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The Case for Intra-executive Accountability in the Banking Union

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4.1 INTRODUCTION

One remarkable, widespread trend in the European economic constitution since the financial crisis has been the rise of discretionary powers on the part of independent government agencies, specifically, the European Central Bank (ECB). The shift to unorthodox monetary policy, and in particular quantitative easing, has increased, or rather, brought to light the discretionary powers of the ECB within the four corners of its stability mandate.[1] Moreover, the competencies assigned to the Single Supervisory Mechanism (SSM) imply enormous leeway for the ECB in assessing the financial situation of banks throughout the European Union.[2] In times of radical uncertainty, it seems difficult to imagine carrying out monetary policy or supervisory functions without ample discretion at hand.[3]

Yet, many observers frown upon these powers as they undermine the technocratic narrative that has served as a justification for ECB independence so far.[4] A first boiling point was reached in the *Landesbank* case. According to

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[1] BVerfG *PSPP*, 2 BvR 859/15, Judgment of 5 May 2020, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 129.

[2] 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, OJ L 278/63 of 29 October 2013 (hereinafter SSM Regulation).

[3] Kay and King, *Radical Uncertainty: Decision-Making for an Unknowable Future* (Bridge Street Press 2020).

[4] Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2018); Feichtner, 'The German Constitutional Court's PSPP

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the Court of Justice of the European Union (CJEU), the SSM enjoys wide discretion to cede its supervisory competence over less significant institutions to national supervisory authorities.[5] This judgment provoked backlash not only in academia[6] but also at the German Constitutional Court (BVerfG). While ultimately accepting the CJEU judgment, it clearly drew a red line, pointing out that the CJEU narrowly missed an *ultra vires* verdict from Karlsruhe.[7] Moreover, members of domestic parliaments sense a loss of influence and are skeptical of the concentration of powers in the hands of the ECB, even though Article 21 SSM Regulation stipulates ample consultation rights for them.[8] On the other hand, nobody has come forward with a proposal to dismantle the ECB and shift its powers to the European Commission or, worse, the Council. Apart from well-known time-inconsistency problems, the ideas of expertise and reliability favor delegation to authorities enjoying some degree of autonomy.[9] Some therefore suggest that one should assign supervisory competencies to the European Banking Authority (EBA) instead of the ECB.[10]

This chapter argues that the accountability of the SSM may be better than the current debate suggests. While judicial and parliamentary modes of accountability – the focus of the present debate – do have certain limits, a set of intra-executive accountability mechanisms is often overlooked. It is adequate for politically salient decisions like the discretionary powers exercised by the SSM.

The chapter proceeds as follows. An overview of the breadth and depth of discretionary powers exercised by the SSM debunks any attempt to base the

Judgment: Impediment and Impetus for the Democratization of Europe', 21 *German Law Journal* 1090 (2020).

5 Cf. *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank*, Case T-122/15, Judgment of the General Court (Fourth Chamber, Extended Composition) of 16 May 2017, ECLI:EU:T:2017:337; confirmed by the CJEU in Case C-450/17 P, Judgment of 18 May 2019, ECLI:EU:C:2019:372, mn. 53 et seq.

6 Tröger, "How Not to Do Banking Law in the 21st Century: The Judgement of the European General Court (EGC) in the Case T-122/15-Landeskreditbank Baden-Württemberg-Förderbank V Euro-pean Central Bank (ECB)," SAFE Policy Letter No 56 (2017).

7 BVerfG *Banking Union*, 2 BvR 1685/14, Judgment of 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514, para. 203 et seq.

8 Cf. Deutscher Bundestag, Motion "Europäisches System der Finanzaufsicht effizient weiterentwickeln," BT-Drs. 18/7539 of 16 February 2016; see also the speech of MdB Radwan, 18 February 2016, Plenary Protocols, 18th term, session 155, pp. 15265–15266, http://dipbt.bundestag.de/dip21/btp/18/18155.pdf#P.15265.

9 Tucker, supra note 4, pp. 92 et seq.

10 Ramthun, "CSU-Vorstoß zur Trennung von EZB-Geldpolitik und Bankenaufsicht," Wirtschaftswoche, 11 January 2018, available at: www.wiwo.de/politik/deutschland/europaeische-zentralbank-csu-vorstoss-zur-trennung-von-ezb-geldpolitik-und-bankenaufsicht/20834002.html. This might require a treaty change, see Moloney, "European Banking Union: Assessing Its Risks and Resilience," 51 *Common Market Law Review* 1609 (2014), pp. 1653 et seq.; Ohler, *Bankenaufsicht und Geldpolitik in der Währungsunion* (Beck, 2015), pp. 145–146.

legitimacy of the SSM on a technocratic rationale (B.I.). Instead, the chapter argues that the legitimacy of independent institutions like the SSM is effectively a question of a level of accountability commensurate to the institutional position of the SSM and the authority exercised by it (B.II.). The specific authority exercised by the SSM requires judicial, parliamentary, and intra-executive accountability (B.III.).

The chapter then reviews the current framework of checks and balances applicable to the SSM. While judicial review is an effective accountability mechanism for standard administrative decisions that implement legal requirements, it has a limited function in respect of the highly policy-relevant, quasi-governmental powers of the SSM (C.I.). Parliamentary accountability is generally capable of dealing with politically salient issues that might require changes in the law or of keeping budgetary side effects of financial regulation under control. However, the control exercised by the parliament is rather general in nature and cannot address individual regulatory decisions. This impedes the review of policy-heavy, discretionary decisions addressing individual cases (C.II.). This turns the focus to intra-executive accountability mechanisms. These mechanisms comprise the review of individual, discretionary decisions with potentially far-reaching consequences. As the independence of the ECB prohibits the issuance of binding directives like in ordinary administrative review proceedings, the Commission and the European Court of Auditors (ECA) yield a nonbinding type of authority by reviewing the work of the SSM. Fortunately, obstacles initially preventing the work of ECA have been eliminated. Taken together with parliamentary accountability and judicial review, it does not appear that the SSM is suffering from a severe accountability gap (C.III.).

The chapter concludes by reviewing suggestions for strengthening intra-executive accountability. They range from reassigning the SSM to EBA, to increasing the Commission's powers of control. In fact, the latter scenario seems most advantageous. It is even possible to reconcile it with the treaty-guaranteed independence of the ECB. Despite the positive assessment of the present level of SSM accountability, increasing the powers of the Commission over the SSM might be in the ECB's best long-term interest (D.).

4.2 THE LEGITIMACY OF INDEPENDENT INSTITUTIONS

4.2.1 *The Limits of Technocratic Legitimacy*

Historically, the legitimacy of independent institutions has been based on the ideas of expertise and time inconsistency. Some decisions require too much technical expertise and a longer-term perspective to leave them to elected

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officials whose primary focus is on winning the next elections.[11] This, however, assumes that the issue in question is essentially a technical, low-politics one that does not shift major redistributive decisions to unelected institutions.[12]

I think that this justification is insufficient for independent supervisory authorities. The sheer extent of the SSM's discretionary powers debunks the attempt to adorn it with a technocratic varnish. Of course, not all SSM decisions raise similar concerns. To the extent that the SSM takes decisions of a rather narrow administrative character, that is, by applying a narrowly defined normative program to a specific case, it would be wild to assume a spectacular legitimacy gap. One example would be fit and proper decisions.[13] Rigorous judicial review appears to be sufficient for decisions of this type. The CJEU would even allow delegating such competencies to independent agencies.[14] However, there is another category of supervisory decisions, which are of far-reaching political significance. They involve crucial choices that might have relevance for the health of the entire financial sector. The following scenarios illustrate some of these decisions and their impact and potential for conflict.

