regulation on the *Single Supervisory Mechanism* (SSM) – the first pillar of the Banking Union¹³ – provides specific tasks of prudential supervision on credit institutions and financial holding companies, except for insurance companies¹⁴, and special legal procedures, with the consultation of the European Parliament and the ECB. Provision has been made for further legal acts, with regard to the well-known categories of monetary policy as well as new administrative procedures in compliance with the activity of supervision and the new bodies; however these acts have, in the hierarchy of norms, a lower value than the rules of the European Commission and the EBA¹⁵. The paper aims to examine the critical profiles of this new additional administrative integration in relation to European banking supervision and its guarantee of effectiveness.

Further requirements of Banking Union are provided for by European Parliament and Council Regulation (EU) no. 806/2014 and Directive no. 2014/59/EU: that is to say, the *Single Resolution Mechanism* for crisis of banks (SRM) and *Resolution Authority*, in order to remove the “vicious circle” between crisis and sovereign debt, sustain banks, overcome financial fragmentation and finally adopt a common policy to rescue banks¹⁶; new authorities, proceedings and legal acts are introduced, creating a new complicated scheme.

L'Unione Bancaria Europea. Nuove istituzioni e regole di vigilanza e di gestione delle crisi bancarie (2015), 29.

¹² See Art. 127.5 TFEU. For the effects of the ECB's monetary policy on shares, bonds and money-market instruments, according to an empirical investigation for a number of European markets see D. Faber, *Auswirkungen geldpolitischer Maßnahmen der Europäischen Zentralbank auf Aktien-, Anleihe- und Währungsmärkte, Eine empirische Untersuchung ausgewählter europäischer Märkte*, (2009), 5.

¹³ The three fundamental pillars of the European Banking Union are the SSM, the SRM and the Deposit Guarantee Schemes (DGS) with the Single Rulebook; see the recitals of Regulation on SSM.

¹⁴ Art. 127.6 TFEU.

¹⁵ Art. 4, para 3.1. of the Regulation on SSM.

¹⁶ See “Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 806/2014 in order to establish a European Deposit Insurance Scheme”, 24 November 2014; COM(2015) 586 final 2015/0270 (COD), in *www.eur-lex.europa.eu*.

2. Prudential supervision and regulation: separation in the SSM

In November 2011 the Commission had already requested a number of experts to draft a report (*Liikanen Report*) about the pros and cons of a *future structural reform* of the EU banking system, also making a comparison with the experience of other systems¹⁷. The report¹⁸ was presented in October 2012 and was clearly a compromise between the US solution and the UK solution, according to a number of recommendations applied when the SRM was created. These recommendations focus on compulsory separation into different legal subjects of trading activity from the remaining banking activity, but the separation is not compulsory when the trading activities are either 15-20% of the profits or under 100 billion Euros. This will not entail a complete end to the “universal bank” for all banking activities, but a legal separation, although the best practice should lead to the first scenario¹⁹. The report released a Proposal²⁰ to separate legal trading entities and the rest of the banking group, and to separate retail activities and investment business by means of a clear distinction between transparent essential banking activities for the real economy (credit disbursement, payment systems and deposits) and investment activities.

¹⁷ For instance in the USA the debate about the *Volcker rule* and *Dodd-Frank Act*. About the separation between banking activities see reforms in France (*Loi de séparation et de régulation des activités bancaire*, n. 2013-672 du 26 juillet 2013, in www.legifrance.gouv.fr), in Germany (*Trennbankengesetz* del 2013, at www.bundesfinanzministerium.de) and in the United Kingdom (*The Financial Services (Banking Reform) Act 2013*, in www.legislation.gov.uk).

¹⁸ See the Report “*High-level Expert Group on reforming the structure of the EU banking sector, Chaired by Erkki Liikanen, Final Report*”, Brussels, 2 October 2012, IP/12/1048, at http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf; “*Follow-up to the Liikanen report – 16-17 May 2013*” on Stakeholders meeting on Bank Structural Reform and Consultation: reforming the structure of the EU banking sector, in www.consilium.europa.eu.

¹⁹ About the “dangerous” encroachment of banks into finance see F. Merusi, *Il sogno di Diocleziano*, cit. at 11, 67.

²⁰ See Press Releases “*Structural reform of the EU banking sector*”, Bruxelles, 29 January 2014, at http://europa.eu/rapid/press-release_IP-14-85_en.htm.; “*Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions*” (29 January 2014, COM (2014) 43 final; “*Banking structural reform: ECOFIN Council agrees its position – 19 June 2015*”, in www.consilium.europa.eu).

A huge reform of supranational banking system is about to be introduced, in relation to the current single supervision and resolution of banking crises. Evidently, national systems should adhere to it whether directly (regulations) or indirectly with ancillary legislation (directives). The reform will be inspired by a number of points highlighted by the *Economic and Monetary Affairs Committee*²¹, such as the encouragement of competition, the demarcation between economic activities (especially when harmful) and traditional banking operations, the improvement of corporate governance, the will to strengthening banking capital assets and rules on liquidity (Regulation (EU) no. 575/2013), and the fourth revision on financial conditions (Directive no. 2013/36/EU), resources for the real economy and means to implement correctly the mechanisms for recovery and crisis resolution. Moreover, other instruments are relevant, such as the Directive no. 2013/14/EU on *rating agencies*²² and the Proposal for a regulation of the European Parliament and of the Council on the indices used as benchmarks in financial instruments and contracts²³.

In this context of reform, the debate preceding the Regulation (EU) on SSM on whether to grant the ECB direct powers of banking supervision also depended on a certain

²¹ See "Draft Report" 8 March 2013, (2013/2021- INI) and *Amendments*, 2013/2021 (INI), 18 April 2013, about "*Reforming the structure of the EU banking sector*" and rules to separate risks of investment activity and of banking services; *Report* 24 June 2013 (A7-0231/2013) at www.europarl.europa.eu.

²² For details see G. Deipenbrock, *Trying or Failing Better Next Time? – The European Legal Framework for Credit Rating Agencies after Its Second Reform*, *European Business Law Review* 207 (2014); A. Kern, *The Risk of Ratings in Bank Capital Regulation*, *European Business Law Review* 295 (2014).

²³ See these documents available in www.ec.europa.eu: Commission proposals to prohibit and criminalise manipulation of benchmarks (27 July 2012); Consultation on benchmarks and market indices (5 September 2012); Proposal of Regulation of the Commission COM (2013) 641 final (18 September 2013); EU Council backs European Commission proposal to fight against the manipulation of financial benchmarks (13 February 2015); European Parliament agrees negotiating mandate for regulation of financial benchmarks (19 May 2015) and the text adopted (P8_TA(2015)0195, in www.europarl.europa.eu); Agreement between the Parliament and the Council on a Regulation of financial benchmarks (25 November 2015). See the opinion of the ECB 7 January 2014 (CON/2014/2) with some integrations and press release 29 January 2014 (IP/14/85) in www.ecb.europa.eu.

difficulty in the theoretical framework of the administrative function of supervision in the absence of a precise legal definition²⁴, as also emerges in our own legal system; furthermore, the European integration of the banking and financial sector has accelerated unexpectedly because of widespread consequences of the crisis.

As is known, supervision is not the only typical task of the national central banks, given that their aims and tasks have evolved over time: not only the issuance of money, but also lending to the banks, control of the money and foreign exchange, control of the loan instrument and direction of the economy (structural supervision), a strategic role for financial stability (prudential supervision). Furthermore in some orders (UK, Germany), prudential supervision was exercised by authorities other than the central bank; for example in UK, until the Financial Services Act 2012, there was a single supervisor - Financial Services Authority²⁵ - which had the power to regulate banks,

²⁴ On the concept of regulation of the banking sector see: C.M. Peláez and C.A. Peláez, *Regulation of Banks and Finance* (2009), 4-20; the authors state that the economic theory of regulation is “the essence of the private interest view of regulation with predictions that are different than those of the public view. The public view predicts that regulation will occur in response to market failures. The excess profits charged by a monopolist or the externalities of pollution cause the government to intervene to find an efficient allocation that cannot be obtained in a free market”; while the private-interest view claims that the regulated industrialists, politicians, and government officials interact to create regulatory agencies and measures to optimise their own interests. For details on regulation: A. Busch, *Banking Regulation and Globalization* (2009), 23; F. Zatti, *La vigilanza tra regolamentazione e controllo* (2015), 51-53; for the debate on international banking regulation about its role and the right way of exercising the function of the controls, see A. Carretta, P. Schwizer, *La vigilanza bancaria dopo i controlli interni: verso la consulenza regolamentare e il knowledge management*, in A. Carretta, P. Schwizer (eds.), *Governance 2.0*, (2015), 21.

²⁵ On the concept of a unified financial service regulator and the case of the UK: K.K. Mwenda, *Legal aspects of financial services regulation and the concept of a unified regulator*, (2006), 37, 82. About the reform in the UK: A. Adami, *La regolazione dei mercati finanziari nel Regno Unito dopo il Financial Services and Markets Act 2000* (2004); J. Russen, *Financial Services*, (2006), 63; A. Busch, *Banking Regulation and Globalization*, cit at 24, 123; for a critical view on FSA’s tasks: T. Arthur, P. Booth, *Does Britain Need a Financial Regulator?* (2010), 24; E. Lomnicka, *The Control of Banking Activities in the United Kingdom*, in E.P. Ellinger, E. Lomnicka and C.V. M. Hare (eds.), *Ellinger’s Modern Banking Law* (2011), 26; G. Morton, A. Marsh, *UK Central Banking and Financial Stability*, in M.

insurance companies and other sectors (e.g., investment and pensions advisers, stockbrokers, fund managers and derivatives traders), but the financial and banking crises of 2008 revealed the weaknesses of this system with the numerous responsibilities that the Authority failed to anticipate creating many difficulties²⁶. A new system of financial services was introduced under the Financial Services Act 2012 establishing three regulatory institutions to achieve increased effectiveness on systemic financial stability rather than an individual authority which adopts too many decisions for different sectors. The first is the Financial Policy Committee (FPC) of the Bank of England, responsible for macro-prudential regulation; the Financial Conduct Authority (FCA) as the formal successor of the FSA and responsible for consumer protection and market regulation; the Prudential Regulation Authority (PRA), a subsidiary of the Bank of England and responsible for the prudential regulation of firms. The FCA has a strategic role which is “ensuring that the relevant markets [primarily the financial markets and regulated markets for financial services] function well”; its general functions are the making of rules, preparing and issuing codes, the provision of general guidance under the Act and “determining the general policy and principles by reference to which it performs particular functions under this Act”²⁷. It has rule-making, investigative and enforcement powers to protect and regulate the financial services industry and grants permission to individuals or firms to carry out regulated activities; while the PRA is responsible for the prudential regulation and supervision of banks, credit unions, insurers and major investment firms, and it has statutory objectives: to promote the safety and soundness of these firms and to contribute for insurers to the securing of an appropriate degree of protection for policyholders²⁸. It makes forward-looking judgments on the risks posed by firms to its statutory objectives

Blair QC, G. Walker and S. Willey (eds.), *Financial Markets and Exchanges Law* (2012), 101.

²⁶ Originally established as a wholly owned subsidiary of the Bank of England, its existence now rests on the Act of 2000, s. 2A as amended by the 2012 Act, s. 6 (1).

²⁷ Act of 2000, s. 1B (6) as amended by the Act of 2012, s. 6.

²⁸ At <http://www.bankofengland.co.uk/pru/Pages/default.aspx>, For the tasks and objectives of the PRA see the 2000 Act, s. 2E-I as amended by the 2012 Act, s. 6 (1).

and also has powers to grant permission to carry out regulated activities²⁹. The focus of these bodies and issues is on the greatest risk to the stability of the financial system and their functions and powers spelled out in detail in law mean that financial regulation is more complicated. The extent of the FSA’s failures during the financial crisis and after meant that the public interest demanded the far-reaching changes outlined³⁰; the Financial Services Banking Reform Act 2013 also introduced more control over bank executives.

In Germany, until the new European system arrives, there is a reverse evolution and banking supervision is divided between *Bundesanstalt für Finanzdienstleistungsaufsicht* and *Bundesbank*: the first authority, established in 2002 after the merger of three pre-existing authorities for different sectors, is given the task of grant the banking authorisation; the central bank is responsible for the supervision of credit institutions in the strict sense³¹.

The Italian solution allows some general comments on supervision due to the function of administrative control; the normative reference is the Italian Banking Act (*Testo Unico Bancario*): art. 5 about the “sound and prudent management” exercised by banks, a benchmark for the lending authority exercising the power of supervision, for the evaluation of the Statute of the shareholders and managers within the banking authorisation, to the provisions of regulatory supervision, inspection activities and information. More generally, banking

²⁹ See the 2000 Act, s. 55N as amended by the 2012 Act, s. 11.

