

## **ADEMU WORKING PAPER SERIES**

### **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**

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#### **Abstract**

This working paper focuses on the accountability arrangements for the ECB in the framework of the EU's Banking Union. For this purpose, first of all an analytical framework for the purposes of evaluating the preconditions and instruments of accountability placed at the disposal of the European Parliament in the Single Supervisory Mechanism is set out. Thereafter the powers conferred on the European Parliament in the legal framework of the SSM to hold the Supervisory Board to account for the exercise of its duties are examined based on this framework. Notably, the paper highlights the lack of a clear yardstick against which to assess the ECB's performance in the area of banking supervision, as well as a gap in terms of the ability of the European Parliament to assign consequences to the ECB's conduct. Furthermore, the interaction between the European Parliament and the Supervisory Board of the ECB, as evidenced through the parliamentary hearings that have been held thus far, is examined. A qualitative analysis of these hearings notably highlights the topics covered in those hearings, as well as the attitude of the MEPs towards the institutional structure and accountability arrangements in the Banking Union. Finally, a number of concrete proposals for enhancing the role of the European Parliament as an accountability holder in the Banking Union are made.

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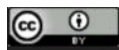
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## I. Introduction

The Single Supervisory Mechanism Regulation (SSM Regulation) has conferred specific supervisory tasks on the European Central Bank (ECB). The latter is currently responsible for the supervision of 124 ‘significant’ banks or cross-border groups that are established in Euro area Member States, whereas the national authorities supervise ‘less significant’ banks or branches ‘with a focus on protecting the stability of the financial system of the Union.’<sup>1</sup> One of the (many) remarkable features of the SSM Regulation is the inclusion of two provisions directly addressing the accountability of the ECB and namely its Supervisory Board vis-à-vis the European Parliament (EP) and the national parliaments (NPs) of the participating Member States. With this a practice is continued and extended that has started with the monetary dialogue for monetary policy and thereafter found its way into secondary Union law in the shape of the economic dialogues as part of the Six Pack<sup>2</sup> and Two Pack legislation.<sup>3</sup>

As this supervisory dialogue between the ECB and the EP is a relatively new feature, this paper aims to provide evidence for the effectiveness of this mechanism as a means to hold the ECB to account for its conduct in the context of the SSM by specifically analyzing the interaction between the EP and the ECB, which is governed by the SSM Regulation and further specified in the related Interinstitutional Agreement between these two Union institutions. Rather than to duplicate existing studies offering a more or less descriptive analysis of the legal framework and the inter-

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<sup>1</sup> Preamble recital 13, Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63 (hereafter: SSM Regulation).

<sup>2</sup> Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Council Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41; Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8.

<sup>3</sup> Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.

institutional dynamics involved, the paper will focus on a qualitative assessment of actual practice in these first years of the existence of the supervisory dialogue. In doing so this version of the working paper focuses on the exchanges between the Chair of the ECB's main decision-preparing body on SSM matters, i.e. the Supervisory Board, and the EP's Committee on Economic and Monetary Affairs. In this context, the notion of 'meaningful prudential supervision dialogue' stated in the title of this working paper is directly linked to the notion of accountability. By evaluating the practical modalities and outcomes of the interaction between the ECB and the European Parliament in the SSM against an explicit yardstick of accountability, tentative conclusions about the value of this procedure as a way to hold the ECB to account for the exercise of its prudential supervisory tasks can be drawn and, where applicable, recommendations can be made on the ways in which this interaction may be improved. Moreover, these findings can be put into perspective by looking at previous studies that have undertaken such an exercise for the pre-existing monetary dialogue between the ECB and the EP and that have come up with rather mixed results in terms of the usefulness of this forum in increasing accountability. While in its current shape this working paper will thus focus on the relationship of the European prudential supervisor with the EP, it is envisaged that at a later stage the paper may extend this analysis to include the relationship with national parliaments.<sup>4</sup> Moreover, as provisions similar to the one found in the SSM Regulation also exist in the framework of the Single Resolution Mechanism (SRM) in the second pillar of the European Banking Union,<sup>5</sup> a future version of this working paper may also include a comparison of the accountability practices in these two pillars of the Banking Union.

Thereafter, section 2 provides the theoretical background and broad analytical framework for the study of parliamentary hearings as an accountability mechanism. Section 3 offers a brief overview of the legal framework governing the relationship between the EP and the ECB in the framework of the SSM. In section 4 a –for the time being– mostly qualitative analysis of the actual exchanges between these two Union institutions is offered. Section 5 draws some preliminary conclusions on

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<sup>4</sup> The latter is dealt with in Article 21 SSM Regulation.

<sup>5</sup> Regulation 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L225/1.

the current state of affairs, thereby providing a tentative answer to the somewhat rhetoric question asked in the title of this paper.

## **II. On the function of parliamentary hearings as accountability mechanism**

From a conceptual point of view, the function of parliamentary hearings in holding the ECB or any other body exercising public authority for that matter to account needs to be determined. For this purpose, the somewhat vague term ‘accountability’ requires specification. Moreover, the conditions in which parliamentary hearings can fulfil an accountability function have to be identified.