First, supervisory decisions may include monetary policy considerations. While the SSM Regulation provides for the separation of monetary and supervisory powers,[15] in practice, the two fields are too closely related for a full separation to work out. It would create an impossible situation for the ECB if its monetary and supervisory prongs were pulling on the opposing ends of one and the same string.[16] Moreover, the legal frameworks of the Treaty on the Functioning of the EU (TFEU) and the SSM Regulation provide enough discretionary leeway for the ECB to take monetary concerns and concerns for financial stability into account in its prudential decisions.[17] The relevant rules define goals rather than setting out a precise normative program to be applied in a narrowly defined situation – a familiar feature of the provisions applicable in the scope of the Economic and Monetary Union.[18] Naturally, the application of goal-oriented provisions involves a wide margin of discretion.

[11] Tucker, supra note 4.; Goldmann, "United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union," 14 *European Constitutional Law Review* 283 (2018).

[12] Tucker, *supra* note 4, at 569.

[13] Cf. Article 4(1)(e) SSM Regulation.

[14] *United Kingdom v Parliament and Council (ESMA)*, Case C-270/12, judgment of 22. January 2014, ECLI:EU:C:2014:18.

[15] Article 25, SSM Regulation.

[16] See Goldmann, supra note 11.

[17] Ibid.

[18] Bast, "Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review," 15 *German Law Journal* 167 (2014), at p. 175.

Second, wide discretionary powers exist with respect to decisions on bank resolution. According to the Single Resolution Mechanism (SRM) Regulation, the Resolution Board decides about the resolution of a financial institution on the basis of the opinion of the ECB on the probability of default.[19] Although the Resolution Board may override the ECB's opinion, the ECB's decision structures the ultimate result in a decisive way.[20] In taking this decision, the ECB might have to balance conflicting interests. On the one hand, it might be cost-effective to resolve failing institutions as soon as the situation appears to be irreversible. On the other hand, supervisory concern for the stability of other institutions likely to be affected by the resolution might militate in favor of a delay until precautionary measures are in place or the other institutions have been stabilized. The wording of Article 18 SRM Resolution provides enough leeway for the ECB to tilt in one direction or another. In particular, to establish under Article 18(1)(c) SRM Regulation that a resolution action is in the public interest, Article 18(5) SRM Regulation refers to the broadly phrased objectives of Article 14(2) SRM Regulation, which comprise, among others, the objective to protect "financial stability."[21] This concept is hardly more concrete than the notion of price stability.[22]

The third scenario concerns the influence of the ECB on rulemaking. In the Banking Union, the EBA in cooperation with the Commission normally holds rulemaking powers, while the ECB is only a nonvoting member of the EBA board of supervisors.[23] However, the ECB has gained effective influence owing to its position as the institution hosting the SSM. In particular, the ECB and National Competent Authorities (NCAs) are charged with the implementation of EBA guidelines. For this purpose, the ECB and the NCAs have developed common policies reflected in guides, such as the guide for fit and proper decisions.[24] Of course, such guides are subordinate to, and need to be in compliance with, all applicable rules, including relevant EBA guidelines.

[19] Article 18(1) subpara. 1 lit. a SRM Regulation.

[20] Article 18(1) subpara. 2 SRM Regulation. Nothing else applies to decisions about alternatives to resolution, Article 18 (1) subpara. 1, lit. b SRM Regulation, or decisions on early intervention, Article 18(2) SRM Regulation.

[21] Article 14(2)(b) SRM Regulation.

[22] Actually, the ECB financial stability mandate is derivative of its price stability mandate, see Psaroudakis, "The Scope for Financial Stability Considerations in the Fulfilment of the Mandate of the ECB/Eurosystem," 4 *Journal of Financial Regulation* 119 (2018).

[23] Article 40(1)(b), Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331/12 of 15 December 2010 (hereinafter EBA Regulation).

[24] ECB, Guide to fit and proper assessments, May 2018, www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705_rev_201805.en.pdf.

But apart from the fact that the ECB published its guide before the adoption of the relevant EBA guidelines,[25] the ECB's guide effectively reduces options available to NCAs under the regulatory framework.[26] The regulatory powers of the ECB under Article 4(3) SSM Regulation for its own supervisory powers, and under Article 6(5)(a) SSM Regulation with respect to the supervisory activities of NCAs, put the ECB in a competition with EBA.[27] Moreover, the development of a common "supervisory culture"[28] by the EBA is difficult to imagine without crucial support from the ECB. In fact, this culture is likely to be framed by ECB practice and through supervisory guidelines and recommendations pursuant to Article 4(3) SSM Regulation. One might therefore wonder who the master is and who the servant in this relationship.

The last scenario described here concerns the familiar interplay between financial stability and fiscal policy. The ECB is – still – involved in the design and implementation of adjustment policies of the European Stability Mechanism (ESM). According to Article 13 ESM Treaty, the ECB is charged with the production of debt sustainability analyses, the negotiation of MoUs, and, as part of the "troika," with compliance control (Article 13(7) ESM Treaty). In states where a spillover from problems in the banking sector is at the origin of trouble, the multiple roles of the ECB might be difficult to juggle. On the one hand, as a supervisor, the ECB sets the conditions relevant for the fiscal situation of member states. On the other hand, it is charged with playing crucial roles in fixing the very same crisis.[29]

Overall, this overview reveals the political salience of the ECB's supervisory powers. This regularly stems from the fact that the applicable legislation often holds the ECB to follow certain objectives rather than strict rules, or even to balance various potentially diverging objectives, thereby equipping the ECB

[25] Commission Staff Working Document accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) 1024/2013, 11 October 2017, COM(2017) 591 final, 39.

[26] Instructive: Chiti and Recine, "The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position," 24 *European Public Law* 101 (2018), at p. 122.

[27] These tensions shine through in the Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU)No 1024/2013, SWD(2017) 336 final, 11 October 2017, 15.

[28] Article 8(1)(b) EBA Regulation.