³⁰ See T. Prosser, *Regulation and Legitimacy*, in J. Jowell, D. Oliver D., C. O’Cinneide (eds.), *The Changing Constitution* (2015), 336; the author explains that, in the context of financial crisis, “the Authority was criticized as having failed to supervise effectively the rapidly changing developments which had undermined financial stability. The effectiveness of regulatory supervision had been severely weakened by, among other things, the range of different regulatory functions given to the same body, inadequate coordination due to complex and confused institutional relationships with the Treasury and the Bank of England, the limited role of national regulators in international markets, and the adoption of a ‘light touch’ approach to regulation”.

³¹ For details on the banking system and supervision in Germany see P. Scherer, *The German Banking System*, in P. Scherer and S. Zeller (eds.), *Banking Regulation in Germany*, (2009); A. Busch, *Banking Regulation and Globalization*, cit. at 24, 75; G. Mangione, *La disciplina costituzionale del risparmio in Germania*, in G. Cerrina Feroni (ed.), *Tutela del risparmio e vigilanza sull’esercizio del credito: un’analisi comparata* (2011), 119.

supervision can be defined as a function of administrative control exercised by *Banca d'Italia* as “verification of the regularity” of activity of private enterprise related to important public interests: the protection of investors, stability and balanced development of the financial market. The supervision relates to the banking business as a whole: the organisation, the legal acts, the operational management of the banks, and it is a preventive and permanent management structure. In a broad sense it will operate prior control by the processes of the banking licence, corrective action, sanctions and the replacement of organs that depend on the results of supervision³².

Furthermore supervision is distinct from the regulation³³, which refers to the prescriptive activity more than the control in the strict sense; it is, however, control of conformation and regularity. There are some essential distinctions for the prudential supervision of a micro-prudential and macro-prudential nature: the first relates to the individual intermediaries for the assessment of the risks, while the second is concerned with phenomena not limited to individual intermediaries but more extensive and requiring the management of systemic risk, which is based on the close relationship between prudential controls of individual intermediaries and the assessment of risks to the entire financial

³² See S. Amorosino, *La governance delle banche fra Banca centrale europea e banche centrali nazionali*, in *Bancaria* 55 (2005); on three kinds of supervision provided by the *Testo Unico Bancario*: supervision as absolute transparency, as inspection and as regulatory function (capital requirements, prudential supervisory review and information to the depositors), see *amplius* R. Costi, *L'ordinamento bancario*, (2012), 553, 567.

³³ On the concept of banking regulation and prudential rules see L.E. Panourgias, *Banking Regulation and World Trade Law, GATS, EU and 'Prudential Institution Building* (2006), 18; on regulation through authorisation, requirement, and approval: J. Russen, *Financial Services*, cit. at 25, 1. On the central issues of the regulation after the crisis: A.E. Goodhart, *The regulatory response to the financial crisis* (2009), 45; in consequence of the recent turmoil, there are at least seven fields of regulation that became, according to the author, major issues for discussion: deposit insurance, bank insolvency regimes, money-market operations by central banks, liquidity risk management, capital requirements, boundaries of regulation and reputational risk and crisis of the management. For other details: L. Dragomir, *European Prudential Banking Regulation and Supervision* (2010), 65; J. Black, *The rise, fall and fate of principles-based regulation*, in A. Kern, N. Maloney (eds.), *Law Reform and Financial Markets*, (2011), 3; J. R. Barth, G. Caprio Jr., R. Levine, *Guardians of finance: making regulators work for us*, (2012), 205.

system; the purpose is to identify critical signs in the financial system to study its effects on the system and micro-prudential level. The Larosière Report³⁴ excluded responsibility for the ECB for monitoring micro, while the decisive role could be the macro-prudential supervision³⁵.

The discipline of European banking and financial supervision has traditionally been based on the national authorities and the principle of coordination and collaboration between the regulators of the Member State of origin and the host Member State in case of cross-border services³⁶; as a result, the initial model was reshaped on a national basis to introduce a harmonisation of rules and, therefore, the conditions for a single market in banking and financial services³⁷.

In particular, the law of the SSM has distinguished the macro-prudential supervisory function from regulation in the strict sense and there are supervisory powers for the ECB and residual tasks for national authorities, in relation to the criteria of systemic significance or “less significance” of banking institutions. The ECB has a primary regulatory power, but it will be affected by the rules at European and international level; for the limited area left by the Regulation, the ECB will draw up its own standards in the form of soft law, as implemented by banks. In some cases the provisions of the SSM Regulation are so detailed as to implicitly exclude any discretion in the supervision of the ECB. The question arises whether the current regulatory framework is adequate or whether it would require specific regulatory powers for the ECB

³⁴ For details see http://ec.europa.eu/internal_market/finances/docs/de_larosière_report_en.pdf.

³⁵ For the concept of prudential supervision see L.E. Panourgias, *Banking Regulation and World Trade Law, GATS, EU and ‘Prudential Institution Building*, cit. at 33, 9, 17. The author considers in particular the term “macro-prudential supervision” “to mean arrangements for monitoring and dealing with systemic stability aspects of the operations of financial institutions as well as of economic and financial systems development. Such arrangements include information gathering from financial institutions and assessment of risks for systemic stability, analysis of macroeconomic conditions and financial markets, fine-tuning of individual capital requirements, regulation of payment systems and management of liquidity crises and banks’ insolvencies”.

³⁶ For details on the general political and economic history of Europe: G.A. Walker, *European Banking Law, Policy and Programme Construction*, (2007), 43.

³⁷ On the EU and global banking regulation see L. Quaglia, *The European Union and Global Financial Regulation* (2014), 25.

as it is the authority responsible for prudential supervision; in fact the EBA exercises the regulatory function and the Regulation establishing the EBA no. 1093/2010 was adapted to the new system³⁸.

Since the late 1990s, there has been an intense debate about which institutional framework for the regulation and supervision of banking could effectively allow the *financial integration process* that had been accelerated by the introduction of the Euro. As is known, in the Maastricht Treaty, the assignment of monetary policy to the ECB has not been accompanied by a transfer of banking supervision powers as strong as the national authorities. The debate on the need for a greater European coordination of banking supervision has been complicated by the tendency of some European States to entrust the powers not to the national central bank, as happened traditionally, but to a different independent authority without an European policy.

There was also a heated debate before the EU Regulation of 2013 especially as regards the allocation to the ECB of the supervisory function. It is clear, however, that no provision of the EU provided for the prohibition of the exercise of supervisory powers to the national central banks or the ECB, but there are limitations in art. 127.1 TFEU and art. 14.4 of the ECB Statute: the primary objective is price stability, but also that the ESCB should support the general economic policies for the purposes set out in art. 2 of the Statute, while the central banks may perform functions other than those specified in the Statute unless the Governing Council considers they run counter to the objectives and tasks of the ESCB. Another issue that has been much discussed is the concentration of powers in the ECB on monetary policy and banking supervision, and different solutions also opposed emerged from the debate³⁹; for example, vigilance would allow

³⁸ See Regulation EU no. 1022/2013.

³⁹ For details on the debate about the separation or concentration of monetary and supervisory functions, see R. Smith, *The European Central Bank* (1997), 323; for the conflict of interest in case of concentration and, on the other hand, the efficiency of decisions arising from the exercise of both functions, there are some risks, such as the excessive power of the ECB in relation to national banks. The author examines the issue of independence of the national central banks and the condition of the ECB and supports the solution of the exercise of monetary function and supervision by a single institution with clear objectives

the acquisition of relevant information on the economy useful for monetary policy decisions, or the centralisation of tasks would depend on the role of lender of last resort and, in fact, the ECB and the ESCB have already acted as the guarantor of the overall stability of the banking system before the SSM⁴⁰.

The current regulatory framework is the product of institutional arrangements which have existed for a period of time and should be reviewed; this situation is caused by the complex peculiarities of the EU which is not a federal state. In fact, on the one hand, there is the goal of achieving an integration of the regulatory structure of banking supervision also in the absence of a federal authority and, on the other, there is a layering of very detailed rules of primary level applicable directly or through national laws, regulations issued by the Commission on the basis of delegation. There are also legal acts of the ECB for its supervisory tasks and the national authorities included in the SSM.

3. Regulation (EU) no. 1024/2013: principles of administrative organisation, tasks and the independence of the ECB

The legal framework on organisation and functions is very complex and the specificity of the tasks of the ECB⁴¹, provided for by Regulation (EU) no. 1024/2013 may be interpreted in a twofold manner. These tasks include the authorisation of banks and ensuring compliance with requirements regarding e.g., their own funds, securitisation, liquidity and governance arrangements. First, they can be interpreted in an objective way, as it may suggest specific activities. On the other hand in a subjective way, as the direct surveillance concerns systemic banks, namely “credit institutions, financial holding companies or mixed financial holding companies, or branches, which are established in participating Member States, of credit institutions established in non-participating Member States”⁴², whose *significance* shall be

to safeguard the independence and the close connection with the supervision of payment systems.

⁴⁰ Art. 127.5 TFEU.

⁴¹ Art. 127.6 TFEU.

⁴² Art. 6.4.

evaluated on the basis of *automatic criteria* instead of exercising discretionary power. Furthermore, the general criteria, following the specific protocol⁴³ adopted by the ECB, are useful in order to identify on the one hand the ECB's set of competences and on the other hand the remaining power of supervision by competent national authorities. In addition, the criteria are based on actual economic data, e.g. dimension, relevance for the economy of the Union and each participating Member States and the value of transnational activities. Particularly, supervision of the ECB involves credit institutions or financial holding companies or mixed financial holding companies that "shall not be considered *less significant* unless justified by particular circumstances to be specified in the methodology"⁴⁴.

Moreover, the ECB "may also, on its own initiative, consider an institution to be of *significant relevance* where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities subject to the

⁴³ If any of these conditions is met; (i) the total value of its assets exceeds 30 billion Euros; (ii) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20% unless the total value of its assets is below euro 5 billion Euros; (iii) the ECB takes a decision confirming a *significance* such as significant relevance with regard to the domestic economy considered by the national authority, following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution (art. 6.2). See the Decision ECB 2014/3 of 4 February 2014, identifying the credit institutions that are subject to the comprehensive assessment and with the same title: the Decision ECB 2015/839 of 27 April 2015; the "List of significant supervised entities and the list of less significant institutions. Latest update of the list: 4 September 2014"; the full "List of supervised entities (as of 30 December 2015)"; "The Supervisory Review and Evaluation process 2015" in www.bankingsupervision.europa.eu. The ECB has conducted its annual significance assessment (arts. 6.4 of SSM Regulation; 43 of the SSM Framework Regulation (ECB/2014/17); as a result of this assessment, the full list contains the names of each supervised entity and supervised group which is directly supervised by the ECB (art. 2, points 16 and 22 of the SSM Framework Regulation). The list also indicates the country of establishment of the entities and the specific grounds for significance. For the five supervisory priorities (business model and profitability risk, credit risk, capital adequacy, risk governance and data quality, liquidity) for 2016 see "ECB Banking Supervision publishes priorities for 2016". Documents on SSM are available in the website www.bankingsupervision.europa.eu

⁴⁴ Art. 6.2.

conditions laid down in the methodology”⁴⁵. Indeed of significant relevance are those institutions for which has been requested or received public financial assistance by ESFS or ESM. However the ECB carries out its activity on the three most important credit institutions of each Member State, unless particular circumstances prevent this⁴⁶. Nevertheless, the competence of the national authorities, which is a residual one, concern bodies which do not match a specific given standard, as they are “*less significant*”⁴⁷.

The ECB may broaden its supervisory activity “when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with competent national authorities or upon request of national authority, decide to *exercise directly itself* all the relevant powers for one more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM”⁴⁸; so therefore a replacement power of the ECB to the national supervisory authorities is expected.

The organisation follows the principle of *shared exercise* of supervision between the ECB and national authorities in this manner: a) the ECB holds the centralised prudential supervision of all Eurozone banks and banks of other Member States participating on a voluntary basis; b) it has the direct supervision of the “more significant” banks with the assistance of the national competent authorities; c) national authorities exercise a decentralised supervision on “less significant banks” and the ECB has a replacement power.

In order to carry out specific tasks of prudential supervision and maintain high standards of supervision, the ECB “*shall apply* all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives”⁴⁹. On this point, it has to be highlighted that the ECB shall control the implementation of capital conditions provided for by national law, as well as those provided for by national supervisory authorities, and as the ECB should not base its decisions on

⁴⁵ Art. 6.4.3.

⁴⁶ Art. 6.4, para 2-5.

⁴⁷ Art. 6.4.1.

⁴⁸ Art. 6.5. b).