As has become clear namely from an analysis of the SSM Regulation and a study of the ever-growing literature on the subject matter that does not have to be reproduced here, the ECB has been given numerous substantial powers not only relating to credit institutions under its direct supervision but also relating to the oversight over NCAs in the exercise of SSM-related tasks.<sup>6</sup> To the extent that the European legislator has thus entrusted the ECB with the exercise of public authority, mechanisms must be in place to ensure the back coupling to one or more main political institutions, which ensure the democratic legitimacy of governance and the observance of the rule of law in the European Union.<sup>7</sup> As such, the basic case for the accountability of the ECB for its SSM-related tasks does not differ substantially from what has previously been abundantly argued for its monetary policy tasks.<sup>8</sup> This is particularly the case since the legal basis of the SSM ensures

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<sup>6</sup> For the sake of focus, these powers are not further discussed in this paper. See B. Wolfers and T. Volland, ‘Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank’, (2014) CML Rev, 1463-1496; N. Moloney, ‘European Banking Union: assessing its risks and resilience’, (2014) CML Rev., 1609-1670; E. Wymeersch, ‘The single supervisory mechanism or “SSM”, part one of the Banking Union’, NBB Working Paper No. 255, April 2014; T.H. Tröger, ‘The Single Supervisory Mechanism – Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement’, (2014) European Business Organization Law Review, 449-497; G. Schuster, ‘The Banking Supervisory competences and powers of the ECB’, (2014) EuZW-Beilage 2014, 3; K. Alexander, ‘The European Central Bank and Banking Supervision: The Regulatory Limits of the Single Supervisory Mechanism’, (2016) ECFR, 467-494.

<sup>7</sup> The ECB is presently not considered to fall into this narrowly defined category of political institutions. Moreover, the term ‘political institution’ is used here in a narrower sense than what is discussed in political science research, see e.g. J.G. March and J.P. Olsen, ‘Elaborating the “New Institutionalism”’, in S.A. Binder, R.A.W. Rhodes, and B.A. Rockman, *The Oxford Handbook for Political Institutions* (OUP, 2008), 3-20.

<sup>8</sup> See e.g. L.W. Gormley and J. de Haan, ‘The Democratic Deficit of the European Central Bank’, (1996) EL Rev., 95-112; F. Amtenbrink, *The Democratic Accountability of Central Banks. A Comparative Study of the European Central Bank* (Hart Publishing, 1999). Generally, making the case for the accountability of financial market supervisors, see R.M. Lastra and H. Shams, ‘Public Accountability in the Financial Sector’, in E. Ferrán and C.

the independence of the ECB and the NCAs ‘in carrying out the tasks conferred on it by this Regulation’, whereby the ECB’s Supervisory Board and the steering committee must act ‘independently and objectively in the interest of the Union as a whole and [...] neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or from any other public or private body.’<sup>9</sup> With regard to the latter part of this sentence, the SSM Regulation mirrors Article 130 TFEU on the independence of the ECB and the national central banks of the Member States.<sup>10</sup>

As has been observed elsewhere, in abstract terms accountability can be defined as a concept that stands for the ‘continuous control of power’, as well as ‘the notion that the accountee takes responsibility for failure and takes steps to prevent their recurrence’.<sup>11</sup> Arguably, an indispensable part of any meaningful accountability is that the party to which the accountee has to answer is in a position, if needed, to assign consequences to its evaluation of the performance, e.g. in the case

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Goodhart (eds.), *Regulating Financial Services and Markets in the XXIst Century* (Hart Publishing, 2001), 165-188; E. Hüpkens, M. Quintyn and M.W. Taylor, ‘The Accountability of Financial Sector Supervisors: Principles and Practice’, IMF Working Paper WP/05/51, 2005; F. Amtenbrink and R.M. Lastra, ‘Securing Democratic Accountability of Financial Regulatory Agencies - A Theoretical Framework’, in R.V. De Mulder, *Mitigating Risk in the Context of Safety and Security – How Relevant is a Rational Approach?* (OMV, 2008), available at <[https://www.researchgate.net/publication/228209991\\_Securing\\_Democratic\\_Accountability\\_of\\_Financial\\_Regulatory\\_Agencies\\_-\\_A\\_Theoretical\\_Framework](https://www.researchgate.net/publication/228209991_Securing_Democratic_Accountability_of_Financial_Regulatory_Agencies_-_A_Theoretical_Framework)>. Specifically concerning the ECB in the SSM see G. Ter Kuile, L. Wissink and W. Bovenschen, ‘Tailor-made accountability within the Single Supervisory Mechanism’, (2015) CML Rev., 155-189.

<sup>9</sup> Brackets added. See Article 19 SSM Regulation.

<sup>10</sup> Whether the independence of the ECB for SSM-related tasks also derives from Article 130 TFEU and thus from primary Union law has been subject of debate: see, e.g., I. Angeloni, ‘Rethinking Banking Supervision and the SSM Perspective’ (23 April 2015) <[www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150423.en.html](http://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150423.en.html)>; A. De Gregorio Merino, ‘Institutional Report’, in G. Bándi et al. (Eds.), *European Banking Union – Congress Proceedings Vol. 1*, Budapest, Wolters Kluwer, 2016; R.M. Lastra, ‘Financial Institutions and Accountability Mechanisms’, in P. Iglesias-Rodríguez (Ed.), *Building Responsive and Responsible Financial Regulators in the Aftermath of the Global Financial Crisis*, Cambridge, Intersentia, 2015; J.-V. Louis, ‘Democracy and the European Central Bank. Some Comments on Independence and Accountability’, in G. Garzón Clariana (Ed.), *Democracy in the New Economic Governance of the European Union*, Madrid, Marcial Pons, 2015; T. Tridimas, ‘General Report’, in G. Bándi et al. (Eds.), *European Banking Union – Congress Proceedings Vol. 1*, Budapest, Wolters Kluwer, 2016; M. Markakis, *Political and Legal Accountability in Economic and Monetary Union*, Doctoral thesis completed at Oxford University (2017).