[29] For similar reasons, Advocate General Cruz Villalón admonished the ECB should discontinue its involvement in the "troika" in countries where it would implement it Outright Market Transactions Program, see *Peter Gauweiler and Others v Deutscher Bundestag*, Case C-62/14, Opinion of Advocate General Cruz Villalón delivered on 14 January 2015, ECLI:EU:C:2015:7, para. 150.

with considerable authority.[30] These decisions are not merely of a technocratic nature but involve political judgment, including difficult discretionary choices and at times severe financial consequences. The ECB's supervisory powers therefore require more than a technical, expertise-driven kind of legitimacy based on narrowly defined mandates.[31]

4.2.2 *Democratic Legitimacy of Independent Institutions*

How to establish the legitimacy of independent authorities with considerable discretionary powers? At the outset, it is important to move beyond the familiar, yet mythological concept of technocratic legitimacy. This concept implies that independent institutions are a democratic pathology. In particular, in the view of the BVerfG, they are at loggerheads with the principle of representative democracy, undermining the principle of ministerial control, a core trajectory of legitimacy in parliamentary democracies.[32] The court therefore accepts them only under narrowly circumscribed conditions.[33] The result is no different if one understands the European Parliament (EP) as the ventricle of representative democracy, rather than national parliaments.[34] However, the pathological view tends to underestimate the significance of independent institutions for the Union. As Antoine Vauchez has argued, the Union's independent institutions – the Commission, the CJEU, and the ECB – have been its most effective ones, the ones that represent the Union's interest most clearly and have given the Union its contemporary shape.[35] The concept of technocratic legitimacy therefore not only fails to provide a satisfactory level of legitimacy for the existing discretionary powers of independent institutions; by

[30] Smits, "Accountability of the European Central Bank," *Ars Aequi* 27 (2019), at p. 29.

[31] Dawson, Bobić and Maricut-Akbik, "Reconciling Independence and Accountability at the European Central Bank: The false promise of Proceduralism," 25 *European Law Journal* 75 (2019), p. 77 et seq.

[32] Cf. Fichtmüller, "Zulässigkeit ministerialfreien Raums in der Bundesverwaltung," 91 *Archiv des öffentlichen Rechts* 297 (1966).

[33] For example, BVerfG *Maastricht*, 2 BvR 2134, 2159/92, Judgment of 12 October 1993, 89 BVerfGE 155, at 207 et seq.; Assigning exceptional status to the democratic legitimacy of the ECB: BVerfG *Gauweiler*, Case 2 BvR 2728/13, Judgment of 21 June 2016, para. 131, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813; on supervisory powers: BVerfG *Banking Union*, 2 BvR 1685/14, Judgment of 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514, para. 132 et seq.

[34] Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press, 2007) 18, at p. 138 (on why independent agencies are more compatible with a constitution built around a separation of powers like the US constitution rather than the European constitution built around parliament).

[35] Vauchez, "The Appeal of Independence: Exploring Europe's Way of Political Legitimacy," TARN Working Paper 7/2016 (2016). <http://dx.doi.org/10.2139/ssrn.2881913>, at p. 19.

doing so, it also misses out on core features of the European Union's exercise of public authority, redefining the "normal" as an anomaly. It might occasionally go as far as echoing populist attacks on the administrative state.[36]

The point is therefore to ensure the democratic legitimacy of independent institutions in a genuine way, one that sees them as part of democratic institutional frameworks, rather than as pathologies. This is a challenge that certainly exceeds the analysis of the SSM. This chapter may only outline the broad contours of such a theory of democratic legitimacy for independent institutions. This theory is based on proposals in the literature. For the most part, they emerge from specific contexts other than the European Union, which one should keep in mind when analogizing from them.

As a first insight from this literature, it seems important to distinguish between different types of independent institutions. Bruce Ackerman proposed to distinguish regulatory and integrity institutions as specific emanations of the administrative state.[37] While integrity institutions, like courts of audit, would be justified by the significance of their task and the limitations of their mandate, regulatory institutions fulfill more executive functions, therefore requiring some level of democratic participation.[38] Tarunab Khaitan has recently extended the concept of integrity institutions by pointing out the specific role of "guarantor institutions," including ombudsmen and human rights commissions.[39] The kind of independent institution in the focus of this chapter is clearly different, given the political salience of SSM decisions.

A second recent proposal merits consideration. Cass Sunstein and Adrian Vermeule have suggested a strategy to redeem the administrative law by charging courts with the enforcement of the "inner morality" of the law against administrative agencies.[40] The concept of the "inner morality" stems from Lon Fuller's theory of government legitimacy and comprises a bunch of rule-of-law principles of an overly formal-procedural character. The authors argue that recent case law mostly revolves around obliging the administration to respect this inner morality. Their theory intends to dispel fears of the administrative state predominantly among the political right. This strategy deliberately restricts judicial control of allocative decisions[41] and does not consider the democratization of the administrative state as a particular

[36] Cf. Peters and Pierre, "Populism and Public Administration: Confronting the Administrative State," 51 *Administration & Society* 1521 (2019).
[37] Ackerman, "The New Separation of Powers," 113 *Harvard Law Review* 633 (2000), p. 693 et seq.
[38] Ackerman, ibid., at p. 697.
[39] Khaitan, "Guarantor Institutions," *Asian Journal of Comparative Law* 1 (2021).
[40] Sunstein and Vermeule, *Law and Leviathan* (Harvard University Press, 2020).
[41] Ibid., at p. 90 et seq.

urgency.[42] While this strategy might further Sunstein's and Vermeule's agendas of nudging and common good constitutionalism,[43] it seems hardly adequate for a pluralistic society.

A third proposal is Pierre Rosanvallon's theory of good government.[44] He argues that democratic struggles for representation prevailed during the nineteenth and early twentieth centuries. As the elected members of government became the predominant political power in the latter part of the twentieth century and traditional party systems began to erode, the struggles for representation became one for a better quality of government, for making the executive act in the people's best interest. It is therefore time to go beyond a conception of democracy as centered on elections and to understand democracy as a permanent process that requires transparency, responsibility, responsiveness, and truthfulness on the part of the executive power. In this respect, Rosanvallon points out the antipopulist potential of independent institutions and the function of integrity institutions to control the executive.[45] One could further extend this thought and even consider regulatory agencies as a way of establishing a separation of powers within the executive branch.

I believe that one can read the core constitutional provisions of the European Union as comprising both classical ideas of representative democracy and the trajectories for ensuring permanent democracy in line with Rosanvallon's theory. At the center of the core constitutional provisions sits Article 2 TEU, which stipulates the fundamental values of the Union, among them democracy and the rule of law.[46] Articles 9 to 12 TEU further specify these values for the interaction between citizens and Union institutions,[47] while Articles 13 to 19 TEU concretize them with respect to the institutional legal frameworks. There is no doubt that the core constitutional provisions of EU law also apply to the ECB.[48] From these provisions, one may derive various trajectories of legitimacy for independent institutions.

[42] On the democratic approach to the administrative state in historical context: Emerson, *The Public's Law: Origins and Architecture of Progressive Democracy* (Oxford University Press, 2019).

[43] Sunstein, *Why Nudge?: The Politics of Libertarian Paternalism* (Yale University Press, 2014); Adrian Vermeule, "Beyond Originalism" (31.3.2020) *The Atlantic*.

[44] Rosanvallon, *Good Government* (Harvard University Press, 2018).

[45] Ibid., at pp. 253 et seq.

[46] On Article 2 TEU as a fundamental value of EU law, see CJEU, Case C-64/16, Associação Sindical dos Juízes Portugueses (ASJP), Judgment of 27 February 2018, ECLI:EU:C:2018:117. On the significance of Article 2 for the identity of the EU, see Armin von Bogdandy, *Strukturwandel des öffentlichen Rechts* (Suhrkamp 2021) 16 et seq.

[47] Cf. BVerfG *Banking Union*, 2 BvR 1685/14, Judgment of 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514, para. 135. The BVerfG does not mention Articles 13 to 19 TEU, though.