⁴⁹ Art. 4.3.

national law. Nevertheless if the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB *shall* also *apply* the national legislation exercising those options; so the discretion of the ECB is very limited.

The competent national authorities have *macro-prudential tasks* and *tools* consisting of various measures⁵⁰: they shall apply requirements for capital buffers to be held by credit institutions at the relevant level in accordance with relevant Union law in addition to own funds requirements provided by this Regulation⁵¹, including capital buffer rates, and any other measures aimed at addressing systemic or macro-prudential risks provided for, and subject to the procedures set out, in Regulation (EU) no. 575/2013 and Directive no. 2013/36/EU. The ECB should be informed about the measures adopted by the national authorities and, as a consequence, it may produce written *objections*, which are to be examined by the relevant authority⁵². Besides the ECB may apply *higher requirements* for capital buffers than applied by the competent national authorities or national designated authorities of participating Member States in addition to own funds requirements⁵³ and more stringent measures aimed at addressing systemic or macro-prudential risks at the level of credit institutions subject to the procedures set out in Regulation (EU) no. 575/2013 and Directive no. 2013/36/EU.

The principle of *cooperation*⁵⁴ between the ECB and the national authorities is frequently invoked: the ECB “shall *cooperate*

⁵⁰ Art. 5.

⁵¹ Art. 4.1, d).

⁵² Art. 5.1.

⁵³ Art. 5.2.

⁵⁴ See Regulation (EU) no. 468/2014 of the ECB of 16 April 2014, establishing the framework for cooperation within the SSM between the ECB and competent national authorities and with designated national authorities, in www.bankingsupervision.europa.eu. We can consider this cooperation like a new form of administrative cooperation (art. 197 TFEU); in general, see E. Chiti, *La cooperazione amministrativa*, Giorn. dir. amm. 241 (2010); M. Macchia, *La cooperazione amministrativa come «questione di interesse comune»*, in M.P. Chiti, A. Natalini (eds.), *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (2012), 87. Administrative cooperation contributes to new integration developments, but it could also limit the establishment of new European composed administrations, as art. 197 TFEU seems to statue; however, the interdependence between national administrations and between

*closely*⁵⁵ and perform its tasks in the framework of the SSM consisting of the ECB and the competent national authorities; it is responsible for the effective and consistent functioning⁵⁶ and both the ECB and competent national authorities shall be subject to a *duty of cooperation* in good faith and an obligation to exchange information; competent national authorities shall provide the ECB with all the information necessary for supervisory tasks. This duty of *close cooperation* of the ECB may also involve credit institutions established in participating Member States whose currency is not the Euro⁵⁷ and after their request, the decision is adopted by the ECB, by using a number of instruments (i.e. duty of national authorities to respect the guidelines, to give information about credit institutions and to implement instructions about measures relating to the tasks and which should be adopted by a national authority). A detailed procedure has to be put into effect, when the relevant authority has not adopted “*decisive correct actions*”, indicated by ECB, in order to suspend or cease previous connections⁵⁸. Through the instrument of cooperation, the ECB carries out supervision on branches of credit institutions⁵⁹.

As mentioned above, the relevant authorities of Member States are bound to cooperate in the field of supervision on credit institutions seeking to open branches or acting under the free movement of services, carrying out activities not specifically provided for⁶⁰. As regards tasks, the ECB shall respect a “*fair balance*” between all participating Member States⁶¹ and “in its relationship with non-participating Member States, respect the

them and the European authorities in European legislation is well-established; on this aspect see E. Chiti, *La costruzione del sistema amministrativo europeo*, in M.P. Chiti (ed.), *Diritto amministrativo europeo* (2013), 82-83; on European organisational structure see C. Franchini, *L’organizzazione amministrativa dell’Unione europea*, *ibid.*, 205.

⁵⁵ “The ECB shall in particular notify its intention to the concerned national competent authorities or national designated authorities ten working days prior to taking such a decision” (art. 5.4.).

⁵⁶ See art. 6, “Cooperation within the SSM”.

⁵⁷ See art. 7. On the progress of Member States with a derogation to the Euro-system about their obligations regarding the achievement of Economic and Monetary Union see ECB, *Convergence Report*, June 2014, in www.ecb.europa.eu.

⁵⁸ Arts. 7.4; 7.5.

⁵⁹ Arts. 4.2; 5.

⁶⁰ Arts 4; 17.1.

⁶¹ Art. 6.8.

balance between home and host Member States established in relevant Union law”⁶².

A tricky point regards supervisory powers⁶³, as the ECB, regardless of other competences, has a number of instruments to impose the fulfilment of duties on any credit institution, financial company or mixed financial company throughout the territory of the Union, in order to adopt “the *necessary measures* at an early stage to address relevant problems”, when there is a lack of requirements⁶⁴. Besides, the ECB may require a plan in order to restore the conformity of requirements and a reduction in the risk of the activity of the institutions. That plan could also exhibit the use of net profit in order to strengthen funds or lay down a further duty of information, that are common in the field of capital or liquidity assets, and in order to lay down specific duties regarding liquidity. The ECB can also require a credit institution to directly remove its members from the Board of directors when they do not comply with specific requirements⁶⁵; so as regards these aspects the ECB has an important power.

The Council Regulation (EU) no. 1024/2013 fully confirms the approach used on the monetary policy, particularly the *operational independence*⁶⁶ of the ECB, from the interests of politics and the economy, with the character of an independent authority with full extension of powers⁶⁷. In fact, the ECB and the competent national authorities play their role in the SSM independently to fulfil their assignments, although they are subject to the rules of

⁶² Art. 17.3.

⁶³ Art. 16.

⁶⁴ Art. 4.3.1. Otherwise, either the ECB may use proof that credit institutions will break those requirements in the aftermath, specifically 12 months, or, in the framework of a *supervisory review* in accordance with point (f) of article 4(1), the arrangements, strategies, processes and mechanisms implemented by credit institutions and their own funds and liquidity held by it do not ensure “a sound management and coverage of its risks” (art. 16.1, a, b, c). Article 16.2 envisages specific faculties. For instance, the ECB can require strengthening of systems, strategies, processes, mechanisms, possession of greater funds in respect of capital requirements given by art. 4.3 para 1, for elements of risks which are not covered by relevant EU acts (art. 16.2, (a)).

⁶⁵ These requirements provided for art. 4.3 para 1.

⁶⁶ Art. 19.

⁶⁷ On the concept of an independent but accountable regulator see K.K. Mwenda, *Legal aspects of financial services regulation and the concept of a unified regulator*, cit. at 25,19 ss.

this Regulation. EU institutions, EU bodies, national governments and any other body must respect the independence of the *Supervisory Board* and the *Steering Committee* in carrying out the assignments given by the ECB. Furthermore, a code of conduct has been established by the *Governing Council*, to be addressed to the staff and managers of the ECB, as they supervise in the field of conflict of interest. There are concerns about the possible conflict of interest in the context of the two functions and, in particular, with regard to the tasks of the ECB for the “solidity” of the banks if that would affect the stability of prices. The positive solution depends on the organisational structure and adequate internal procedures to be shaped in the light of efficiency.

Moreover the fundamental characters of the European banking supervision arise from the organisational principles⁶⁸, that is to say the independence of the ECB, which is linked to responsibility, as it is subject to the European Parliament and the Council through *accountability and reporting*⁶⁹. In that regard a number of guarantees has been adopted, for instance that the ECB submit a report annually to the European Parliament, the Council, the Commission and *Eurogroup*, in order to provide information about the implementation of its duties and other developments of the structure. The Chair of the Supervisory Board may, after the request of the *Eurogroup*, be heard on the execution of its supervisory tasks or at the request of the European Parliament⁷⁰, and the ECB shall reply orally or in writing to questions put to it⁷¹. Moreover there are instruments given to the European Court of Auditors to control the operational efficiency of the ECB, as the Court has to consider the activity of supervision⁷². In addition, the compulsory and simultaneous submission of reports to the

⁶⁸ Art. 19.

⁶⁹ Art. 20. See “*Interinstitutional Agreement between the European Parliament and the ECB 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 SSM*”, *Legal Framework for Banking Supervision*, I, December 2014; on the procedures (e.g. reports, hearings, exchanges of view) of accountability see “*Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the SSM*”, *ivi*, in www.bankingsupervision.europa.eu.

⁷⁰ Arts. 20.4; 20.5.

⁷¹ Art. 20.6.

⁷² Art. 20.7.

national parliaments has been launched, which in turn can submit back well-motivated observations or call upon the President of the Supervisory Board to provide “an *exchange of view* in relation to the supervision of credit institutions in that Member State together with a representative of the competent national authority”⁷³; so there is a clear political and administrative accountability. However, national authorities are liable to national parliaments for activities which cannot be carried out by the ECB, as well as the tasks conferred⁷⁴, in compliance with relevant national law.

The rule of *separation from monetary policy function*⁷⁵ is another organisational principle that has been the subject of extensive discussion. It is particularly important as the ECB must only pursue its objectives in compliance with the Regulation, in a completely independent way from the tasks falling under the exclusive competence on monetary policy. In order to avoid a conflict of interest, as well as to ensure both functions are exercised in compliance with the objectives⁷⁶, the ECB shall ensure a *complete organisational separation* and refrain from interfering with the tasks, the personnel and the hierarchy.⁷⁷

As mentioned above, in this new organisation, the Supervisory Board plays a great role, as it can appoint the *Steering Committee*⁷⁸ which does not have any decisional power, but rather preparatory ones including cooperating with the Board in “*full transparency*”. The numeric composition is more limited, although a “*fair balance and rotation between competent national authority*” is guaranteed. The *Steering Committee* should adopt internal rules on relations with the *Supervisory Board*, which in turn has internal rules based on the “*equal treatment of all participating Member States*”⁷⁹.

⁷³ Art. 21.3.

⁷⁴ Arts. 6; 21.4.

⁷⁵ Art. 25. See the Decision of the ECB on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39).

⁷⁶ On the conflict between monetary policy and banking supervision in some aspects see S. Glatzl, *Geldpolitik und Bankenaufsicht im Konflikt* (2009), 247, 267.

⁷⁷ On the topic of separation between monetary function and banking supervision see R. Smits, *The European Central Bank*, cit. at 39, 322.

⁷⁸ Art. 26.10, para 2.

⁷⁹ Art. 26.12.

4. Administrative proceedings and legal acts

The administrative activity consists in implementing new measures by means of complex proceedings, legal acts according to the categories used for monetary policy, but with some significant restrictions, and typical administrative acts; this further development involving legal and administrative aspects and organisation in the banking sector, favours a new example of *administrative integration*⁸⁰; but the legal framework appears very complex for the execution and requires an extended time before the new mechanism is fully efficient in its activity.

In particular, the granting of a European administrative act⁸¹: the *authorisation* to credit institutions in participating States after a *composed administrative proceeding* involving the ECB and competent national authorities which submit a first draft to both the ECB and the applicant in order to propose the granting of authorisation for credit activity⁸²; it is conditioned by law, as well as the revocation whose scope is to sanction where there is a lack of conditions provided. Nevertheless there is still a margin of *technical discretion*, because of the focus on technique coming from different authorities; however, the decisions taken by the ECB on the acquisition and transfer of shareholdings in credit institutions are discretionary (apart from the case of the resolution of a bank crisis) as regards technical profiles, after a thorough evaluation by the authority.

The *authorisation*⁸³ is necessary to start the business activity of a credit institution within a Member State in the Eurozone, and

⁸⁰ On European administrative integration see E. Chiti, C. Franchini, *L'integrazione amministrativa europea* (2003); M.P. Chiti, *Diritto amministrativo europeo* (2011), 330, 340-341; the author considers the ECB and the SEBC an evident example of an integrated European administration as a cohesive system with relations for the economic and monetary coordination according to an organisation focused on the ECB; from this context derive a full integration between national authorities (central banks) and a European institution (ECB) and composed organisational relationships. On the integration process favouring the coexistence of different national administrative systems and European law that acts centrally for the unification see G. della Cananea, C. Franchini, *L'amministrazione europea e il suo diritto*, in G. Della Cananea, C. Franchini, *I principi dell'amministrazione europea* (2013), 41.

⁸¹ On European administrative acts see C. Franchini, *Il procedimento*, in G. della Cananea, C. Franchini, *I principi dell'amministrazione europea*, cit. at 80, 233.

⁸² Art. 14.