<sup>11</sup> Amtenbrink and Lastra, op. cit. supra note 8, with reference to Hüpkens, Quintyn and Taylor, op. cit. supra note 8, at 6. For an overview of different concepts of accountability see Ter Kuile, Wissink and Bovenschen, op. cit. supra note 8, 159 et seq., with further references to relevant literature, including namely M. Boven, ‘Analysing and Assessing Accountability: A Conceptual Framework’, (2007) ELJ, 447-468, who offers different classifications of accountability. On the application of the principle agent theory to the ECB see R. Elgie, ‘The politics of the European Central Bank: principal-agent theory and the democratic deficit’, (2002) Journal of European Public Policy, 186-200. Critical on the application of principle-agent theory on independent agencies is G. Majone, ‘Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach’, in JITE 157 (2001), 57-78.

of bad performance or abuse of power. It is only in the presence of the latter power that in multiple principle-agent relationships, as can be observed in the case of the delegation of legislative or executive tasks onto independent agencies, the party at the helm of the accountability mechanism (principle), e.g. the government or parliament, can itself be held to account for the way in which it exercises its accountability powers vis-à-vis the independent agency, e.g. by parliament, the judiciary or the electorate.

From this abstract approach two principal elements of accountability can be dissected that provide a basic analytical framework for the evaluation of accountability arrangements in the books and in action (*de jure* and *de facto*), namely preconditions and instruments of accountability.<sup>12</sup> If the essence of accountability is that the party at the helm of mechanism can pass an informed judgment on the performance of the agent and can assign consequences to this judgment, the existence of a sufficiently clear standard based on which the performance can be evaluated, as well as the availability of relevant information on the activities of the accountee, form two essential preconditions of accountability.

In the absence of clear predetermined objectives or standards based on which the action by the accountee can be assessed, it remains unclear for the latter what exactly is expected in term of performance. Moreover, in such a case any evaluation bears the danger of being aimless or arbitrary. Where the legislator has chosen to vest specific public powers in an independent agency, a clear and unequivocal yardstick also contributes to shielding the latter from undesirable political influence. The dangers loom large in the case of vague, very broad or multiple objectives without a clear hierarchical order.<sup>13</sup> Institutional exchanges, such as parliamentary hearings, may in the ‘best-case’ scenario have the character of a general exchange of information, without however focusing on the question whether the accountee has met the predefined objectives or targets, and in the ‘worst-case’ scenario deteriorate to a political settling of scores. As a side effect, this also makes any evaluation of the performance of the party at the helm of the accountability mechanism problematic. As regards financial market regulation and supervision, it has been observed that they are often characterised by entailing not only several objectives, but also several instruments and at

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<sup>12</sup> As developed in Amtenbrink (1999), *op. cit.* supra note 8, 334 et seq.

<sup>13</sup> Amtenbrink and Lastra (2008), *op. cit.* supra note 8.

times even several agencies.<sup>14</sup> What is more, objectives can be formulated rather broadly or vaguely, such as financial stability, investor protection, or the conduct of business.

Next to a clear yardstick, transparency forms a crucial precondition for accountability. For monetary and financial policies, transparency has been broadly described to entail ‘an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale, data and information related to monetary and financial policies, and the terms of agencies’ accountability, are provided to the public on an understandable, accessible and timely basis.’<sup>15</sup> Information thus forms an important, albeit not the only, aspect of transparency, as the applicable legal framework predestines the degree of transparency of an agency to a considerable extent.<sup>16</sup> Focusing here on information, this can be provided by means of (legally prescribed) reporting requirements through regular publications, such as monthly, quarterly and annual reports or projections, but can also emerge from institutional contacts between the accountee and the party at the helm of the accountability mechanism. In this context, it has been observed for the national context that contacts with parliament have to be considered ‘as the most important institutional contact for the democratic accountability of the agency’, as the latter regularly has the power to change the legal basis of the accountee.<sup>17</sup> While parliament can discuss the performance of the agency on a regular basis, the latter can ‘explain and justify its conduct’ not only to democratically elected parliamentarians, but –in the case of public hearings– the public at large.<sup>18</sup> It is thus hardly surprising that legal arrangements on the appearance of central bank officials before parliament are not uncommon around the globe.<sup>19</sup> Institutional contacts can also exist with (executive) government, which is of particular importance, if government is primarily or in the first line in charge of the accountability mechanism.

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<sup>14</sup> Hüpkens, Quintyn and Taylor, op. cit. supra note 8, at 11; Amtenbrink and Lastra (2008), op. cit. supra note 8.

<sup>15</sup> International Monetary Fund, Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principle (Washington, D.C. 1999), available at <<https://www.imf.org/external/np/mae/mft/code/>>.

<sup>16</sup> On the role of transparency see R. Lastra, ‘How much accountability for central banks and supervisors?’, (2001) Central Banking, 69-75; F. Amtenbrink, ‘The three pillars of central bank governance: Toward a model central bank law or a code of good governance?’, in International Monetary Fund, Current Developments in Monetary and Financial Law, Vol. 4 (2005), 101-132. Treating accountability and transparency as separate concepts are S. Collignon and S. Diessner, ‘The ECB’s Monetary Dialogue with the European Parliament: Efficiency and Accountability during the Euro Crisis?’, (2016) JCMS, 1296-1312.

<sup>17</sup> Amtenbrink and Lastra (2008), op. cit. supra note 8.

<sup>18</sup> Ibid.

<sup>19</sup> See the e.g. the cross-country analysis by D. Stasavage, ‘Transparency, Democratic Accountability, and the Economic Consequences of Monetary Institutions’, (2003) AJPS, 389-402.



While meaningful accountability is thus arguably impossible in the absence of a clear yardstick based on which performance can be evaluated and in the absence of meaningful information relating to the achievement of the agency's objectives, this is not to say that the presence of a clear objective and arrangements ensuring transparency by itself can ensure the accountability of an agency. This requires instruments at the disposal of the party at the helm of the accountability mechanism to act based on its findings and, where necessary, to intervene. Various escalation levels can be differentiated in this regard, ranging from the dismissal of agency officials (performance-based dismissal), to the overriding of decisions, funding cuts, or amendments of the agency's legal basis. This stands next to the possibility of a judicial review of the action taken by the agency and any pecuniary consequences that may result therefrom.