[48] Haag, "Article 10," in von der Groeben, Schwarze, and Armin (eds.), *Europäisches Unionsrecht* 1, 7th edn (2015) mn 5.

The first trajectory is representative democracy as required by Article 10 TEU. While representative democracy is normally associated with Parliaments, there is no reason to exclude independent institutions from its scope. The members of their governing bodies are not subject to direct election, but their composition might still follow principles of representation. That, of course, requires seeing them as representatives of the diverging parts that form the Union interest, rather than as neutral experts.[49] The structure of the ECB governing council reflects this desire for representative expertise. It is important that different national traditions and sensitivities have a voice on the governing council and participate in the formation of the Union interest.

Second, besides representative democracy, Articles 10 (3) and 11 TEU stipulate principles for the direct interaction between institutions and the people. In light of Article 10(3) TEU, this implies for independent institutions like the ECB to engage in public discourse, explain their decisions and scientific basis, and interact with the public on these matters.[50] Since the beginning of the financial crisis, the ECB has much improved its practice in this regard.[51]

A third trajectory concerns the relationship between institutions as per Article 13(2) TEU. The principles of conferred powers and mutual sincere cooperation provide a basic framework for interinstitutional accountability, for mechanisms of mutual oversight and control as an essential aspect of the separation of powers in democracies.[52] As I will argue, this includes but goes beyond the control exercised by the EP. It is important to point out that interinstitutional forms of accountability are not per se limited to procedural checks. Depending on the institution exercising accountability, such mechanisms may well question the substance of an independent institution's decision. To safeguard an institution's independence, they may exercise deference and confine themselves to plausibility checks. The distinction between full

[49] Vauchez, *Démocratiser l'Europe* (Seuil, 2014) 90 et seq.

[50] On the parallel challenge for courts, see Bassok, "The Schmitelsen Court: The Question of Legitimacy," 21 *German Law Journal* 131 (2020).

[51] Curtin, "'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency," 23 *European Law Journal* 28 (2017).

[52] Vile, Constitutionalism and the Separation of Powers (2nd edn, Liberty Fund, 2012), 19; Habermas, Faktizität und Geltung (Suhrkamp, 1992) p. 229 et seq.; Möllers, *Die drei Gewalten. Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Integration und Internationalisierung* (Velbrück, 2008), pp. 68–69: Trute, "Die Demokratische Legitimation der Verwaltung" in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts*, vol 1 (2nd edn, Beck, 2012) § 6 mn 53, 108.

review and deference should, however, not be confused with one between procedure and substance.[53]

Lastly, Article 19 TEU establishes the need for both the Union and the member states to respect the rule of law. In case of the SSM, this comprises not only judicial review but also administrative review before the Administrative Board of Review.[54]

In principle, independent institutions need to respect all these trajectories of democratic legitimacy, but not to the same degree. Rather, the adequate legitimacy mix depends on two variables: the particular constitutional framework and the particular authority exercised by an independent institution.[55] Insightful in the latter respect is Habermas's theory of communicative action. Accordingly, one can distinguish different forms of power by the different types of reasons offered for their justification.[56] These reasons oscillate between pragmatic, ethical, and moral arguments in case of law-making, and the strictures of legal discourse in case of law enforcement.[57] The regulatory functions exercised by independent institutions will often display an amalgam of law-making and enforcement, involving legal as well as pragmatic, ethical, and moral arguments, depending on the specific decision taken. In a similar vein, Paul Tucker has proposed a matrix for independent institutions with three options each for who sets policies, and who implements them.[58] The next part will elaborate on how these different trajectories work out in relation to the SSM.

4.2.3 *Democratic Legitimacy of the SSM as a Question of Accountability*

Before assessing whether the SSM actually enjoys a sufficient level of legitimacy, it is necessary to establish a standard of legitimacy for the SSM in accordance with the specific form of authority it exercises. This standard will crucially depend on legal and political forms of accountability, that is on mutual checks and balances. Concerning the other trajectories, the Supervisory Board has a fairly representative structure that reflects a mix of expertise and national interests.[59] Moreover, the ECB has stepped up its

[53] See, however, Dawson, Bobić and Maricut-Akbik, supra, note 31.
[54] Article 24, Council Regulation (EU) 1024/2013.
[55] Cf. Grzeszick, *Die Teilung der staatlichen Gewalt* (Verlag Ferdinand Schöningh, 2013), p. 47 et seq.
[56] Habermas, supra note 52, at 213, 235.
[57] On the different discursive modes, see Habermas, supra note 52, at p. 139 et seq., 187 et seq.
[58] Tucker, supra note 4, p. 72 et seq. – This framework is somewhat insensitive to the specific constitutional context, though.
[59] Article 26(1), Council Regulation (EU) 1024/2013.

interaction with the public considerably, in respect of both monetary policy and its supervisory activities, although there is disagreement as to whether the present level suffices.[60]

As concerns appropriate levels of accountability, the current literature focuses on two forms of accountability: judicial review and parliamentary oversight.[61] In explanation of the focus on parliamentary accountability, Menelaos Markakis submits that someone needs to define the public interest with respect to economic and monetary policy, and that should be the EP.[62] For analogous reasons, Paul Tucker is chiefly concerned about the interaction between parliaments and democratic legislatures.[63]

However, what is sufficient for monetary policy does not need to be good for supervisory authority. In this regard, it seems useful to take a closer look at similarities and differences between the two prongs of the ECB. A crucial difference between these two functions is often said to consist in the fact that monetary policy only pursues one objective, that of price stability, while financial supervision has to keep an eye on an array of objectives.[64] After the Public Sector Purchase Programme (PSPP) saga, this position no longer holds. According to the BVerfG, the ECB has to balance many factors to ensure the social impact of its monetary policy remains within

[60] Curtin, supra note 51. On the significance of transparency for accountability, see Tucker, supra n 4, p. 349 et seq.; cautioning that transparency is not an end in itself and might undermine the effective discharge of the ECB's mandate: Dawson, Bobić and Maricut-Akbik, supra note 31, at p. 82. More critical: Beroš, "ECB's Accountability within the SSM framework: Mind the (transparency) gap," 26 *Maastricht Journal of European and Comparative Law* 122 (2019). However, it stands to reason that supervisory powers require a different level of transparency.

[61] On judicial accountability, see Dawson, Bobić and Maricut-Akbik, supra note 31; Zilioli and Wojcik (eds.), *Judicial Review in the European Banking Union* (Edward Elgar Publishing, 2021). On parliamentary accountability: Magnette, "Towards 'Accountable Independence'? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model," 6 *European Law Journal* 326 (2000); Amtenbrink and Markakis, "Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism," 44 *European Law Review* 3 (2019); Fromage, 'Guaranteeing the ECB's Democratic Accountability in the Post-Banking Union era: An Ever More Difficult Task?', 26 *Maastricht Journal of European and Comparative Law* 48 (2019).

[62] Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press, 2020), p. 112 et seq.

[63] Tucker, supra note 4, pp. 569 et seq.