⁸³ Art. 14.

has to be requested to competent national authorities, according to the requirements set out by national law; so this new European administrative act has *transnational* effects, but the principle of mutual recognition⁸⁴ has already operated for national authorisations favouring the convergence of similar legal acts. The requirements reflect the prudential method by which it is necessary to ensure economically solid and well-organised institutions, in relation to the activity of deposit and credit, can carry out banking activities. If the applicant complies with all conditions, the competent national authority shall prepare a first draft decision and propose it to the ECB in order to grant the authorisation, and the draft decision shall be notified to the ECB and the applicant; the specific procedure of authorisation shall be settled in compliance with EU law and the general principle of fair process, principle of transparency, and the recipient's right to be heard. Clearly due to the references to national law and EU law, it is a conditioned activity of the ECB.

Furthermore the possibility of *tacit approval* of the authorisation has been established, in fact the decision has to be approved when no objection has been expressed within 10 days, a period which can be extended once for valid reasons; otherwise the draft of the decision could be rejected in written form. Furthermore, according to EU law, the ECB has the power to *withdraw the authorisation* in the cases set out in relevant Union law on its own initiative, following consultations with the competent national authority or on a proposal from such a competent national authority⁸⁵ with the possibility of deciding necessary remedial actions (for example, resolution measures).

For that matter a revocation could undermine the resolution of a crisis or the maintenance of financial stability; on the one hand, the relevant national authorities can express their objection to the ECB on the basis of valid reasons to prevent the jeopardy of negative effects. The EU Institution may indeed abstain from adopting the revocation for an agreed period of time and also defer it if "*sufficient progress emerges*"⁸⁶. On the other hand, the ECB can take a decision, stating the national authorities

⁸⁴ See G. della Cananea, C. Franchini, *L'amministrazione europea e il suo diritto*, 43-45, cit. at 80.

⁸⁵ Art. 14.5.

⁸⁶ Art. 14.6.

have not adopted the necessary measures on financial stability, and this leads to an immediate revocation of the authorisation; the scope of the revocation may depend on those procedures and it would confirm its nature of sanctioning because of the lack of legal conditions or the ECB would exercise its margin of discretion to evaluate requirements. Moreover, if the national authority decides the revocability of the authorisation, it shall submit to the ECB a valid reason on the basis of which the ECB would make its decision⁸⁷.

The ECB shall adopt the legal acts provided by the art. 132 TFEU, such as *guidelines, recommendations and decisions*⁸⁸, but in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to arts. 290-291 TFEU; the supervision of the ECB is *subjected* to binding regulatory and implementing technical standards developed by the *European Banking Authority*⁸⁹ (EBA, from here on) and adopted by the European Commission in accordance with arts. 10-16 of Regulation (EU) no. 1093/2010 and to the provisions of that Regulation on the *European supervisory handbook* adopted by the EBA. The acts of the ECB, unlike those used for monetary policy, are bound by the measures of other institutions; so the ECB is entrusted with the supervision tasks, while the EBA is given the regulatory function together with the European Commission.

The ECB may also adopt “*regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks*”⁹⁰, but after *open public consultations and analysis of*

⁸⁷ Art. 15.5, para 2.

⁸⁸ See art. 4.3, para 2. About different categories of legal acts (regulations or administrative acts) see S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 49; B.G. Mattarella, *Procedimenti e atti amministrativi*, in M.P. Chiti (ed.), *Diritto amministrativo europeo*, cit. at 54, 356; in general, for legal acts of EU see H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union* (2014), 88 ss.

⁸⁹ EBA, ESMA (*European Security and Market Authority*) and EIOPA (*European Insurance and Occupational Pension Authority*) were established in 2010 as new European supervisory bodies, according to the De Lorosière project, for the general strengthening of international cooperation; see S. Antoniazzi, *La Banca centrale europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 145; G. Boccuzzi, *L’Unione Bancaria Europea*, cit. at 11, 46.

⁹⁰ See art. 4, para 3.2 of Regulation (EU) of 2013; Regulation (EU) no. 468/2014 of the ECB of 16 April 2014 “*establishing the framework for cooperation within the SSM between the ECB and competent national authorities and with designated national*

the potential related costs and benefits, unless they are disproportionate in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency. These open public consultations are unusual as regards the procedures of the ECB, but they are part of the technical rules of regulation adopted by the EBA⁹¹ and finally provided by Regulation (EU) no. 1024/2013 for banking supervision; the public consultations are possible before the ECB adopts a regulation, unless they are *disproportionate* in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency⁹². In addition, they shall take place before calculating the amount of fee levied on a credit institution or branch⁹³. The institute was not part of the first draft of the regulation by the EU Commission, so that it seems it has been inserted into it to fill the gap of the *deficit of democracy* which actually concerns the independent administrative authorities, by embedding a guarantee for stakeholders to participate in the decision-making process.

As is known, the regulatory power of the ECB in monetary policy is inserted in the primary level but it produces non-legislative acts; in fact, the ECB may adopt regulations such as legal acts of “general application” that are very close to the laws of a general and abstract nature⁹⁴ and the ECB, under the art. 34.1 Statute, adopts regulations to the extent necessary to implement the tasks defined in the same Statute; so the rules are mandatory

authorities. SSM Framework Regulation” (ECB/2014/17) and in the title it is qualified as “(Non-legislative acts)”.

⁹¹ Art. 10, Regulation n. 1093/2010; “ESAs consult on margin requirements for non centrally cleared derivatives”, 10 June 2015; the European Supervisory Authorities (ESAs) has introduced a second consultation on draft Regulatory Technical Standards outlining the framework of the European Market Infrastructure Regulation; this second consultation document is the result of an intense engagement with other authorities and industry stakeholders in order to identify all the operational issues that may arise from the implementation of such a framework.

⁹² Art. 4.3, para 3.

⁹³ Art. 30.2.

⁹⁴ See art. 288 TFUE.

and directly applicable in the Member States and in relation to national central banks⁹⁵.

Otherwise this framework seems not be present for the supervisory function; in fact art. 4, para 3.1 of the EU Regulation no. 1024/2013 specifies that acts adopted by the ECB in prudential supervision have, in the hierarchy of norms, a *value lower* than that of the EU Commission and the EBA; the regulations of the ECB may only cover the organisation of supervisory functions and prudential decisions and other acts bound by EU law which has a higher precedence. This is in contrast to the independence accorded to supervisors as independent authorities with extensive powers of regulation; the regulation of 2013 clarifies that the powers of the ECB are equivalent to those of the national authorities⁹⁶; this approach does not appear to be coherent with the classification of the ECB as an European institution like the Commission, Council and European Parliament and the primary level of legal acts in monetary policy.

Besides the ECB contributes with legislative and administrative acts to the activity carried out by national authorities when supervising less significant credit institutions⁹⁷, because it shall issue *regulations, guidelines or general instructions* to competent national authorities⁹⁸, while supervisory decisions are adopted by competent national authorities. Instructions may refer to the specific powers⁹⁹ for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM¹⁰⁰; the ECB also adopts instructions to request national authorities to use their powers, e.g. of investigation according to national law; this is the case when the ECB cannot use these specific powers, although it shall be always be informed¹⁰¹. The national legislation may envisage *precautionary powers* and those of *urgent intervention*¹⁰² not

⁹⁵ For details see S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 56; A. Malatesta, *La Banca Centrale Europea* (2003), 122.

⁹⁶ Art. 4.

⁹⁷ Art. 6.5 a).

⁹⁸ For the tasks defined in article 4 excluding points (a) and (c) of paragraph 1 (such as grant or revocation of authorisation).

⁹⁹ Art. 16.2.

¹⁰⁰ Art. 6.5, (a).

¹⁰¹ Art. 9.1, para 3.

¹⁰² See *Whereas* no. (35) of the Regulation (EU) no. 1024/2013.

provided for in EU law yet; in fact, the usage of these powers could be requested by the ECB for the scope of SSM's effectiveness.

As concerns legal acts and the *close cooperation* with the relevant national authorities of participating third countries, the ECB can adopt *decisions* or *guidelines* and *instructions* (e.g. on evaluating the adoption of specific measures towards credit institutions by using complex procedures); besides, doubts have been raised about the implementation of these measures, mostly because of the complexity of rules and the suspension or cessation of the activity of cooperation, when remedies have not been put in place.

The role of the EBA is slightly different from the ECB, as it is a regulator working on the drafts of technical rules, opinions, and recommendations, in the light of a convergence in banking supervision and coordination between national authorities, in compliance with the Regulation establishing the EBA no. 1093/2010 and Regulation no. 1024/2013 and no. 1022/2013. Moreover, as is known, the ECB should adopt regulations when necessary for its specific assignments, when there is a lack or incompleteness of rules coming from EU law or national authorities; on this point, doubts have been raised since the ECB is in charge of evaluating completeness of law and this possibility seems to exceed the powers conferred on the EBA and European Commission. In addition, *technical rules* are part of delegated acts and implementing acts¹⁰³; as a consequence, there is a mismatch between the competences of European Commission and the adoption of supervisory measures by the ECB falling within art. 132 TFEU whose regulatory competences are *residual*. So the intention to maintain the 2010 regulation system is reasonably clear, which cannot *completely* rule out, *a priori*, the regulatory power¹⁰⁴ of the ECB. Furthermore the ECB contributes, if necessary, to draft technical rules in order to implement the rules of the EBA, or it can request the EBA to submit a proposal of modifications to the European Commission¹⁰⁵. Specifically, the

¹⁰³ Arts. 290-291 TFEU.

¹⁰⁴ On the relationship between the regulation of the EBA, the power of adopting acts of the ECB and remarks about limits: F. Guarracino, *Supervisione bancaria europea. Sistema delle fonti e modelli teorici* (2012), 165.

¹⁰⁵ Art. 4.3 para 4, and art. 4.1, d).

ECB has to *apply* the law on prudential supervision provided for by EU Regulations and Directives which include the standards of the *Basel Committee on Banking Supervision* (e.g. banking balance sheet requirements¹⁰⁶) and to ensure the correctness of national ancillary law. On the base of these rules, the ECB may request higher capital requirements on credit institutions in comparison with those applied by the national authorities, just as they can be also requested in addition to or substitution of its own funds¹⁰⁷.

Besides the ECB adopts *guidelines* and *recommendations* and makes *decisions* according to the relevant provisions of EU law and recommendations of the EBA. Therefore the ECB is the authority in charge of macro-prudential supervision, but the EBA still holds regulatory powers to be exercised on the basis of Regulation no. 1093/2010 amended and it influences the legal acts of the ECB in a relevant way. In addition, the EBA maintains the possibility to adopt binding decisions on implementing the *Rulebook* as regards the ECB as well, when there is a breach of EU law¹⁰⁸ or in a case of emergency operations¹⁰⁹ and resolution of disputes between competent national authorities on transnational operations¹¹⁰.

Regulation (EU) no. 1022/2013 has grown out of these tricky points so that it modifies the Regulation establishing the EBA, in such a way as to put into effect a *necessary compliance* of the procedures to the specific tasks of supervision by the ECB and to the fact that the ECB may be not in accordance with the decisions of the EBA. In fact, equal treatment and equal representation must be guaranteed among Member States regardless of their participation in SSM, to ensure a fair decision-

¹⁰⁶ On the tasks (e.g. capital requirements and agreements, risk control) of the Basel Committee see R. Costi, *L'ordinamento bancario*, cit. at 30, 581. The Basel Accords contain international standards and Basel III is implemented in Europe through the CRD IV package of EU law (Capital Requirements Regulation no. 575/2013 and Directive no. 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms).

¹⁰⁷ Art. 5.2. For details on capital requirements see D. Howarth, L. Quaglia, *Banking on stability: the political economy of new capital requirements in the European Union*, *Journal of European Integration* 333 (2013).

¹⁰⁸ Art. 17.

¹⁰⁹ Art. 18.

¹¹⁰ Art. 19.

making process and the integrity of the single market for financial services.

For banking supervision too, the ECB shall decide discretionally to adopt *administrative penalties*¹¹¹ towards credit institutions (or financial holding, companies, or mixed financial holding companies) which intentionally or negligently breach a requirement under relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent national authorities. Besides, it may impose penalties of up to twice the amount of the profits gained or losses avoided because of the breach, where they can be determined, or up to 10 % of the total annual turnover of a legal person in the preceding business year or such other pecuniary penalties as may be provided for in relevant Union law¹¹².

The sanctions adopted by the ECB and national authorities including the procedures set out in Regulation (EC) no. 2532/98 must be “effective, proportionate and dissuasive”¹¹³; in approving the sanction the ECB exercises its supervisory and investigatory powers¹¹⁴ as well as those conferred upon the competent authorities on the basis of EU law. Moreover the ECB may request national authorities to adopt appropriate sanctions on the basis of legal acts¹¹⁵ and national remedies providing for specific instruments which are not part of EU law; to determine whether and which sanction is to be applied, the ECB should act “in close cooperation”¹¹⁶ and with the assistance of the competent national authorities¹¹⁷. The ECB may adopt sanctions in compliance with Regulation (EC) no. 2532/1998 and art. 132.3 TFEU, in case of a breach of its regulations or decisions¹¹⁸; these guiding principles

¹¹¹ Art. 18. See for general references O. Jansen, *Administrative Sanctions in the European Union* (2013).