What becomes clear from this is that parliamentary hearings can in principle fulfil an important role in agency accountability. To what extent this is in fact the case depends not only on the concrete (legal) arrangements concerning such institutional contacts, the agency's objective(s) and applicable transparency, but more generally on the extent to which parliament has instruments at its disposal to assign consequences to its judgment.

### **III. The accountability framework of the SSM Regulation**

Differently to what could previously be observed for the monetary policy function of the ECB, the legal basis of the SSM includes several provisions explicitly addressing the accountability of the ECB 'for the implementation' of the SSM Regulation. Focusing presently on the European Parliament, Article 20(1) SSM Regulation provides that '[t]he ECB shall be accountable to the European Parliament and to the Council for the implementation of this Regulation'.<sup>20</sup> Interestingly, neither Article 20 nor any other provision of the SSM Regulation contains a legal definition of the term 'accountability'.<sup>21</sup> Rather, the scope of this term has to be construed from the contents of Article 20, as well as the Interinstitutional Agreement that has been concluded between the EP and

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<sup>20</sup> SSM Regulation, Article 20(1).

<sup>21</sup> Including namely Article 2 SSM Regulation on 'Definitions'.

the ECB and which complements the SSM Regulation.<sup>22</sup> The latter agreement sets out the practical modalities for the exercise of what is referred to as ‘democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the SSM’.<sup>23</sup> Applying the basic analytical framework introduced in section 2 of this article, the arrangements relating to prerequisites of accountability and instruments can be differentiated in the following manner.

### ***Provision of information and institutional contacts***

The basic legal obligations introduced by Article 20 SSM Regulation are reporting requirements, hearings and *ad hoc* exchanges, as well as the response to written questions.<sup>24</sup> The ECB is obliged to submit an annual report not only to the European Parliament, but also to the Council, the Commission and the Eurogroup. With regard to its content, while the SSM Regulation only in very general terms refers to ‘the execution of the tasks conferred on [the ECB] by this Regulation’,<sup>25</sup> the Interinstitutional Agreement specifies in much greater detail what the annual report must cover, including not only the execution of supervisory tasks, but also for instance the sharing of tasks with the national supervisory authorities, the cooperation with other national or Union relevant authorities, and the separation between monetary policy and supervisory tasks.<sup>26</sup> The Chair of the ECB’s Supervisory Board is obliged to present the report in public to the European Parliament, whereby the latter receives the report on a confidential basis four working days in advance of the hearing.<sup>27</sup> The Annual Report must thereafter also be published on the website of the SSM.

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<sup>22</sup> The conclusion of such an Interinstitutional Agreement is legitimized through secondary Union law, namely Article 20(9) SSM Regulation. Generally, on the legal nature and effects of such agreements in European law, see W. Hummer, ‘From “Interinstitutional Agreements” to “Interinstitutional Agencies/Offices”’, (2007) ELJ, 47-74.

<sup>23</sup> Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU) [2013] OJ L320/1.

<sup>24</sup> For a neat summary of those powers, see European Parliament, ‘Single Supervisory Mechanism (SSM) Accountability arrangements and legal base for hearings in the European Parliament: State of Play – June 2017’ (21 June 2017) <[www.europarl.europa.eu/RegData/etudes/ATAG/2015/497742/IPOL\\_ATA\(2015\)497742\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/497742/IPOL_ATA(2015)497742_EN.pdf)> accessed 22 August 2017. For the powers conferred on the Council, Eurogroup and Parliament, see also J.-V. Louis, op. cit. supra note 10, especially pp. 135 *et seq.*; M. Markakis, ‘Political and Legal Accountability in the European Banking Union: A First Assessment’ in M. Szabó, P.L. Láncoš and R. Varga (eds), *Hungarian Yearbook of International Law and European Law 2016* (Eleven Publishing 2017) ch 32.

<sup>25</sup> SSM Regulation, Article 20(2), brackets added.

<sup>26</sup> Interinstitutional Agreement, section I.1, p. 3.

<sup>27</sup> SSM Regulation, Article 20(3). Interinstitutional Agreement, section I.1, p. 3.

The SSM Regulation and the Interinstitutional Agreement distinguish three types of parliamentary discussions. There are ordinary public hearings; *ad hoc* exchanges of views; and confidential meetings.<sup>28</sup> As to the scope of these discussions, while in the SSM Regulation reference is made in broad terms to the execution of the supervisory tasks, the Interinstitutional Agreement states that ‘all aspects of the activity and functioning of the SSM covered by Regulation (EU) No 1024/2013’ can be addressed.<sup>29</sup> The Interinstitutional Agreement also determines that the Chair of the Supervisory Board participates in an ordinary public hearing twice a year on request of the European Parliament’s competent committee, which according to the Rules of Procedure of the European Parliament is the Committee on Economic and Monetary Affairs (ECON Committee).<sup>30</sup> In addition, the Chair of the Supervisory Board can be invited to additional *ad hoc* exchanges of views ‘on supervisory issues’.<sup>31</sup> Furthermore, upon request, the Chair of the Supervisory Board can schedule confidential oral discussions behind closed doors with the Chair and Vice-Chairs of the ECON Committee. Interestingly, Article 20(8) SSM Regulation restricts this parliamentary right to cases ‘[w]here [it would be] necessary for the exercise of Parliament’s powers under the TFEU and Union law’.<sup>32</sup> The Interinstitutional Agreement stipulates that no minutes or any other recording of the confidential meetings must be taken and no statement is to be made for the press or any other media. Each participant to the confidential discussions must sign every time a solemn declaration not to divulge the content of those discussions to any third person.<sup>33</sup>

Next to regular hearings and *ad hoc* exchanges, the ECB must reply in writing to questions put to it by the European Parliament ‘as promptly as possible, and in any event within five weeks of their transmission to the ECB’.<sup>34</sup> These questions and replies are accessible on dedicated sections of the ECB and the Parliament’s website.<sup>35</sup> The ECB is further put under an obligation to cooperate with the European Parliament during any investigations carried out by Parliament pursuant to Article

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<sup>28</sup> SSM Regulation, Article 20(5), (8) and (6).