[64] Zilioli, "The Independence of the European Central Bank and Its New Banking Supervisory Competences" in Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press, 2016), pp. 161–162; Amtenbrink and Lastra, "Securing Democratic Accountability of Financial Regulatory Agencies – A Theoretical Framework" in de Mulder (ed.), *Mitigating Risk in the Context of Safety and Security – How Relevant Is a Rational Approach?* (OMV, 2008), pp. 115, 125.

reasonable limits.[65] Although the proportionality analysis required by the CJEU differs on this point,[66] it turned out that considerations concerning the social impact actually do play a role in monetary policy decisions.[67] Hence, as concerns their policy implications, there is no longer much of a difference between monetary policy and financial supervision. While price stability is undeniably the primary objective of the ECB pursuant to Article 127(1) TFEU, it has the secondary objective to support the Union's economic policy. Whatever the precise relationship between the primary and secondary objectives, it shows that the complexity of monetary policy might not be inferior to that of financial supervision.

Nevertheless, there is indeed a difference between monetary policy and financial supervision with respect to the dimensions and the addressees of each policy. Monetary policy is macro policy. It affects everyone. The ECB sets only one policy rate for the Eurozone. Financial supervision has a more narrow scope. Decisions typically concern individual institutions or persons, or, in the case of guidelines and regulations, a specific industry, or part thereof. This applies even though the exercise of supervisory powers might involve a good deal of far-reaching policy considerations, as the initial examples have shown. Hence, accountability mechanisms for financial supervision need to take account of the comparatively narrow scope of supervisory powers.

This raises the question as to the institutions that should hold the SSM to account. While the SSM Regulation seems to understand accountability quite specifically as the relationship between the SSM on the one hand and the EP and Council on the other,[68] the treaty framework as applied to the SSM suggests a holistic view of accountability that comprises multiple accountability channels. Depending on the specific power exercised, accountability mechanisms operating within the executive branch might be particularly well-positioned to fill gaps left by judicial or parliamentary oversight.[69] This concerns particularly the gaps created by the comparatively narrow scope of supervision.

[65] BVerfG *PSPP*, 2 BvR 859/15, Judgment of 5 May 2020, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915; see Goldmann, "The European Economic Constitution after the PSPP Judgment: Towards Integrative Liberalism?" 21 *German Law Journal* 1058 (2020).

[66] Wendel, "Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception," 21 *German Law Journal* 979 (2020); Amtenbrink and Repasi, "The German Federal Constitutional Court's Decision in Weiss: A Contextual Analysis," 45 *European Law Review* 757 (2020), pp. 771 et seq.

[67] Cf. Schnabel, "Necessary, Suitable, and Proportionate" ECB Blog, 28 June 2020, www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200628~d238a8970c.en.html.

[68] Cf. Article 20(1) SSM Regulation.

[69] Cf. Amtenbrink and Lastra, supra n 64, at p. 123; contra Dawson, Bobić and Maricut-Akbik, supra note 60, at p. 85; Egidy, "Proportionality and Procedure of Monetary Policy-Making," 19 *International Journal of Constitutional Law* 285 (2021).

With this in mind, the following part will analyze the different accountability relationships that operate within the legal framework of the SSM with a view to achieving an overall level of accountability that is commensurate to their powers.

4.3 ACCOUNTABILITY OF THE SSM

4.3.1 *Judicial Review*

Decisions of the SSM are subject to judicial review before the CJEU.[70] This follows from Article 263 TFEU, to which Recital 60 of the SSM Regulation makes explicit reference. In addition, persons concerned by SSM decisions have the option of lodging an internal review before the Administrative Board of Review pursuant to Article 24 SSM Regulation.[71] The scope of review to be carried out by the Administrative Board of Review is limited to assessing the procedural and substantive conformity with the SSM Regulation. It may adopt an opinion but cannot directly modify the challenged decision.[72]

Despite the seemingly far-reaching dimensions of judicial review, one can doubt for several reasons whether judicial review alone leads to a satisfactory level of accountability. First, the scope of acts subject to judicial review is limited, as the scenarios set out in the previous part usefully illustrate. For instance, the ECB's assessment of whether an institution is failing or likely to fail is a preparatory decision and therefore not subject to judicial review.[73]

Second, judicial review of the guides published by the ECB under the SSM Regulation faces the obstacle that these instruments are of nonbinding character. Article 263(1) TFEU requires actions for annulment to be directed against acts having "legal effect." In the case concerning the location of Central Counterparties, the General Court gave a wide reading to this term. While mere recommendations would not have "legal effect," the General Court considered it sufficient to assume legal effects that national competent

[70] Overview: de Lucia, "A Microphysics of European Administrative Law: Administrative Remedies in the EU after Lisbon," 20 *European Public Law* 277 (2014); Loosveld, "Appeals Against Decisions of the European Supervisory Authorities," 28 *Journal of International Banking Law & Regulation* 9 (2013).

[71] Cf. Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16).

[72] On administrative review, see particularly Zeitlin and Brito Bastos, "SSM and the SRB accountability at European level: room for improvements?: Banking Union Scrutiny," Economic Governance Support Unit (EGOV) PE 645747 (2020).

[73] Cf. Dörr, "Artikel 263 AEUV" in Grabitz and Hilf (eds.), *Das Recht der Europäischen Union: EUV/AEUV*, vol 3 (Beck, 2012) paras 39–40.

authorities might have reason to consider themselves obliged to implement the policy.[74] This might not be the case for guides like the one guide on fit and proper assessments, as it states explicitly that it is nonbinding.[75] Also, NCAs have to take relevant domestic law into account and might not be able to implement the guide in a strict manner. It therefore seems difficult to subject such guides to judicial review. In any event, only privileged applicants under Article 263(2) TFEU would be in the position to bring such a suit.

The third limitation of judicial review, and arguably the most important one, relates to the applicable standard of review, especially in case of discretionary SSM decisions. The exercise of such discretion depends to a large extent on economic projections, the balancing of complex, uncertain risks, and other policy choices, not on the interpretation of a legal rule. A case in point is the definition of financial stability. In Article 10(5) of the SRM Regulation, financial stability is defined as "a situation where the financial system is actually or potentially exposed to a disruption that may give rise to financial distress liable to jeopardize the orderly functioning, efficiency and integrity of the internal market or the economy or the financial system of one or more Member States."[76] The prognostic challenges implied in this definition are evident. One might reasonably disagree about the requisite data basis and methodology. Such decisions diverge significantly from the classical, Weberian ideal type of administrative activity guarded by legal rationality. It rather resembles a governmental type of decision-making, characterized by multiple, overlapping policy considerations.[77] In taking such decisions, independent institutions all but meet the expectation of rules-based, depoliticized governance.[78]

Such settings call for judicial deference and self-restraint. Courts need to respect the fact that the administration is in principle better positioned to take the requisite policy decisions and to assess risks under conditions of (radical) uncertainty.[79] Judicial review may still play a role, for example, by applying

[74] *United Kingdom of Great Britain and Northern Ireland v ECB*, Case T-496/11, Judgment of 4 March 2015, ECLI:EU:T:2015:133, paras. 31–48.

[75] *Supra* note 24, at p. 3.

[76] Note that Article 14(2) SRM Regulation, which stipulates financial stability as the objective of resolution, does not explicitly refer to Article 10(5) SRM Regulation.