¹¹² See the Regulation of the ECB 16 April 2014, no. 18, amending the Regulation (EC) no. 2157/1999 about the power of the ECB for administrative penalties (ECB/1999/4), in www.ecb.europa.eu.

¹¹³ Art. 18. See Recommendation for a Council Regulation amending Regulation (EC) no. 2532/98 concerning the powers of the ECB to impose sanctions (ECB/2014/19), in www.bankingsupervision.europa.eu.

¹¹⁴ Art. 9.2.

¹¹⁵ Art. 4.3 para 1.

¹¹⁶ Art. 9.2.

¹¹⁷ Art. 6.3 para 1.

¹¹⁸ Apart from the cases set out in art. 18.1-6.

are also applicable both to those economic sanctions against credit institutions as a consequence of a breach of national rules for the ancillary law and against a member of the board of directors of any credit institution or any other responsible body according to national law. Besides, it has been established a duty of publication of the sanctions, even if appealed, in compliance with EU law.

The measures of the ECB are legally adopted in the field of its supervisory activity and since they are capable of affecting third persons they are subject to the *review* of the Court of Justice of the European Union¹¹⁹ (CJEU) under art. 263 TFEU (apart from recommendations and opinions). Moreover they are also subject to art. 340 TFEU concerning damages coming from non-contractual liability. Despite the general provision, the ECB is *directly responsible* for any damage to compensate in relation to its duties¹²⁰.

As regards the judicial review, Regulations no. 1022/2013 and no. 1024/2013 do not provide detailed rules, even if it would be particularly useful, because of the number of competences: ECB, EBA, ESMA, EIOPA and the national authorities. As mentioned earlier, decisions binding third parties and national authorities are subject to the jurisdiction of the CJEU¹²¹; there is the possibility for natural or legal persons to appeal against acts laid down by bodies, offices and agencies of the Union under specific conditions and arrangements¹²², as was established in the previous Regulations of 2010. In fact the *Board of Appeal* has the power to control the decisions of the EBA, the ESMA and the EIOPA¹²³, either confirming the decision or referring the matter to

¹¹⁹ See M.P. Chiti, *La tutela giurisdizionale*, in M.P. Chiti (ed.), cit. at 54, 383.; G. della Cananea, *La giustizia*, in G. della Cananea, C. Franchini (eds.), *I principi dell’amministrazione europea*, cit. at 80, 310 ss.

¹²⁰ Art. 340, 2nd-3rd, TFEU “In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties”.

¹²¹ Arts. 263 TFEU; 24.11.

¹²² Art. 24.5 of SSM Regulation.

¹²³ Art. 58, in Regulations (EU) no. 1093/2010, Regulations no. 1094 and no. 1095/2010.

the competent authority¹²⁴. Similarly, the *Administrative Board of Review*¹²⁵, established by the ECB, can judge on the administrative acts of the same institution; in fact, any natural or legal person may activate an *internal administrative proceeding* concerning the procedural and substantive conformity of the decisions with the Regulation. In any case, the internal procedure does not undermine the judicial control of the CJEU under art. 263 TFEU and art. 24.11 of the Regulation. The Board is particularly technical and has professional competences on supervisory activities; its members are not bound to any instructions and they act only in the public interest.

Any request for review has to be made in writing, alongside a statement of grounds, to be submitted to the ECB within one month of the date of notification of the decision to the applicant or, in its absence, of the day on which it came to the knowledge of the applicant. It has to be remembered that any natural or legal person could request a review of an act “which is addressed to that person, or is of a direct and individual concern to that person”. After the ruling of admissibility of the review, the Board may express an opinion within a reasonable period or, at any rate, within two months, in order to defer the matter to the *Supervisory Board*. The latter submits to the *Governing Council* a new draft that is *abrogative* of the initial decision, by replacing it either with a new one of identical content or with an amended decision which cannot be appealed against. Here a *tacit approval* could play its role, as the decision is adopted when the Governing Council makes no objections within a maximum period of ten working days¹²⁶. In addition, the initial opinion, the new draft opinion and the conclusive one always have to be reasoned and notified to the parties and the request of review does not automatically have a *suspensive effect*, although the Governing Council may decide whether to suspend the decision contested, on a proposal of the Administrative Board of Review, having considered the circumstances¹²⁷.

¹²⁴ For details see W. Blair, *Board of Appeal of the European Supervisory Authorities*, *European Business Law* 165 (2013).

¹²⁵ Art. 24.

¹²⁶ Art. 24.7.

¹²⁷ Art. 24.8.

5. Critical considerations on administrative procedures and legal acts

According to the Regulation, it is crystal clear that the competences conferred on the ECB must follow one *single set of rules* which has to be the same for all Member States, but the legal framework is very complex¹²⁸. At this point, it is essential to distinguish between measures of the ECB and measures of the EBA, as the latter is in charge of *regulation activity*, drafting *technical standards, guidelines* and *recommendations* in the light of a converging of the results arising from the activity of bank surveillance within the Union¹²⁹. Currently, the ECB’s supervision does not replace that of the EBA and it may adopt legal acts under art. 132 TFEU, in the lack of or flaw in any act of the EBA and EU law on fundamental aspects, in order to carry out its tasks.

Therefore, legal instruments in the field of banking supervision are the same that the ECB may adopt in the field of monetary policy, apart from the opinions, not explicitly recalled but linked to art. 132 TFEU and art. 34 of the ESCB Statute; otherwise this framework has no primary position. As it is well known, legal acts, including the regulations, are adopted by the Governing Council¹³⁰ which may interest the *Supervisory Board*, as the latter has supervisory powers and, as a consequence, new rules for the ESCB Statute will be necessary. Moreover, the Supervisory Board adopts internal rules on proceedings¹³¹, ensuring equal treatment amongst participating Member States. Particularly, the Regulation¹³², adopted by the Supervisory Board on 31st March 2014 and which came into force on 1st April 2014, provides for rules on setting meetings, the participation of different Member State, access to information and voting

¹²⁸ For some critical considerations on the fragmentation of tasks and measures and stratification of standards see A. Pagliacci, *The Three Pillars of the European Banking Union: An Evolutionary Road*, IJPL 327 (2014).

¹²⁹ On the relationship between the ECB and the EBA and if the latter has a sufficient capacity to protect the internal market interest, see N. Moloney, *European Banking Union: Assessing its Risks and Resilience*, Common Market Law Review 1663 (2014).

¹³⁰ Art. 17.1 of internal regulation of the ECB.

¹³¹ Art. 26.12 of Regulation (EU) no. 1024/2013.

¹³² See “*Rules of procedure of the Supervisory Board of the European Central Bank*”, in www.ecb.europa.eu.

procedures, empowerment and *Steering Committee* (functions, setting and organisation of meetings).

The ECB may adopt *guidelines* and *recommendations* and it makes *decisions* and *regulations*, but only if they are necessary to organise its tasks¹³³; the ECB “shall issue regulations, guidelines or general instructions to competent national authorities, according to which the tasks defined in art. 4 excluding points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by competent national authorities”¹³⁴. Such instructions¹³⁵ may refer to the specific powers for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM.

Finally, the Supervisory Board shall carry out preparatory works regarding the supervisory tasks conferred on the ECB and propose to the Governing Council of the ECB *complete draft decisions* to be adopted by the latter, pursuant to a procedure to be established by the ECB¹³⁶; it can only exercise its powers in relation to draft decisions or regulations adopted, only to the extent necessary to organise or specify the arrangements for tasks¹³⁷, according to the planning and implementation of the tasks of the ECB. However the Supervisory Board is not involved in the procedure regarding other legal acts, although they are part of the supervisory activity. This has raised a number of doubts, as the Executive Committee implements the monetary policy according to the guidelines and decisions taken by the Governing Council adopting necessary instructions to national central banks¹³⁸.

As mentioned above, the legal acts that bind third parties can come under the judicial control of CJEU¹³⁹; indeed, not all the measures coming from national authorities are the expression of a discretionary power, as they might be a mere implementation of decisions of the ECB and it needs to be clarified whether the

¹³³ Art. 4.3 para 2. See e.g. Regulation (EU) no. 468/2014 of the ECB on the framework for cooperation within SSM, *supra* n. 54.

¹³⁴ Art. 6.5 a).

¹³⁵ Art. 16.2.

¹³⁶ Art. 26.8.

¹³⁷ Art. 4.3, para 2, as declared in art. 26.7.

¹³⁸ Art. 12.1, ESCB Statute.

¹³⁹ Art. 263 TFEU and art. 35.1 of the ESCB Statute.

instrument of the ECB or the one coming from the national authority has to be contested. For example, as the request for authorisation needs to comply with national law¹⁴⁰ and EU law¹⁴¹, that has to be highlighted in the draft of authorisation by national authorities to the ECB. Clearly this will lead to some difficulties in judicial review when contesting rejection or revoking the authorisation¹⁴². Otherwise the system is perfectly accomplished, in coherence with the principle of effective justice, because individual rights and interests are protected by judicial and administrative review; in fact, in order to reduce the number of disputes lodged before CJEU, which is also competent on preliminary rulings concerning the interpretation of EU law, the administrative review has been introduced. Moreover the view of the Court has also legitimated new bodies and legal instruments; in fact the judgment¹⁴³ of the Court on the ESMA clarifies that art. 114 TFEU is the legal basis of that institution, as well as of SRM and the Single Resolution Board which is a new European authority. This solution has been also followed by the German Federal Constitutional Court¹⁴⁴ which recently decided on the European Stability Mechanism (ESM), in line with the CJEU case law.

Presently the responsibilities conferred upon the ECB, EU and national authorities build up a scheme of *administrative composite proceedings*¹⁴⁵ involving the cooperation of different

¹⁴⁰ Art. 14.1.

¹⁴¹ Art. 13.3.

¹⁴² Art. 14.3-5.

¹⁴³ Court of Justice EU, 22 January 2014, C-270/12, in *www.europa.eu*.

¹⁴⁴ The German Constitutional Court, in line with the EU Court of Justice (Full Court, 27 November 2012, C-370/2012, in *www.europa.eu*), with decision 2 BvR 1390-1312, 18 March 2014, in *www.bverfg.de/entscheidungen/rs20140318_2bvr139012.html*, affirmed the legitimacy of the ESM Found (European Stability Mechanism applied to help banking systems of Ireland, Greece, Portugal, Cyprus and Spain) confirming the preliminary decision 12 September 2012 (2BvR 1390/12) for the ratification of the ESM by the German Parliament.

¹⁴⁵ About composite proceedings of the EU see: S. Cassese, *Il procedimento amministrativo europeo*, in F. Bignami, S. Cassese (eds.), *Il procedimento amministrativo nel diritto europeo*, Quaderno n. 1, RTDP 31 (2004); G. della Cananea, *I procedimenti amministrativi composti dell’Unione europea*, *ibid*, 307; L.F. Maeso Seco, *I procedimenti composti comunitari: riflessioni intorno alla problematica della impossibilità a difendersi ed eventuali alternative*, in G. della Cananea, M. Gnes

bodies and legal instruments and creating a mixed organisational framework¹⁴⁶; in fact administrative procedures are often characterised by the action of both EU and national administrative agencies, but this is also a prevalent trend in competition and the electronic communications sectors. Procedural *guarantees*¹⁴⁷ are provided: the opportunity of being heard for a person subjected of the proceeding, rights of defence and the right of access to the documentation¹⁴⁸. As is known, in these proceedings there is the question to establish which parties are to be protected, making clear which acts are part of the proceeding and which of the final decision¹⁴⁹. As a consequence, we have to focus on the source of the measure in order to consider the jurisdiction of either the CJEU or the national judge. Indeed, the solutions will be different in the case of “less significant” credit institutions subject to the supervision of national authorities and their legitimate measures apart from the authorisation coming from the ECB. If the ECB

(eds.), *I procedimenti amministrativi dell'Unione europea. Un'indagine* (2004), 18; M. Veronelli, *Procedimenti composti e problemi di tutela giurisdizionale*, *ibid*, 59; L. Saltari, *I procedimenti composti e l'integrazione funzionale nella nuova disciplina delle telecomunicazioni*, *ibid*, 4; M.P. Chiti, *L'organizzazione amministrativa*, in M.P. Chiti, G. Greco (eds.), *Trattato di diritto amministrativo europeo, Parte generale*, II (2007), 415; G. Greco, *L'incidenza del diritto comunitario sugli atti amministrativi nazionali*, *ibid*, 978; S. Antoniazzi, *Procedimenti amministrativi comunitari composti e principio del contraddittorio*, *Riv. it. dir. pubbl. com.* 641 (2007); L. Saltari, *Amministrazioni nazionali in funzione comunitaria* (2007), 213; M.P. Chiti, *Diritto amministrativo europeo*, *cit.* at 80, 469; B.G. Mattarella, *Procedimenti e atti amministrativi*, *cit.* at 54, 336; C. Franchini, *Il procedimento*, in G. della Cananea, C. Franchini, *I principi dell'amministrazione europea*, *cit.* at 80, 222; H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, *cit.* at 88, 405 e 918-919.