<sup>29</sup> Interinstitutional Agreement, section I.2, pp. 3-4.

<sup>30</sup> Interinstitutional Agreement, section I.2, p. 3. Rules of Procedure of the European Parliament (8<sup>th</sup> parliamentary term, January 2017), Annex V, section VI.

<sup>31</sup> Interinstitutional Agreement, section I.2, p. 3.

<sup>32</sup> SSM Regulation, Article 20(8).

<sup>33</sup> Interinstitutional Agreement, section I.2, p. 4.

<sup>34</sup> SSM Regulation, Article 20(6); Interinstitutional Agreement, section I.3, p. 4.

<sup>35</sup> See, e.g., <<http://www.europarl.europa.eu/committees/en/econ/banking-union.html>> accessed 23 August 2017.

226 TFEU on the setting-up of temporary Committees of Inquiry to investigate alleged contraventions or maladministration in the implementation of Union law.<sup>36</sup>

Whereas the SSM Regulation does not include any additional details on this point, the Interinstitutional Agreement further contains a number of provisions on access to information by Parliament.<sup>37</sup> Notably, the ECB must provide the ECON Committee at least with a comprehensive and meaningful record of the proceedings of the Supervisory Board that enables an understanding of the discussions, including an annotated list of decisions. In the case of an objection of the ECB's Governing Council against a draft decision of the Supervisory Board,<sup>38</sup> the President of the ECB must inform the Chair of the ECON Committee of the reasons for such an objection. In the event of the winding-up of a credit institution, non-confidential information relating to that credit institution shall be disclosed *ex post*, once any restrictions on the provision of relevant information resulting from confidentiality requirements have ceased to apply.<sup>39</sup>

Finally, the information duties of the ECB also extend to the acts it adopts. According to the Interinstitutional Agreement, the ECB must duly inform the ECON Committee of the procedures (including timing) it has set up for the adoption of regulations, decisions, guidelines and recommendations that are subject to public consultation in accordance with the SSM Regulation. The ECB must, in particular, provide information on the principles and kinds of indicators or information it is generally using in developing acts and policy recommendations, with a view to enhancing transparency and policy consistency. Moreover, the ECB must transmit the draft acts before the beginning of the public consultation procedure. Where the European Parliament submits comments on the acts, there may be informal exchanges of views with the ECB on such comments, in parallel with the open public consultations. Once the ECB has adopted an act, it must forward it to the ECON Committee. Finally, the ECB is obliged to regularly inform the European Parliament in writing about the need to update adopted acts.<sup>40</sup>

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<sup>36</sup> Interinstitutional Agreement, section III, pp. 5-6.

<sup>37</sup> But see SSM Regulation, Article 20(9), according to which 'appropriate arrangements' have to be concluded between the ECB and the European Parliament on these and other 'practical arrangements'.

<sup>38</sup> Pursuant to Article 26(8) SSM Regulation.

<sup>39</sup> Interinstitutional Agreement, section I.4, p. 4.

<sup>40</sup> Interinstitutional Agreement, section V, p. 6.

### ***The benchmark: the objectives of the SSM***

What becomes clear from this brief overview is that the SSM Regulation, taken in conjunction with the Interinstitutional Agreement, introduces a relatively detailed framework governing the provision of information by the ECB and its relationship with the European Parliament. Yet, as was argued in section 2, whether institutional contacts and information provided can become the basis of meaningful accountability depends on the existence of a clear set of objectives or standards based on which the action of the accountee can be assessed. Article 20 SSM Regulation on the accountability of the ECB does not itself specify the object of this accountability beyond referring in rather broad terms to ‘the implementation of this Regulation’ and ‘the execution of its supervisory tasks’.<sup>41</sup> Moreover, an unequivocal objective cannot be found elsewhere in the SSM Regulation. In fact, the SSM Regulation very much underscores the observation made in the previous section concerning the characteristics of financial market regulation and supervision. The first paragraph of Article 1 SSM Regulation states that the objectives of the conferral of specific tasks relating to the prudential supervision of credit institutions are: ‘contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage.’ To the extent that the safety and soundness of credit institutions and the stability of the financial system may be qualified as the core objectives of the ECB as a European supervisor, they hardly amount to a quantifiable yardstick based on which the performance of the ECB can be objectively evaluated.

The ECB itself has defined financial stability as ‘a state whereby the build-up of systemic risk is prevented’.<sup>42</sup> In turn, according to the ECB, ‘[s]ystemic risk can best be described as the risk that the provision of necessary financial products and services by the financial system will be impaired to a point where economic growth and welfare may be materially affected.’<sup>43</sup> While any attempt to quantify the objectives of the SSM must be applauded, in doing so the ECB is effectively

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<sup>41</sup> SSM Regulation, Article 20(1) and (5).

<sup>42</sup> See <<https://www.ecb.europa.eu/pub/fsr/html/index.en.html>> accessed 28 August 2017.

<sup>43</sup> *ibid.*

replacing one vague yardstick with another one, as it may be up to debate at what point economic growth and welfare are ‘materially affected’.