[77] Schröder, "Die Bereiche der Regierung und Verwaltung" in Isensee and Kirchhof (eds.), *Handbuch des Staatsrechts*, vol 5 (C. F. Müller, 2007), para. 9.

[78] Classical: Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962), pp. 51–54; Tinbergen, *Centralization and Decentralization in Economic Policy* (North Holland Publishing Co., 1954); Kydland and Prescott, "Rules Rather Than Discretion: The Inconsistency of Optimal Plans," 85 *The Journal of Political Economy* 473 (1977).

[79] For example, BVerwG, BVerwGE 106, 115 et seq., para. 80, Judgment of 14 January 1998, 11 C 11.96; for a UK perspective, see Poole, "United Kingdom: The Royal Prerogative," 8

plausibility checks of the reasons given by independent institutions and controlling their actions for manifest disproportionality and arbitrariness.[80] Those checks are substantive, not merely procedural; one cannot deduce from the fact that the CJEU has often accepted the reasons given by the ECB that the Court has not reached its own conclusions regarding their plausibility. The requirement to give *plausible* reasons is different from a requirement to give any reasons at all.[81] By contrast, full review of discretionary decisions would effectively replace the informed view of the SSM with the comparatively uninformed view of a court.[82] The PSPP saga has shown that this road should be avoided, not least because it might destabilize the Union.[83]

Notably, this limited standard of judicial review derives from the separation of powers doctrine and may apply to any kind of administrative decision, not just to the exercise of authority by independent institutions.[84] The functional limitation of judicial review is the flip side of the functional separation of powers between different branches of government, especially in highly uncertain, technical fields. Recognizing this policy salience, Recital 64 of the SSM Regulation explicitly states that the Administrative Board should check the legality of SSM decisions "while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions."

To make matters worse, this limited standard of judicial review can even apply to routine, administrative-type decisions of the SSM. The decision by the General Court in the *Landeskreditbank* dispute is a case in point.[85] It turned around the qualification of the plaintiff institution as a systemically important one. This qualification involves many evaluative criteria that defy strict legal scrutiny, such as "particular circumstances" that might justify an exception according to Article 6(4) SSM Regulation. Again, courts might apply plausibility and proportionality checks that duly defer to the administration's higher

International Journal of Constitutional Law 146 (2010). On radical uncertainty, see Kay and King, supra note 3.

[80] Notable: BVerfG, *Gauweiler*, Case 2 BvR 2728/13, Judgment of 14 January 2014, para. 60. See, however, Dawson, Bobić and Maricut-Akbik, supra note 31, at pp. 88 et seq.

[81] But see above note 69 and accompanying text.

[82] In the context of the Gauweiler case: Goldmann, "Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial Review," 15 *German Law Journal* 265 (2014).

[83] Cf. Biernat, "How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland," 21 *German Law Journal* 1104 (2020).

[84] It is therefore misleading to invoke independence as the reason for discretion, see, for example, Fraccaroli, Giovannini and Jamet, "The Evolution of the ECB's Accountability Practices During the Crisis," *ECB Economic Bulletin* 47 (2018), at p. 49.

[85] *Landeskreditbank Baden-Württemberg v ECB*, T-122/15, Judgment of 16 May 2017, ECLI:EU:T:2017:337.

level of expertise. The main value of judicial review might therefore lie in its preventive effect, in the impact it may have on decision-makers.[86]

In conclusion, it emerges that judicial review of SSM decisions stops short of an intense, substantive scrutiny of the discretionary powers of the SSM. This holds even after the BVerfG's Banking Union judgment, in which the BVerfG disagreed with the CJEU on competence issues, rather than on the right standard of judicial review. Accepting the limits of judicial review, it instead emphasized the need for democratic legitimacy of the SSM – the subject of the following section.[87]

4.3.2 *Parliamentary Accountability*

According to Article 20 SSM Regulation, the SSM needs to report to the EP and to the Council. The EP is also involved in the appointment of Supervisory Board and has a role to play in procedures for the removal of its chair or vice-chair, Article 26(4). The interinstitutional agreement between the ECB and the EP specifies the reporting requirements, establishes channels of communication (e.g. feedback), specifies public and confidential hearings and confidentiality requirements, etc. A similar agreement exists between the ECB and the Ecofin Council.[88] National parliaments have rights of information and control specified under Article 21 SSM Regulation, including the right to invite the Chair of the Supervisory Board for an exchange of views.

Many hail the "banking dialogue," which has developed since the establishment of the SSM on the basis of these provisions.[89] The ECB seems to understand it as its main form of accountability.[90] It is even pitched as a model for a refurbished monetary dialogue.[91] However, despite its popularity, even this form of accountability has certain limitations. Some of them stem from empirical issues; others are of a more theoretical character.

[86] Cf. Bobic, "Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice," 18 *German Law Journal* 1395 (2018); Goldmann, 'Constitutional Pluralism as Mutually Assured Discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB', 23 *Maastricht Journal of European and Comparative Law* 119 (2016).

[87] BVerfG *Banking Union*, 2 BvR 1685/14, Judgment of 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514, para. 216 et seq.

[88] See Smits, supra note 30.

[89] For example, Nicolaides, "Accountability of the ECB's Supervisory Activities (SSM): Evolving and Responsive," CERiM Online Paper Series Paper 10/2018.

[90] Cf. Fraccaroli, Giovannini and Jamet, supra note 84.

[91] Fromage and Ibrido, "The 'Banking Dialogue' as a Model to Improve Parliamentary Involvement in the Monetary Dialogue?" 40 *Journal of European Integration* 295 (2018).

Empirically, from a quantitative perspective, banking dialogue has seen an increasing frequency of interactions between the SSM and the EP, as well as more focused exchanges.[92] The ECB has stepped up its transparency by providing multiple reports, holding press conferences, publishing minutes, and making internal documents more accessible.[93] Qualitatively, according to an empirical survey of EP hearings of the Chair of the Supervisory Board, the quality of the questions asked varies, though. They often seem to address issues outside of the competence of the SSM, such as monetary policy, or the development of the banking sector in general or in specific countries, rather than questions relating to supervisory practice.[94] There has also been silencing of policy issues.[95]

Theoretically, one should not overestimate the potential of the EP to check the performance of the SSM. First, for the EP to be in the position to impose effective checks on the SSM would require consensus on the actual standard by which the SSM is to be measured.[96] The notion of financial stability does not become easier to apply when put in the hands of the heterogeneous group of members of the EP.

Second, effective accountability requires a congruence between the power of review and the power to impose consequences.[97] It therefore stands to reason that parliamentary control is most effective for tasks in respect of which the EP is a stakeholder because of its legislative, budgetary, or creative functions. However, the fact that the SMM Regulation has been adopted under Article 127(6) TFEU relegates the EP to an advisory body. Also, the EP does not control the budgets, which might suffer the most should the SSM err in its judgment. Any losses that require bail-out or compensation by the public purse will likely be covered by domestic budgets or the ESM. The only significant power of the EP over the SSM consists in its role in the appointment process of Supervisory Board members pursuant to Article 26(3) SSM Regulation. But for that, ex-post control is rather ineffective.

[92] Fraccaroli, Giovannini and Jamet, supra note 84, at p. 70; Smits, supra note 30, at pp. 31–32.