¹⁴⁶ The distribution of supervisory powers results from a scheme of mixed organisational figures: see S. Cassese, *La nuova architettura finanziaria europea*, *Giornale dir. amm.* 80 (2014); O. Jansen and B. Schöndorf-Haubold, *The European Composite Administration* (2011). In general on organisation and procedures of co-administration since the 1990s see C. Franchini, *Amministrazione italiana e amministrazione comunitaria. La coamministrazione nei settori di interesse comunitario* (1993), 203; M.P. Chiti, *Diritto amministrativo europeo*, *cit.* at 80, 81.

¹⁴⁷ See for details J.C. Laguna De Paz, *El Mecanismo Europeo de Supervisión Bancaria*, *Revista de Administración Pública* 66-67 (2014).

¹⁴⁸ Art. 22.

¹⁴⁹ On this point see M.P. Chiti, *Diritto amministrativo europeo*, *cit.* at 80, 470-472.

takes upon itself the supervision of “less significant” credit institutions¹⁵⁰ the CJEU is still competent for judicial review.

Comparing the tasks assigned to the ECB and the national authorities, we actually note the ECB has an *exclusive competence* on a number of matters of prudential supervision (e.g. investigation powers on national banks, final administrative acts such as the banking authorisation or its revocation, powers on requests for the acquisition or cessation of shareholdings related to credit institutions) and finally limited regulatory powers. The national authorities are requested to draft preparatory acts which are auxiliary to the measures of the ECB. However, they maintain full powers towards both credit institutions which are “less significant” and credit institutions of third countries based or active in the territory of the Union. Therefore, when national authorities assume preparatory and auxiliary powers, they act as part of the *Single Supervisory Mechanism* (the same as the national central banks of the ESCB) and as they have direct knowledge of the national credit market they play a very important role.

As is known, because of the crisis, on occasion the ECB has inserted *unconventional measures*¹⁵¹ (or *non-standard monetary policy measures*) into its decisions or other legal instruments. They are *implicit powers* exercised in order to ensure the effectiveness of monetary policy, as well as to ensure the relations between Member States, the ECB and other institutions as a consequence of the crisis. However it should be noted that unconventional measures have been taken as a result of the inactivity or tardiness of Member States in responding to the financial and economic crisis that has overrun specific Member States and the Community in general. The absence of adequate decisions by Member States has been explained by the absence of political *impetus*, the complexity of EU decision-making procedures, legal limits imposed by EU law and national limits. Often, when the decision is taken at EU level, a reasonable period of time is necessary from

¹⁵⁰ Art. 6.5, b.

¹⁵¹ See on the asset purchase programmes the *Introductory statement to the press conference (with Q&A)*, M. Draghi and V. Constâncio, Frankfurt am Main, 3 June 2015, in www.ecb.europa.eu: “the asset purchases of Euro 60 billion per month are intended to run until the end of September 2016 and, in any case, until we see a sustained adjustment in the path of inflation that is consistent with our aim of achieving inflation rates below, but close to, 2% over the medium term”.

adoption to implementation to comply with democratic proceedings. To a certain extent we can assume that Member States have obliged the ECB to assume their powers since the *Governing Council's* acts are indeed faster, in the absence of any parliamentary consent or unanimity.

The Governing Council during the crisis has managed to take majority decisions in relation to both unconventional measures and bank rates; moreover the ECB does not account to electors, as a member state does, and the consequences of its decisions are mostly perceived by stakeholders rather than of citizens. *De facto* the ECB is considered the only institution acting quickly enough to keep up with the dynamism of the financial markets which clearly clashes with the slowness of democratic procedures.

On the basis of these general considerations can be explained the acquisition of *bonds*¹⁵² by the ECB and assistance over credit to support national banking systems. However the ECB has to give different reasons to intervene on national economic policy, by putting *pressure* on those Member States facing difficulties in implementing structural reforms, that is to say, all the conditions necessary to make unconventional measures effective. It can be interpreted as an attempt to highlight the limits of managing its institutional role and the provisional nature of unconventional measures. It is obviously a necessary attempt, though not sufficient to resolve the crisis of the Member States. During the various tardy reactions to the crisis, the ECB has taken measures on monetary policy so as to factually implement those reforms that bind a number of interventions (the recent case of the Greece¹⁵³). However the influence of the ECB to introduce national

¹⁵² For national *bonds* see: P. De Grauwe, *The European Central Bank: Lender of Last Resort in the Government Bond Markets? CESifo Working Paper*, n. 3569 (2011). Recently on easing of financing rates/spreads offered in the provision of funding to clients collateralised with government bonds, high-quality corporate bonds and covered bonds versus tightening of maximum amounts and maximum maturity of funding, see *Results of the June 2015 survey on credit terms and conditions in euro-denominated securities financing and OTC derivatives markets (SESFOD)*, 3 July 2015, in www.ecb.europa.eu.

¹⁵³ See *Press Release*, 6 July 2015, *ELA to Greek banks maintained*; the Governing Council of the ECB decided to maintain the provision of emergency liquidity assistance (ELA) to Greek banks at the level decided on 26 June 2015 after discussing a proposal from the Bank of Greece, in www.ecb.europa.eu.

reforms is only related to the Member States of Eurozone, although sometimes it would include all the States that have adopted the Euro for supranational reforms, e.g. the SRM will go beyond bonds market and strengthen the Union through economic and banking governance. It seems that unconventional measures have restricted the doubts about the beginning of a deflation process because of the crisis¹⁵⁴, even if the actual risk of deflation has recently led the ECB to adopt new instruments. As the ECB has chosen flexibility and adopts unconventional measures, at the same time it has been called upon to manage the balance between its powers conferred by TFEU and the Statute on monetary policy and those expressed by the new framework on prudential supervision of the Banking Union¹⁵⁵. By ordering specific financial and structural reforms of Member States, there is the risk of confusing the role of the ECB, interpreting its attempts as political conditioning, in contrast with its solid independence¹⁵⁶.

6. The implementation of the Regulation (EU) on SSM in national banking systems and the difficulties of harmonisation and administrative integration

The Banking Union is made up of Regulation (EU) no. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and Regulation (EU) no. 806/2014 and the Directive no. 2014/59/EU establishing the SRM. As a consequence, national

¹⁵⁴ See P. De Grauwe, *The European Central Bank: Lender of Last Resort in the Government Bond Markets*, in F. Allen, E. Carletti, S. Simonelli (eds.), *Governance for the Eurozone. Integration or Disintegration?* (2012), 17; about the effects of the so-called “sterilisation” following the programme to purchase bonds by the ECB that simultaneously removes liquidity to the markets: T. Petch, *The compatibility of Outright Monetary Transactions with EU law*, *Law and Financial Markets Review* 17 (2013).

¹⁵⁵ For recent remarks about European integration see V. Constâncio, *Reflections on financial integration and stability*, Speech at the Joint ECB-EC Conference on Financial Integration and Stability in a New Financial Architecture, Frankfurt, 28 April 2014, in www.ecb.europa.eu.

¹⁵⁶ Generally, on independent institutions and regulation in EU see G. García Álvarez, *La Unión Europea Como «Estado Regulador» y las Administraciones Independientes*, *Revista de Administración Pública* 79 (2014).

governments have substantially empowered supranational authorities and that innovates national banking systems, so that they will manage to adjust or erase previous rules¹⁵⁷. Therefore, the Banking Union involves a further evolution for the administrative integration in the EU but only for Eurozone Member States; they have to adapt their banking systems to the new rules and the supervisory national authorities are involved in these amendments¹⁵⁸.

Despite the intention to launch uniform mechanisms in line with the Monetary Union, however it has been maintaining a substantive *distinction* amongst Member States and double-faced systems on monetary policy, banking supervision and the resolution mechanism for the banking crisis. In fact a banking centralisation is a distant goal as of now, since the supervision of the ECB (based on the criteria of the distinction between “significant” credit institutions and “less significant” ones¹⁵⁹) and the SRM is only of interest to the Member States of the Eurozone and States willing to participate in it through the signing of cooperation agreements¹⁶⁰.

This doubling has an impact on application, but not decision-making since there are instruments that are common to all banks, e.g. regulations, directives, legal acts with the purpose

¹⁵⁷ In general, on the necessary adjustment of the national structures as a result of the evolution of the EU see G. della Cananea, C. Franchini, *I rapporti tra l'amministrazione europea e quella nazionale*, in G. della Cananea, C. Franchini (eds.), *I principi dell'amministrazione europea*, cit. at 80, 341.

¹⁵⁸ *Banca d'Italia* is the competent national supervisory authority and in relation to SSM see R. D'Ambrosio, *The ECB and NCA liability within the Single Supervisory Mechanism*, 78 *Quaderni di Ricerca Giuridica*, January 2015; M. Lamandini, D. Ramos Muñoz, J. Solana Álvarez, *Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of fundamental Rights' Protection*, 79 *Quaderni di Ricerca Giuridica*, November 2015, in www.bancaditalia.it. See the documents “*L'attività di vigilanza svolta dalla Banca d'Italia: linee generali e interventi nei confronti delle quattro banche poste in “risoluzione”*”, 30 gennaio 2016; the Report on financial stability no. 2/2015 and the annual report in www.bancaditalia.it.

¹⁵⁹ For details see B. Wolfers, T. Voland, *Level the Playing Field: The new supervision of credit institutions by the European Central Bank*, *Common Market Law Review* 1463 (2014).

¹⁶⁰ See the decision of the ECB 31 January 2014 (ECB/2014/5, in www.ecb.europa.eu) about close cooperation with competent national authorities of participating member States which do not have the Euro and relevant procedures.

of harmonising. Nevertheless the distinction on application procedures seems evident and can be confirmed by the role of the ECB and the different role of the EBA, which has been maintained and is partially integrated. The latter has administrative and regulation powers (e.g. drafting technical standards for the *Single Rulebook*) also involving credit institutions which are not part of Eurozone (e.g. the United Kingdom¹⁶¹) and so supervises competent national authorities and eventually takes their powers upon itself¹⁶².

The EBA exercises its regulatory and limited supervisory powers (e.g. the application of EU-wide *stress test* results of the 26th October 2014 to verify the solidity of banks¹⁶³) over each banking supervisory authority as well as the ECB; where disputes arise between supervisory authorities (e.g. banking activity

¹⁶¹ The UK does implement legal instruments coming from the EBA, however it expresses strong criticisms about the European integration, in relation not only to the Monetary Union (they are not willing to adopt the Euro) but also to the Banking Union. The UK point of view has led to a number of debates within British politics about a possible plan for exit from the Union and evidently a fierce debate at EU level about the future and possible consequences of the exit. There were a number of conferences on the UK position about Banking Union: *Britain Alone*, University of London, 9 May 2014, criticising the *Single Resolution Mechanism* (e.g. essay by P. Schammo (Durham University), *Differentiated Integration and the Single Supervisory Mechanism*; by contrast T. Tridimas, *EU Law and Monetary Union: Parallel Universes*, highlights recent news on ECB supervision, SRM and Banking Union which are the consequence of the failure of the European Supervisory Authority (2010), particularly of the EBA which do not have direct powers, but regulation powers, even if not quite the same as the powers of the ECB. See also *Europe in crisis*, 2 June 2014, London, King’s College; the crisis has led to adopt authoritative decisions without democratic legitimacy (T. Tridimas) and *accountability*. Crisis of constitutionalism of the so called *Troika* and political fragmentation of the Union (see I. Solty, York University, Canada); the financial and economic crisis is linked to the crisis of politics which is also its consequence (see S. Gill, York University, Canada). Within the financial and banking system the close cooperation between relevant institutions and harmonisation at international level are common and quite complex though (L. Quaglia, *The “ebb and flow” of transatlantic regulatory cooperation in banking*) as well as the new framework involving European and national competent authorities (A.H. Türk, *Institutional Architecture of EU Financial Regulation*); on these points see also P. Petit, *Charting ways out of Europe’s impasse*.

¹⁶² Art. 18 of the Regulation (EU) no. 1093/2010.