### ***The European Parliament’s accountability instruments***

Due to the nature of the legal basis of the SSM, it is in principle possible to change the legal framework of the SSM by means of an amendment of secondary Union law. This stands in sharp contrast to the ‘quasi-constitutional status’ of the legal and institutional arrangements on monetary policy, which are enshrined in EU primary law and hence are much more difficult to amend.<sup>44</sup> Yet, as the SSM Regulation has been adopted pursuant to Article 127(6) TFEU, a special legislative procedure applies, which puts the Council at the helm of the process with the European Parliament only having a right to be consulted.<sup>45</sup> In fact, in procedural terms the ECB is put on an equal footing with the European Parliament, as the former also has a right to be consulted. Due to the absence of the application of the ordinary legislative procedure the possibility of an amendment of the SSM Regulation cannot therefore be considered an instrument at the disposal of the European Parliament. To be sure, any amendment of the SSM Regulation by the Council has to take place within the parameters of the EU Treaties and the relevant international standards.<sup>46</sup>

Compared to the procedure for the amendment of the SSM Regulation, the role of the European Parliament in the appointment and dismissal of the management of the Supervisory Board is somewhat more substantial. Firstly, while the Chair and Vice-Chair are formally appointed by the Council by means of an implementing decision, this requires the approval of the European Parliament.<sup>47</sup> To this end the Interinstitutional Agreement states that the ECB must provide Parliament with the shortlist of candidates for these two positions. The ECON Committee may submit questions to the ECB relating to the selection criteria and the shortlist of candidates. The ECB must then submit its proposals for the Chair and the Vice-Chair to Parliament together with written explanations of the underlying reasons. A public hearing of the proposed Chair and Vice-

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<sup>44</sup> F. Amtenbrink and K. Van Duin, ‘The European Central Bank before the European Parliament: Theory and Practice After Ten Years of Monetary Dialogue’, (2009) 34 E.L. Rev. 561, 582-83; F. Amtenbrink, ‘The Metamorphosis of European Economic and Monetary Union’ in D. Chalmers and A. Arnall (eds), *The Oxford Handbook of European Union Law* (OUP, 2015) 729; De Haan and Gormley (1996), op. cit. supra note 8, 101.

<sup>45</sup> Article 127(6) TFEU.

<sup>46</sup> Louis (2015), op. cit. supra note 10, 137-38.

<sup>47</sup> SSM Regulation, Article 26(3).

Chair of the Supervisory Board is held in the ECON Committee. The Parliament must reach its final decision through a vote in the ECON Committee and in plenary. If the ECB's proposal is not approved by the European Parliament, the ECB may decide either to draw on the pool of candidates that applied originally for the position or to re-initiate the selection process.<sup>48</sup> This involvement of the European Parliament stands in sharp contrast to what can be observed for the appointment of the main managerial board of the ECB. Indeed, it will be recalled that the European Parliament is merely consulted on the appointment of the President, the Vice-President and the other members of the Executive Board of the ECB.<sup>49</sup> It is thus little surprising that the European Parliament has made a point out of emphasising that it considers the arrangements in the SSM Regulation 'an important precedent for an enhanced role of the EP in an EMU governance based on differentiation', calling 'for the inclusion of Parliament in the appointment procedure of the President, Vice-President and other members of the Executive Board of the ECB in Article 283 TFEU, by requiring that it consents to the recommendations of the Council'.<sup>50</sup> This proposal is reminiscent of the arrangements governing the Fed, whereby any appointment to the Board of Governors by the President of the United States has to be confirmed by the US Senate.<sup>51</sup> The implementation of this proposal would, however, require an amendment of primary Union law. Beyond the obvious motivation to increase the European Parliament's role in the accountability of the ECB for its monetary policy tasks, it can also be observed that a substantive role of the European Parliament in the appointment of the members of the Executive Board would also be a recognition of the fact that its members form an integral part of the ECB's Governing Council, which pursuant to the SSM Regulation, formally adopts (or objects to) supervisory decisions that are prepared by the Supervisory Board.<sup>52</sup>

The European Parliament's approval is further required for the removal of the Chair or Vice-Chair of the Supervisory Board from office.<sup>53</sup> The approval process again requires a vote in the ECON

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<sup>48</sup> Interinstitutional Agreement, section II, pp. 4-5.

<sup>49</sup> TFEU, second subparagraph of Article 283(2).

<sup>50</sup> Committee on Constitutional Affairs, 'Report on Constitutional Problems of a Multitier Governance in the European Union' 2012/2078(INI) (15 November 2013) <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0372+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0372+0+DOC+XML+V0//EN)> accessed 13 November 2015, paras 40 and 75.

<sup>51</sup> G. Claeys, M. Hallerberg and O. Tschekassin, 'European Central Bank Accountability: How the Monetary Dialogue Could Evolve' (March 2014) Bruegel Policy Contribution Issue 2014/04, 5.

<sup>52</sup> SSM Regulation, Article 26(8).

<sup>53</sup> SSM Regulation, Article 26(4).

Committee and in plenary.<sup>54</sup> The SSM Regulation provides that these officials can only be removed from office if they no longer fulfil the conditions required for the performance of their duties or have been guilty of serious misconduct.<sup>55</sup> For those purposes, the European Parliament may inform the ECB that it considers the conditions for the removal of those officials from office to be fulfilled.<sup>56</sup> The ECB must provide its considerations in writing.<sup>57</sup> What becomes clear from this provision is that the dismissal procedure cannot in principle be used by the European Parliament as an accountability instrument to assign consequences to bad performance.