[93] Curtin, supra note 60; Smits, supra note 30, at p. 31.

[94] Amtenbrink and Markakis, supra note 61, at pp. 18, 21 50. In the context of monetary policy, the monetary policy competence is used as a pretext for evasive questions, see Amtenbrink and Van Duin, "The European Central Bank before the European Parliament: Theory and Practice After 10 Years of Monetary Dialogue," 34 *European Law Review* 561 (2009).

[95] Maricut-Akbik, "Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament," 58 *JCMS: Journal of Common Market Studies* 1199 (2020).

[96] Amtenbrink and Markakis, supra note 61, at p. 11.

[97] Cf. Grant and Keohane, 'Accountability and Abuses of Power in World Politics," 99 *American Political Science Review* 29 (2005).

By contrast, national parliaments do have reason to worry about the impact of banking supervision on their budgets. In this respect, however, Banking Dialogue suffers from a structural difficulty. In case of a conflict about bail-in or bail-out, national parliaments might take diametrically opposed positions, with the majority of the members of parliament in the member state affected being in favor of a bail-out backed up ultimately by the ESM, and the majority of the members of parliament in other member states likely to favor bail-in to protect their (short-term) domestic budgetary interests. Similar constellations can be expected for the balance between monetary policy and financial stability. Only the EP could assume a neutral position. The EP, however, is not responsible for the budgets that would need to ultimately provide financial support. There is thus an incoherence between control rights and potential financial implications of the EP, on the one hand, and national parliaments, on the other. While interparliamentary hearings might solve the information gap between the EP and domestic parliaments,[98] the problem persists that national parliaments might widely disagree on decisions that affect their constituencies differently.

One further limitation of parliamentary accountability derives from the fact that individual decisions involving specific credit institutions, such as fit and proper decisions concerning board members, or the view of the ECB regarding the regulatory capital of an institution, are usually confidential. It has been reported that while lots of questions relating to individual firms are asked in the EP, the Chair of the Supervisory Board invoke their confidentiality obligations.[99] This also shows that parliaments are not the right place for the review of individual decisions as their intervention would undercut the separation of powers between parliament and the executive branch of government.

4.3.3 *Intra-executive Checks and Balances*

This shifts the focus to accountability mechanisms within the executive branch of government. In many jurisdictions, the higher echelons of the executive branch have mechanisms at their disposal allowing them a certain level of control over administrative decisions, including discretionary ones. Administrative agencies in the United States (to the extent that they are not independent like the SEC or the FED) are under the control of the president. To a certain extent, this even comprises independent agencies, whose head is usually appointed by the President. In Germany, any administrative decision is subject to ministerial

[98] Cf. Amtenbrink and Markakis, supra n 61, at p. 19.
[99] Maricut-Akbik, supra note 95.

control.[100] Ministers might issue general or specific directions. While this power is rarely used, its activation usually takes place in cases with high political significance, reaching beyond the pay grade of the ordinary administration. A well-known example is the decision in the Kaiser-Tengelmann merger case by the Federal Minister of Economics, who allowed the merger against the advice of the Federal Cartel Office.[101] While some might consider ministerial intervention as being prone to capture by special interests, one needs to understand it in the context of the separation of powers. As the minister is directly answerable to parliament in a parliamentary democracy, ministerial intervention shifts political accountability from peripheral intra-executive relationships to the gravitational center of political accountability exercised by parliament over government.[102] In the end, ministerial intervention indirectly increases the leverage of parliament over executive decision-making, thereby contributing to democratic accountability. After all, the members of parliament likely have more influence on the minister than on members of the civil service, who are in the first place answerable to the higher echelons of the government.

Similar principles apply to European law. Article 17 TEU stipulates that the Commission is responsible for the implementation of legal acts by the Union. A corollary of this principle is the *Meroni* doctrine. Accordingly, no powers that include a discretionary element may be delegated to agencies.[103] The doctrine may have been partially restated in the *ESMA* case.[104] The CJEU decided that ESMA could independently exercise discretionary powers. However, the Court emphasized that these powers need to be restricted in various respects. In particular, ESMA may prohibit short selling only in specifically defined emergency situations, and the Commission may further define these situations through secondary rules.[105] The Court concluded that ESMA was ultimately not equipped with "a very large measure of discretion."[106]

As has been shown at the beginning of this chapter, this cannot be said about the SSM, which enjoys ample discretionary powers.[107] In fact, the SSM

[100] Herzog, "Artikel 65" in Maunz and Dürig (eds.), *Grundgesetz-Kommentar*, vol 5 (Beck, 2018), para. 61.

[101] Bundewirtschaftsministerium, Verfügung, 9 March 2016, available at: www.bmwi.de/Redaktion/DE/Downloads/M-O/oeffentliche-entscheidung-edeka-kaisers-tengelmann.pdf?__blob=publicationFile&v=2.

[102] See also BVerfG *Banking Union*, 2 BvR 1685/14, Judgment of 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514, para. 217.

[103] *Meroni v High Authority*, Case 9/56, [1957–1958] ECR 133, 152.

[104] *United Kingdom v Parliament and Council (ESMA)*, Case C-270/12, Judgment of 22 January 2014, ECLI:EU:C:2014:18.

[105] Ibid., para. 51.

[106] Ibid., para. 54.

[107] See above, B.I.

only escapes the Meroni doctrine because it was adopted under Article 127 (6) TFEU,[108] a move that evoked much criticism.[109] While the argument that the SSM powers exceeded the restriction of delegations under Article 127(6) TFEU to "specific tasks" is difficult to sustain as long as domestic supervisory authorities retain important supervisory competencies over insurance companies, securities, or investment firms, the critique has a point insofar as this legal basis obviates the need to satisfy the accountability requirements that form the true core of the *Meroni* doctrine.

Yet, even in case of authorities like the SSM enjoying wide discretionary powers exercised in independence from the administrative hierarchy, intra-executive accountability might make a decisive contribution to the overall accountability mix that might push their legitimacy to acceptable levels. Hence, it seems apposite to investigate whether the SSM is subject to a satisfactory level of intra-executive accountability. There are two potential yielders of such accountability: the Commission and the ECA.

As concerns the Commission, the independence of the SSM under Article 19 SSM Regulation prevents it from revoking, modifying, or otherwise affecting the decisions of the SSM. This also cuts off potential chains of legitimacy between the Supervisory Board and national governments, as representatives of NCAs on the Supervisory Board are obliged to act independently and in the Union interest.

Nevertheless, the Commission has powers to review the decisions of the SSM at a structural level. Article 32 SSM Regulation charges the Commission with triannual in-depth reviews of the performance of the SSM. The first report published under this provision in 2017 demonstrates the potential of this mechanism.[110] It covers the governance structure of the SSM, its instruments and processes, and checks the results for their cost-effectiveness. While the 2017 report understandably postpones a definite assessment of the ultimate impact of the SSM on financial stability and market integration to another day, this trajectory seems particularly apposite as an accountability mechanism for goal-oriented administrative power such as that of the SSM. One cannot review goal achievement by reviewing individual decisions, only by looking at the field in context. Issues of managerial effectiveness also require a holistic approach. In this respect, the Commission report scrutinizes the cooperation of the SSM with other stakeholders, the internal organization,

[108] Preamble, SSM Regulation.