¹⁶³ For this document see www.eba.europa.eu. For details on stress-testing function and methodology see N. Moloney, cit. at 129, 1667.

exercised by credit institutions having branches in different Member States), the EBA coordinates and mediates contingent conflicts between national authorities¹⁶⁴. This *complex architecture* concerns the centralisation of competences on supervisory activity to supranational authorities alongside the empowerment conferred by national governments because of the particular focus on technique¹⁶⁵.

Some matters are still under debate, that is to say the application of criteria for identifying competent national authorities¹⁶⁶ depending on how national governments implement guidelines, the duplication of competences between the ECB and the EBA and the role of the Supervisory Board in banking crises due to the excessive delegation of functions, the complication of the plenary session of the Board and the executive session. Besides there is the question of the implementation of the *Single Rulebook*¹⁶⁷, because it has a complex architecture with a set of rules issued by different authorities and it could be non ineffective in supporting the European Banking Union. In fact it is composed of the *Single Prudential Rulebook* (Directive no. 2013/36/EU and Regulation (EU) no. 575/2013 on capital requirements) and the *Single Resolution Rulebook* (Directive no. 2014/59/EU on bank recovery and resolution, and Council Regulation (EU) no. 806/2014 on SSR); in addition the related technical standards developed by the EBA (in the case of the Directive on resolution this will also include technical standards under Directive no. 2014/49/EU on deposit guarantee schemes) and adopted by the European Commission, as well as the EBA guidelines.

Its rigidity is likely also to limit the effectiveness of ECB supervision activity whose tasks may be increased with specific

¹⁶⁴ On this point see S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 177, 252.

¹⁶⁵ See S. Cassese, *La nuova architettura finanziaria europea*, cit. at 146, 80.

¹⁶⁶ The competent national authorities are defined by arts. 2.2 of the SSM Regulation and 2.9 of the SSM Framework Regulation (ECB/2014/17) in www.supervisionbanking.europa.eu.

¹⁶⁷ See *The Single Rulebook* in www.eba.europa.eu. On EBA's fundamental role in the harmonisation process and for a more robust Rulebook along with the reinforcement of the EBA, see V. Babis, *Single Rulebook for Prudential Regulation of EU Banks: Mission Accomplished?*, *European Union Law Review* 779 (2015); B. S. Nielsen, *Main Features of the European Banking Union*, *European Business Law Review* 809 (2015).

regulatory powers in the prudential supervision sector; in fact the Single Rulebook consists of directives and, therefore, the Member States have some discretion in implementing them even if they have the objective of maximum harmonisation; this context can lead to difficulties for the SSM, because it has to consider the different national rules of company law about the governance of banks. The problems stem from the complex and rigid structure of regulation in the EU, as the Single Rulebook consists of rules stratified on three levels: a) the Commission, the Council and the European Parliament by means of directives and regulations, which are also very detailed because they are derived from complex political compromises; and b) the Commission on the basis of the standards prepared by the EBA. These rules derive from a complex approval proceeding requiring a simple majority of States of the SSM and others. A further third level concerns c) the legislation for the supervision of the ECB and national authorities. The regulation is, therefore, very strict because rules are provided for the legislative procedures of the EU and the agreements between the various national and European institutions derive from political solutions that cannot be changed easily.

In this context it might be difficult for supervisors to have effective regulation that can contribute immediately to the supervisory policies; this problem is even more acute, since for them it is a priority to quickly realise the process of homogenisation of supervisory practices. The EBA, which has extensive experience in cooperation with the various authorities involved, continues to play a central role in the formation of the European Rulebook. Probably it would require a different breakdown of the first two levels of European regulation to allow more space to the national authorities for the adoption of technical rules; also the ECB should have a greater regulatory autonomy to ensure an effective supervision by way of amendments to the Regulation on the SSM in order to recognise to it a dominant role in the supervisory functions as a European institution provided for by the TFEU.

The implementation of the European Banking rules therefore presents many difficulties for national orders also because banking regulation is polycentric and separated from prudential supervision, especially in the Eurozone where the

surveillance has been centralised, but not for an ECB regulatory power. Not only there are many regulators (the Commission, ABE, national authorities), but the rules are very detailed and leave only limited room at other levels in the oversight; or the rules are adopted by national authorities, but they need a complex approval from the European authorities¹⁶⁸. National authorities, however, have some discretion in the implementation of directives (e.g., for corporate governance), but different solutions may result in difficulties in the intervention of the ECB, unless it adopts its own criteria taken from the principles of the directives and the rules of best practice.

So, the question that arises is the sustainability of this system over time, apart from the political compromises to achieve the Banking Union; the main doubt is whether the current regulatory framework would allow the ECB to exercise prudential supervision efficiently or if the rigidity of the current institutional framework may be a limit to its effectiveness. For example, the SSM refers only to banks and not to the banking group as a whole, including non-banking activities, as it is established in some national systems (e.g., the Italian case¹⁶⁹); in fact, the ECB is responsible for the supervision of banks and the law on capital requirements defines the bank as a company holding deposits from the public and the granting of loans. In decisions about the identification of significant banks, the ECB has considered only the banking components of the group and they remain under the responsibility of national supervisory authorities¹⁷⁰; the Regulation of 2013 does not consider the coordination of the supervision of banking and non-banking members of a credit group.

As it is known the tasks assigned to the ECB by the TFEU are exclusive of this European institution, with the exclusion of any regulatory intervention by the Commission or the Council. Despite this institutional configuration, the Regulation on the SSM has provided some details about prudential supervision: it defines

¹⁶⁸ See macro-prudential measures in the Capital Requirements Directive and Regulation.

¹⁶⁹ See R. Costi, *L'ordinamento bancario*, cit. at 32, 674.

¹⁷⁰ See the documents "List of significant supervised entities and the list of less significant institutions" (4 April 2014; 15 August 2015); "Guide to banking Supervision" (September 2014), *supra* n. 43.

the relations of hierarchy between legal acts of the ECB and the other acts of EU law; the former are subordinate legislative and non-legislative EU acts, including those whose issuance is delegated to the Commission¹⁷¹. So the SSM provides for the subordination of the acts and regulations of the ECB to EU law which includes all primary and secondary legislation, the Commission’s decisions in the field of state aid, competition rules and control concentrations and the Single Rulebook. So the regulatory power of the ECB is limited to the organisation of the mode of carrying out the duties of supervision and must comply with the acts adopted by the EU Commission based on the technical rules of the EBA.

The ECB is a European institution¹⁷² for the functions of monetary policy, while it is considered by the Regulation on SSM equivalent to the supervisory role of the national authorities for the hierarchy of legal acts and regulatory power is very limited for supervisory functions¹⁷³. The reason for the different configuration depends on the intention of preserving the function of the EBA with the Commission in charge of financial regulation and to safeguard the technical regulatory harmonisation in the EU¹⁷⁴. Consequently, the ECB is subject to all the powers of the EBA, because it is included in the definition of the competent authorities to ensure equal treatment between the Member States participating in the SSM and the other Member States¹⁷⁵. This solution does not seem acceptable for the effectiveness of the powers of the ECB, given that the independence of regulators is a distinctive element of the independent authorities; moreover supervision within the Eurozone banks will require a level of harmonisation of supervisory practices higher than in other EU States and the ECB will have to create a unity of the practices followed by the participating States in areas not of interest to other Member States; this phase could be slowed by the need for non-participating States to express consent to being subject to the EBA.

¹⁷¹ Arts. 290-291 TFEU.

¹⁷² Arts. 282 ff. TFEU (Section 6) is inserted in Part six “*Institutional and Financial Provisions*”, Title I “*Institutional Provisions*”, Chapter I “*The Institutions*”.

¹⁷³ See G. Ferrarini, F. Recine, *Verso un Testo unico bancario europeo, The Single Rulebook and the role of the ECB in prudential supervision*, *Bancaria* 4 (2015).

¹⁷⁴ As expressed in Recital 32 of the Regulation on SSM.

¹⁷⁵ See Recital 12 of the Regulation on EBA.

Furthermore, the system of the Banking Union was finally accomplished with the new instruments adopted in 2014 related to the SRM according to the already existing federal view on relation between the ECB and European System of Central Banks¹⁷⁶, as it adheres to both the centralisation of EU decision-making and the decentralisation of their implementation by national authorities.

7. Conclusions on requirements of democratic legitimacy and accountability

The process for structural reform has not resolved yet the matters of democratic legitimacy, transparency and *accountability*¹⁷⁷, especially in relation to SSM and SRM, if we consider that the ECB also plays a strategic role in evaluating credit institutions subject to crisis. Accountability is considered essential for the transparency, legitimacy and independence of supervisory decisions¹⁷⁸ and for the activity of the SRM ; remedies to ensure a higher level of democracy are similar both in SSM (arts. 20-21; see § 3) and SRM (arts. 45-46 of Regulation (EU) no. 806/2014). Particularly remarkable is the report of the *Single Resolution Board* on the carrying out of tasks to the European Parliament, The Council, the Commission and the Court of Auditors and also the annual report to the European Parliament and the Council, also providing a number of hearings and question-times. In addition, the report has to be submitted to the national parliaments of participating Member States which can in turn present reasoned observations. The reports represent a fulfilment of the duties partially requested by the ECB as a guarantee for democracy in the framework of the Monetary Union. These instruments have been adapted, modified or reduced (e.g. reports also submitted to the national parliaments) when applied in the field of supervisory activity. In fact the

¹⁷⁶ On the solution of a federal organization see M.P. Chiti, *Diritto amministrativo europeo*, cit. at 80, 330; S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 38, 287.

¹⁷⁷ See S. Antoniazzi, cit. at 1, 241, 288. For details about *accountability* and transparency in EU, see E. Chiti, *L'accountability delle reti di autorità amministrative indipendenti dell'Unione Europea*, Riv. it. dir. pubbl. com. 29 (2012); A. Cygan, *Accountability, Parliamentarism and Transparency in the EU, The Role of National Parliaments* (2013), 34, 67, 185.

¹⁷⁸ See "Accountability" in www.bankingsupervision.europa.eu.

exercise of *high-technical powers* by independent authorities (especially the ECB) has *de facto* reduced the democratic involvement of parliaments whose activity is mostly fact-finding; although the parliaments do have the right to receive reports and clarifications when required, they do not condition any decision. The democracy gap at EU level and the impoverishment of the role of the national parliaments¹⁷⁹ can be explained as a consequence of the lack of a political Union.

More broadly, due to the EU integration process, there is a progressive empowerment on economic subjects from national organisations towards European bodies. Indeed this has set aside the standard of democratic legitimacy and consequently a number of democratic guarantees have vanished at EU level, increasing the democratic deficit in Europe. Besides it has to be noticed that often decisions are often taken unanimously at intergovernmental level and even if the vote is carried by a majority, the citizens of minority Member States are subject to the decision taken by the other Member States regardless of their interests. After this analysis, we can outline a possible (but complex) solution: the creation of bodies with decision-making powers, effectively supranational and linked to European citizens through a voting system that encourages sharing and awareness.

The supervisory function involves difficult technical judgments based on a variety of monetary, economic and financial factors made by complex procedures adopted by institutions which are not elected nor responsible to the European Parliament; they therefore lack direct democratic legitimacy and they do not apply legal acts which have parliamentary approval (see the legal acts of the ECB or the rules of the EBA). Even where they apply standards developed through EU processes, these typically leave considerable scope for autonomy in how they are applied by the regulatory bodies themselves. Issues of supervision and accountability are thus of great constitutional importance considering their direct effects and consequences on the national orders.

¹⁷⁹ For Italy see the law passed on 24 December 2012, n. 234 “*Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione Europea*” that involves the Italian Parliament in EU decision-making process. See also A. Cygan, *Accountability, Parliamentarism and Transparency in the EU*, cit. at 177, 210.

In recent years the improvement of democratic accountability has been an ambitious goal and it has become the leading principle to be applied by European institutions, especially during the crisis due to a greater interference of Europe in national economic and monetary policy. As mentioned already, problems of accountability play a great role in the SSM and the Single Resolution Mechanism¹⁸⁰. However, the decisions on credit institutions facing difficulties were taken within the Euro Group and so by the governments of the Eurozone which are subject to parliamentary controls. Presently what is desirable is a greater involvement of the European Parliament in the decision-making process, as well as the transposition of the debates of the national parliaments into the European debates because it would strengthen the democratic participation of EU citizens nearer the supranational level¹⁸¹.

The recent legal instruments adopted are aimed at entrusting *technical and sectorial bodies*¹⁸², provided with independence and technical discretion, in the field of economic, monetary, banking and financial Union. Moreover the focus on Banking Union has helped to examine in depth the relationships between democracy, politics and *technocracy*¹⁸³. This last easily lead the way over the others in the field of EU decision-making processes, due above all to the increase of technical authorities in a number of economic fields.