Concerning the financing of the SSM-related activities of the ECB it will be recalled first of all that the budget of the ECB does not form part of the general budget of the EU and hence is not part of the decision on the annual budget pursuant Article 314 TFEU which the European Parliament takes jointly with the Council. Pursuant to Article 26(2) Statute ESCB and ECB, it is the Executive Board of the ECB that draws up annual accounts that have to be approved by the Governing Council. The ECB finances itself through own revenues and is only to a very limited extent subject to the scrutiny of the EU's Court of Auditors, as Article 27.2. Statute ESCB and ECB limits the role of the latter institution to an examination of the 'operational efficiency of the management of the ECB.'<sup>58</sup> This approach can be explained by the resolute of the drafters of the legal framework to ensure the (financial) independence of the ECB for its monetary policy tasks. Concerning the ECB's role in the SSM, secondary Union law provides that '[t]he ECB shall be responsible for devoting the necessary financial and human resources to the exercise of the tasks conferred on it by this Regulation.'<sup>59</sup> To this purpose, it levies an annual supervisory fee on credit institutions and branches established in participating Member States, which must cover expenditure incurred by the ECB in relation to the tasks conferred on it under Articles 4-6 SSM Regulation.<sup>60</sup> 'The ECB's expenditure for carrying out the tasks conferred on it by this Regulation

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<sup>54</sup> Interinstitutional Agreement, section II, p. 5.

<sup>55</sup> SSM Regulation, first subparagraph of Article 26(4).

<sup>56</sup> SSM Regulation, third subparagraph of Article 26(4).

<sup>57</sup> Interinstitutional Agreement, section II, p. 5.

<sup>58</sup> For the monetary policy task of the ECB see already R. Smits, *The European Central Banks. Institutional Aspects* (Kluwer Law International, 1997), 168.

<sup>59</sup> SSM Regulation, Article 28.

<sup>60</sup> SSM Regulation, Article 30(1). This is, according to Article 30(5), 'without prejudice to the right of national competent authorities to levy fees in accordance with national law and, to the extent supervisory tasks have not been conferred on the ECB, or in respect of costs of cooperating with and assisting the ECB and acting on its instructions,



shall be separately identifiable within the budget of the ECB.’<sup>61</sup> Moreover, ‘[t]he ECB shall, as part of the [annual] report referred to in Article 20, report in detail on the budget for its supervisory tasks. The annual accounts of the ECB drawn up and published in accordance with Article 26.2 of the Statute of the ESCB and of the ECB shall include the income and expenses related to the supervisory tasks.’<sup>62</sup> That the SSM-related budget is thus considered to be part of the general budget of the ECB also derives from Article 29(2) SSM Regulation, according to which ‘[i]n line with Article 27.1 of the Statute of the ESCB and of the ECB the supervisory section of the annual accounts shall be audited’ by independent external auditors recommended by the Governing Council and approved by the Council.<sup>63</sup> The role of the Court of Auditors is again limited to examining the operational efficiency of the management of the ECB, and the exact scope of this role is subject of debate.<sup>64</sup>

#### **IV. Initial evidence from parliamentary practice**

In observing parliamentary practice to date, this working paper focuses on two main aspects that deserve consideration, namely the internal organisation in the ECON Committee and the actual course of events during the encounters with ECB officials.

##### ***Organisational aspects***

As regards the internal organisation of the European Parliament, in preparation of the coming into operation of the SSM, the so-called Banking Union Working Group (BUWG) was set up in October 2014, which is made up of 15 MEPs from the ECON Committee. Next to the Committee’s Chair and the –no less than four– Vice-Chairs, the BUWG is composed of MEPs from the eight political groups currently represented in the European Parliament. According to the publicly available documentation of the European Parliament, the BUWG ‘monitors the implementation of

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in accordance with relevant Union law and subject to the arrangements made for the implementation of this Regulation, including Articles 6 and 12.’

<sup>61</sup> SSM Regulation, Article 29(1).

<sup>62</sup> SSM Regulation, Article 29(2).

<sup>63</sup> SSM Regulation, Article 29(3).

<sup>64</sup> See European Court of Auditors, ‘Single Supervisory Mechanism – Good start but further improvements needed’, Special Report, 2016, No. 29, available at <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=39744>>.

the SSM, scrutinizes the exercise of the ECB's tasks as bank supervisor and deals with any related matters concerning the SSM'.<sup>65</sup>

While little additional information is publicly available on the internal workings of the BUWG, from queries by the authors of this working paper it can be assumed that the role of BUWG is primarily that of an agenda-setter for the scrutiny of the ECB *inter alia* for its supervisory related tasks. This goes beyond a mere preparation of the regular hearings, as the Group has its own working programme and meets more often than for the twice-a-year regular hearings. It is also the BUWG that decides on the topics to be covered in briefing papers by external experts for the ECON Committee in preparation of the exchanges with the ECB. These external experts are contracted by the ECON Committee, namely the Economic Governance Support Unit (EGOV) of the European Parliament's Directorate-General for Internal Policies, for the duration of the legislative term. Similarly to what can be observed in the context of the monetary dialogue,<sup>66</sup> these briefing papers take the form of an in-depth analysis of specific issues. In the case of the SSM, this includes items such as bank structural reform, conduct risk, and internal rating models. Interestingly, on the website of the ECON Committee no specific information on the composition and selection procedure of this expert group could be found, and its composition can only be divined by glancing at the authors of the expert studies that are made available on the website. This opaqueness surrounding the external experts is quite remarkable considering that the European Parliament regards these briefing papers to 'form part of the scrutiny of the Banking Union'.<sup>67</sup>

Next to the external briefing papers, EGOV also issues its own briefing papers in preparation of the regular hearings and *ad hoc* exchanges with the ECB. These internal briefings analyse issues based on publicly available information and, according to the European Parliament, are made available for information purposes only. An illustration thereof is the briefing paper for the meeting

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<sup>65</sup> European Parliament, 'Banking Union Working Group', available at <[www.europarl.europa.eu/cmsdata/121342/Banking%20Union%20Working%20Group%2020170614.pdf](http://www.europarl.europa.eu/cmsdata/121342/Banking%20Union%20Working%20Group%2020170614.pdf)> accessed 30 August 2017. The BUWG also monitors the implementation of the Single Resolution Mechanism.