[109] For many: Kämmerer, "Bahn frei der Bankenunion? Die neuen Aufsichtsbefugnisse der EZB im Lichte der EU-Kompetenzordnung," *Neue Zeitschrift für Verwaltungsrecht* 830 (2013), pp. 832 et seq.

[110] Report, supra note 27.

including the delegation of decision-making competencies, and the application of discretionary legal provisions, for example, the categorization of certain assets (which might desire more transparency) and waivers for capital requirements (which require further development).[111]

The ECA is charged with examining the operational efficiency of the ECB in accordance with Article 287 TFEU and Article 27.2 ECB Statute. According to Article 20(7) SSM Regulation, this also applies to the SSM. From the text of these provisions, it is unclear how far the ECA may review the practice of the SSM, in particular how far the mandate of the SSM to examine the operational efficiency of the ECB allows it to review supervisory practice.[112] This ambiguity gave rise to a conflict between the ECA and the ECB when ECA compiled information for its 2018 thematic report on the operational efficiency of the ECB's crisis management for banks. The ECB refused to disclose certain information to the ECA that it believed to fall outside the mandate of the latter.[113] On the insistence of the Commission, the ECB has meanwhile concluded a Memorandum of Understanding with the ECA on the issue.[114]

In substance, the ECA criticizes issues pertaining to supervision that are of a discretionary nature. For example, it submitted that the ECB did not set up specific indicators for crisis identification.[115] At this point, ECA and ECB seem to be following different supervisory philosophies: The ECA seems to favor a rules-based approach, while the ECB prefers a more discretionary approach.[116] This goes quite to the heart of the ECB's discretionary powers. One could argue that, instead of imposing a certain level of specificity, ECB should justify their absence. At least, instead of presenting its criticism of ECB as a piece of technical expertise, the ECA should have been more open about the political dimension of their disagreement. This would provide the Commission, the EP, or other stakeholders with a better basis for a decision on whether to follow up on this point.

[111] Ibid., at pp. 9, 12.

[112] See report by the Bundesrechnungshof, "Bericht an den Haushaltausschuss des Bundestages nach § 88 Abs. 2 BHO über die Verkürzung von Prüfungsrechten des Bundesrechnungshofes in den Bereichen Bankenaufsicht und bei Finanzinstituten," III 5 205103, of 20 January 2016.

[113] See ECA, The operational efficiency of the ECB's crisis management (2018); ECA, Communication to the European Parliament concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC)), adopted by Chamber IV at its meeting of 13 December 2018.

[114] Memorandum of Understanding between the ECA and the ECB regarding audits on the ECB's supervisory tasks, 9 October 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELLAR:b44fbfa0-95f6-11ea-aac4-01aa75ed71a1&from=EN.

[115] ECA, The operational efficiency of the ECB's crisis management (2018), para. 75 et seq.

[116] On this age-old debate, see Kydland and Prescott, supra note 78.

Be this as it may, on the whole, these two reports by the Commission and the ECA seem to subject the SSM to more effective scrutiny than some hearings before the EP. The reports are systematic, focused, rigorous, and based on an intense study of the SSM practice. Also, the report by the Commission is not without direct consequences, as the commission has the power to recommend interpretations of the legal framework, or propose amendments to the legislature.[117] The interplay between the executive and legislative branches in the EU lends particular strength to intra-executive accountability. And even though the reports do not review individual decisions, they are well-positioned to identify structural problems. Individuals affected by decisions of the SSM therefore have the possibility of judicial review at their disposal as a remedy against arbitrary decisions, while intra-executive mechanisms, together with parliamentary accountability, will ensure the SSM stays focused on its objectives and puts in place an efficient management structure. It is this combination of the three branches of government that holds the SSM quite firmly to account.

4.4 OPTIONS FOR IMPROVING THE ACCOUNTABILITY OF THE SSM

While the overall level of accountability of the SSM appears satisfactory in light of the intra-executive accountability relations, one might ask for institutional alternatives that might deploy intra-executive accountability even better.

The option to reassign supervisory tasks to the EBA does not appear to be beneficial. While this would defeat the sometimes hegemonic position of ECB towards EBA, it would simply create a new hegemon – one that would combine the formal power to make rules with the power to implement them, and thereby remove an important dimension of intra-executive checks and balances. Apart from the fact that such a shift would possibly require a treaty change, it does not seem advantageous from an accountability perspective.

Another option might consist of integrating the SSM into the hierarchical structure of the Commission. This would correspond to the model of European administration envisaged by Article 17 TEU. However, this would require major shifts in the organizational setup of the SSM as it seems difficult to imagine the representatives of NCAs to be involved in decision-making in the frame of the Commission. From the perspective of the subsidiarity principle, the present constellation therefore appears as advantageous. It involves a certain amount of intra-federal checks and balances. Given that financial markets are heterogeneous across the EU, this should be an asset.

[117] Report, supra note 27, at p. 3.

As a third option, one might give the Commission the right to review, modify, or discard decisions by the SSM, or give directions to the SSM to act accordingly. This option would create a host of constitutional problems, as the ECB Governing Council has to take ultimate responsibility for the decisions of the ECB, including those of the SSM, pursuant to Article 282(2) TFEU. By way of a treaty amendment, an exception from this rule would have to be introduced for the SSM should it be subject to the Commission's direction. Moreover, this option would strip the SSM effectively of its independence. Whether this step would be economically advantageous or not,[118] as a matter of treaty law, it is not unthinkable. While it is argued that the *level* of independence enjoyed by the SSM under Article 19 SSM Regulation is equivalent to that of the ECB under Article 130 TFEU,[119] the latter does not require granting independence to the SSM, as independence was only intended to protect monetary policy. Independent supervisory agencies are a much more recent and much rarer phenomenon.[120] As a novelty in European administrative law at the time, Article 130 TFEU deserves a narrow reading. Nevertheless, the question is whether such a power of review would be advantageous. As the SSM would remain part of the ECB, the Commission would lack the requisite expertise to intervene in individual cases. By comparison, the present framework gives the Commission ample opportunity already by virtue of its right to initiate legislative amendments and adopt regulations.

On the whole, the present state of the SSM appears as advantageous from an accountability perspective. While the present arrangement owes its emergence to the contingency of a specific historical situation and might appear as a constitutional anomaly, it enables a reasonable level of checks and balances. Specifically, it offers a whole network of mutually interconnected accountability mechanisms that extend beyond the much-debated issue of parliamentary accountability. In this regard, intra-executive accountability appears as particularly relevant. Should stakeholders wish to strengthen the accountability of the SSM, this trajectory of accountability might bear some potential. For example, one could complement the periodic reports of the Commission with ongoing mechanisms of supervision and information exchange, or harmonize the cycles of the Banking Dialogue with the review exercised by the Commission or the ECA. But given the present state of the SSM, these improvements appear as options, rather than as stringent constitutional requirements.

[118] Zilioli, supra note 64, at p. 158 et seq.
[119] Ibid., at 161–164.
[120] Cf. Quintyn and Taylor, "Regulatory and Supervisory Independence and Financial Stability," IMF Working Paper WP/02/46 (2002), 3.