The SSM and the SRM¹⁸⁴ have created new legal realities and bodies within EU law and so EU integration is bolstered, but

¹⁸⁰ On *accountability* see C. Bourgault-M. Hauptman, *Single Supervisory Mechanism (SSM), Main Features, Oversight and Accountability*; M. Magnus, *Single Resolution Mechanism (SRM) and Single Resolution Fund (SRF), Main Features, Oversight and Accountability*, in www.europarl.europa.eu.

¹⁸¹ For critical remarks see G. Guarino, *Cittadini europei e crisi dell'euro* (2014).

¹⁸² On the issue of technocracy and the foundation of the power to decide in exceptional situations see G. Cofrancesco, *Fondamenti e prospettive evolutive del potere tecnocratico in Italia*, in G. Cofrancesco, F. Borasi (eds.), *Il potere tecnocratico. Il sistema corporativo in periodo di crisi* (2013), 116.

¹⁸³ For the prevalence of technocracy see A. Mozzati, *La strutturale instabilità dei servizi pubblici locali tra ordinamento europeo, spinte tecnocratiche e diritto interno*, in G. Cofrancesco, F. Borasi (eds.), *Il potere tecnocratico*, cit. at 182, 177-178.

¹⁸⁴ On the intricate relationship between the Regulation and Directive on SRM, the complexity of procedures and legal acts see S. Antoniazzi, *L'Unione Bancaria europea: i nuovi compiti della BCE di vigilanza prudenziale degli enti creditizi e il Meccanismo unico di risoluzione delle crisi bancarie*, II, Riv. it. dir. pubbl. com. 739

the key question concerns the *democratic legitimacy* by means of different modes of accountability depending whether the body or persons accounted to can be classified as having a nature that is political, administrative or judicial. Within the EU accountability is often considered as reporting to elected parliaments; indeed, Council Regulation (EU) no. 1024/2013 on SSM requires the ECB to provide information to the EU and national parliaments¹⁸⁵.

The ECB has an exclusive competence for prudential supervisory tasks and the responsibility for these tasks is divided between the ECB and competent national authorities on the basis of the criterion of the significance of the individual credit institutions supervised; the division of tasks implies that the ECB exercises the supervision of significant banks and the national authorities have to consider less significant banks, but the ECB is responsible for the effective and consistent functioning of the SSM and it has specific powers for less significant banks as well, while the national authorities have to notify the ECB of draft material decisions and material supervisory procedures.

As is known, the SSM Regulation provides for a duty of loyal cooperation and information exchange for both the ECB and the national authorities which have to assist the ECB and follow its instructions. This close cooperation between the ECB and the national authorities and the mixed allocation of supervisory powers result in a very complex accountability of a political nature; there is a political accountability aspect in art. 127.6 TFEU too, because it requires unanimity in the Council (i.e. ministerial

(2014); K. Windthorst, *European Stability Mechanism and Banking Union. Principals and Challenges*, Riv. it. dir. pubbl. com. 949 (2014).

¹⁸⁵ Arts. 20-21. For a view in favour of the democratisation of financial market regulation - a topic resisted by many market participants and by some in regulation, yet this is being explored by policymakers in the US and EU, notably in the UK, see N. Dorn, *Policy stances in financial market regulation: Market rapture, club rules or democracy?*, in A. Kern and N. Moloney (eds.), *Law Reform and Financial Markets*, cit. at 33, 35. The author examines two aspects “active democratic oversight of financial market regulation is merited on grounds of principle. Second, accountability to national and regional parliaments would result in regulatory diversity, resulting in more robust market systems at global level. The current de facto “independence” of financial market regulators allows them to network globally yet privately, to negotiate on the basis of market demands (each national regulator championing its home industry) and to converge their rules accordingly - producing common blind spots, systemic vulnerabilities and heightened potential for global crisis”.

representatives from Member States) and so the Member States must all agree, expressing a greater democratic consensus, but in conferring direct supervisory powers to the ECB, they have probably chosen a wider reading of the provision¹⁸⁶.

Besides there is a conflictual relationship between the independence of the ECB and the necessary accountability; the Basel Committee on Banking Supervision emphasises the importance of independence and accountability for an effective banking supervision¹⁸⁷, and these two characters are present in SSM Regulation¹⁸⁸. In fact the ECB should exercise its powers in full independence, in particular free from undue political influence and from industry interference¹⁸⁹, but the ECB is accountable for the supervisory tasks to the European Parliament and the Council as institutions which are democratically legitimised representing the EU citizens and Member States and confirming the existing independence of the ECB; furthermore national parliaments are involved. These contextual aspects create a *tension* between independence and political accountability, but these two elements may be interpreted in a view of an inevitable trade-off or they could be also considered complementary in a complex balance¹⁹⁰; a good solution would be one whereby the

¹⁸⁶ See G. Ter Kuile, L. Wissink, W. Bovenschen, *Tailor-Made Accountability within the Single Supervisory Mechanism*, *Common Market Law Review* 162 (2015).

¹⁸⁷ See Basel Committee on banking supervision, *Core principles on effective banking supervision*, September 2012, in www.bis.org/publ/bcbs230.pdf.

¹⁸⁸ Arts. 19-21, 55 and 85.

¹⁸⁹ Art. 75.

¹⁹⁰ See for a debate on both solutions: P. Iglesias Rodríguez, *The Accountability of Financial Regulators. A European and International Perspective* (2014), 20. For the first view: F. Ambtenbrink, R.M. Lastra, *Securing Democratic Accountability of Financial Regulatory Agencies – A Theoretical Framework*, in R. V. De Mulder (ed), *Mitigating risk in the context of safety and security. How relevant is a rational approach?* (2008), 121. The authors analyse central issues saying that “it is true that, as has been observed in the context of central banks, that the relationship between independence and accountability is much more complex than a simple trade-off between the two. Indeed, they may actually complement each other. However, the suggestion of ‘designing accountability arrangements that will be supportive of agency independence’ seems a bridge too far as it may stand in the way of the establishment of a legal framework that will serve the true rationale for accountability mechanisms. Despite the partial function of accountability as guarantor of the independent status of an agency, it cannot be ignored that institutional choices in favour of accountability affect the position of the agency

supervisory authority is controlled, but the principal (or political) body is not able to exercise undue influence over the supervisor¹⁹¹. The rule of accountability may inevitably influence the agent’s activity and choices; so independence and accountability appear as “communicating vessels” and independence does not rule out accountability, but it does imply a delicate balance¹⁹².

The focus on the supervisory activity of the ECB and the SRM leads to some final considerations about the objectives set out by economics and monetary policy¹⁹³. Important results have indeed been achieved in the field of *administrative integration*, particularly the introduction of a number of objectives to improve national economies¹⁹⁴ using structural reforms pushed by the ECB and the Union and they create a financial market which is supervised closely by Banking Union. The progressive administrative integration involves banking policy by using uniform rules (so as to prevent discretion on the regulation power – regulatory arbitrage – and the study of weak points in legislation) applicable to national law within the Eurozone and eventually to Member State that are non-Euro but adhere to the SSM and SRM.

vis-à-vis parliament and the executive government and thus, ultimately its independent position. Ultimately there is a trade-off between independence and accountability. Finding the right balance between these two key institutional features becomes a balancing act”. For the second view see C. Zilioli, *Accountability and independence: Irreconcilable values or complementary instruments for democracy? The specific case of the European Central Bank*, in G. Vandersanden, D’A. De Walsche (eds.), *Mélanges en hommage à Jean-Victor Louis*, Vol. II (2003), 401-402.

¹⁹¹ See P. Iglesias Rodríguez, *The Accountability of Financial Regulators*, cit. at 190, 20-22.

¹⁹² See G. Ter Kuile, L. Wissink, W. Bovenschen, *Tailor-Made Accountability within the Single Supervisory Mechanism*, cit. at 186, 166.

¹⁹³ On the evolution of monetary policy see M. Draghi, *Euro area economic outlook, the ECB’s monetary policy and current policy challenges*, Statement prepared for the twenty-ninth meeting of the International Monetary and Financial Committee, Washington, D.C., 10 April 2014, in www.ecb.europa.eu.

¹⁹⁴ On economic convergence of the States of EU before the crisis and current sustainability see P. Praet (Executive Committee of the ECB), *The financial cycle and real convergence in the euro area*, Annual Hyman P. Minsky Conference on the State of the US and World Economies, Washington D.C., 10 April 2014, in www.ecb.europa.eu.

Administrative integration¹⁹⁵ has developed as a consequence of new rules on supervisory activity and SRM and the *mixed administration* represents a complication for an adequate solution of accountability; in fact new bodies have been introduced, e.g. the Board, the agencies, cooperation arrangements, new articulated administrative proceedings and legal instruments, subject to the review of the CJEU and sometimes of the national courts. The legal instruments and in particular those instruments falling within the administrative sphere and, as is well-known, the new legal instruments are closely linked to the financial and economic crisis; indeed it is not always simply to use the *community method* (partially already superseded by the Lisbon Treaty) especially when solutions are needed in emergency situations. Besides the ECB and national authorities have many responsibilities within the SSM and the institution and authorities should be held accountable at both a European and national level and on some occasions simultaneously at both levels with reciprocal obligations of transparency for supervisory information; thus accountability seems possible only by means of a mix of instruments, considering

¹⁹⁵ See F. Giglioni, *European administrative integration through differentiation. Methods of European coordination*, Riv. it. dir. pubbl. com. 311 (2014); in general, see A. von Bogdandy, *Le sfide della scienza giuridica nello spazio giuridico europeo*, *Il Diritto dell'Unione Europea* (2012), 225. For a contribution to the discussion on the recent concept of a systemic deficiency in the rule of law in the EU and the relationship with the economic and financial crisis, see ID, *Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done*, Com. Mkt. L. Rev. 51 ss. (2014). In general, about the rule of law see T. Bingham, *The Rule of Law* (2011); recently J. Jowell, *The Rule of Law and Administrative Justice*, *IJPL* 94 (2015). In relation to the economic crisis, see a very interesting study: S.A. Ramirez, *The Subprime Crisis and the Case for an Economic Rule of Law* (2013), 186, especially 189-191; the author explains that "the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurist are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized". So "a durable economic rule of law, consistent with both notions of human right as well as macroeconomic growth, seems within the reach of the law" and "A more robust economic rule of law can prevent such crises by limiting the ability of governing elites to subvert legal and regulatory infrastructure, exploit the disempowered, and neglect market development through the maintenance of a broad middle class".

the complexities inherent in supervision and the required independence.

There are many difficulties for accountability and the enforcement of rules in this complex framework; there is a need to highlight the large number of legal acts in the field of banking and finance, that is to say EU regulations and directives, legal acts of the ECB, technical rules of the EBA (also recalled by delegate instruments of the Commission¹⁹⁶ under arts. 290-291 TFEU). This complex system is made up of a large number of legal instruments to be applied depending on each case, though. The complexity involves the banking supervision and the SRM which are both prerequisites of the Banking Union and only the implementation phase will highlight appropriate corrections, mainly in simplifying procedures in order to speed up the adoption of measures and legal acts. Besides the organisation and tasks seem to be overly complicated and administrative accountability sometimes spills over into political accountability in terms of the relationship between the ECB, national authorities and the Governing Council¹⁹⁷.

As mentioned above, evidently the complex scheme is made up of a large number of instruments and authorities, e.g. in the proceedings for banking authorisation. The implementation by national law will be lengthy and matters of interpretation will arise, especially in terms of competent national authorities which are now operative. The same complexity results from the SRM, because of the Regulation, the Directive, the legal acts and the legislation recalled (the regulation and the directive on prudential supervision and the patrimonial conditions of credit institutions). Moreover the Single Resolution Board is bound to technical rules elaborated by the EBA and adopted by the Commission and it is subject to the guidelines, recommendations and decisions of the same body.

The ECB finds itself in a complex framework of accountability relationships; in accounting to politicians, the ECB has to report at both EU and national levels and deal with an intricate system of governance; it must maintain dialogue with representatives of the national supervisors in the Supervisory

¹⁹⁶ Arts. 290-291 TFEU.

¹⁹⁷ E. g. on a draft decision see art. 26.8 of SSM Regulation.

Board and the governors of the central banks in the Governing Council.

In conclusion, only some consequences can be predicted from this scenario and the difficulties in implementation by Member States would depend both on SSM and SRM. Evidently, further empowerment of the ECB by the national central banks and competent national authorities and the identification of the resolution authorities will modify the interpretation criteria of the legal instruments, the role of EU institutions and bodies (including new bodies, with specific competences and independence) and their relationships, assuming there will be a number of contradictions, e.g. the excessive fragmentation of competences, the high number of legal instruments and complex administrative composite procedures and the need for simplification so as to guarantee efficiency in emergency cases and effective measures to be adopted by the ECB and the competent national authorities.