<sup>66</sup> On the role of the panel of monetary and economic experts in the monetary dialogue see Amtenbrink and Van Duin (2009), op. cit. supra note 44; S.C.W. Eijffinger, 'Monetary dialogue 2009–2014: Looking backward, looking forward' (2015) *Kredit und Kapital*, 1-10.

<sup>67</sup> See <[www.europarl.europa.eu/RegData/etudes/BRIE/2017/602070/IPOL\\_BRI\(2017\)602070\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602070/IPOL_BRI(2017)602070_EN.pdf)> accessed 28 August 2017.

of 19 June 2017 which focused on the resolution of *Banco Popular*, including *inter alia* a timeline of events and reflections on previous supervisory assessments; supervisory expectations for the relocation of banks to the Euro area after ‘Brexit’; supervisory banking statistics on profitability, NPLs, etc; and recent SSM publications.<sup>68</sup> Moreover, the internal briefing paper typically includes a summary (or an abstract) of the external briefing papers. In case there are more than one external briefing papers for a meeting, there can also be a separate note (or a ‘summary’) consolidating the summaries of those external briefing papers. For example, before the ECB took on its new banking supervision tasks, it carried out a financial health check of all banks to be supervised, consisting of an asset quality review and a stress test. Given the importance of those preparations, the ECON Committee commissioned two experts to assess the ‘Robustness, Validity and Significance of the ECB’s Asset Quality Review and Stress Test Exercise’, and the key findings of their studies were then outlined in a two-page note.<sup>69</sup> One last aspect regarding the ECON scrutiny of the SSM is, according to the information received by the authors, the existence of a ‘secret room’ where MEPs can consult confidential documents such as the reports of the SSM boards, supervisory reports, and so on.

### ***Observations from the regular hearings and ad hoc exchanges***

Turning to the actual encounters between the ECON Committee and ECB officials, at the time of writing there have thus far been eleven (11) hearings, including ordinary public hearings (7), *ad hoc* exchanges of views (1), and the presentation of the SSM’s annual report (3). In contrast to what can be observed for the monetary dialogue, for the time being no transcripts of these meetings are (publicly) available on the ECON Committee’s website. What is instead accessible from the online multimedia library of the European Parliament are video recordings.<sup>70</sup> From these video recordings it can be inferred that these hearings in principle follow a set pattern. They commence with an introduction given by the Chair of the ECON Committee (who is also a member of the BUWG), clarifying what type of meeting this is (ordinary public hearing, *ad hoc* exchange of view,

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<sup>68</sup> See <[www.europarl.europa.eu/RegData/etudes/BRIE/2017/602087/IPOL\\_BRI\(2017\)602087\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602087/IPOL_BRI(2017)602087_EN.pdf)> accessed 28 August 2017.

<sup>69</sup> See <[www.europarl.europa.eu/RegData/etudes/ATAG/2014/528764/IPOL\\_ATA\(2014\)528764\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2014/528764/IPOL_ATA(2014)528764_EN.pdf)> accessed 28 August 2017.

<sup>70</sup> See <<http://www.europarl.europa.eu/committees/en/econ/banking-union.html?tab=Banking%20Supervision>> accessed on 30 August 2017. It should be stressed that the video recording of the meeting of 04/02/2014 was not available to watch, and we have not been able to solve the problem through our contacts with the European Parliament.

and so on), welcoming the Chair of the ECB's Supervisory Board to the Committee, and explaining how the meeting will proceed. This is followed by a short presentation (an introductory statement) from the Chair of the Supervisory Board, and a Question & Answer session between the MEPs and the Chair of the Supervisory Board. During that session around twenty-five (25) questions are asked by the MEPs during each hearing. Overall, a hearing will last for about 90 minutes.

Focusing in this first version of the working paper on the Question & Answer session, what emerges from an initial analysis is that these questions can be put into different categories. Firstly, there are questions which arguably clearly focus on (the duties of) the SSM. Here, a whole range of issues are discussed, concerning bank supervision, non-performing exposures (notably, non-performing loans), capital requirements, stress tests, the Basel rules, accounting standards, proposed EU rules whose adoption is still pending, and the completion of the Banking Union's architecture. Moreover, the institutional interaction between the SSM, EBA, the monetary policy function of the ECB, and the NCAs is also subject of debate. What is further notable is that many questions relate to the situation of specific credit institutions (mostly those that have run into difficulties for various reasons). It can be observed that in many, albeit certainly not in all, instances the MEPs focus on issues that are of interest to the banking sector of the country from which they come from. A notable example in this regard is when Irish MEPs ask questions concerning the health of individual banks in Ireland.<sup>71</sup> The significance of this observation lies in the fact that MEPs in principle do not represent national constituencies, but rather the Union citizens.<sup>72</sup> In instances where questions concern specific cases of supervised credit institutions, the Chair of the Supervisory Mechanism regularly invokes her confidentiality obligations under EU banking legislation and answers the question in a somewhat more general fashion.<sup>73</sup>

A second category of questions that can be observed from the hearings are those that concern issues that clearly fall outside the remit of the SSM. Notwithstanding (and perhaps partly because of) the complex division of tasks between national and EU institutions, bodies and agencies acting in this area, the MEPs do not sharply distinguish between bank supervision, banking resolution,

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<sup>71</sup> See e.g. the meeting of 03/11/2014.

<sup>72</sup> Articles 14(2) and 10 TEU.

<sup>73</sup> Some typical examples of the words used by the Chair of the Supervisory Board are: 'but to respond in a general fashion...'; 'again, without entering into confidential information...' (meeting of 19/10/2015).

and indeed monetary policy issues. This is interesting, especially because of the emphasis that was put on the organisational separation between the monetary policy function and the supervisory tasks of the ECB when the SSM was created.<sup>74</sup> While the majority of questions indeed concern bank supervision, there are also questions on various other issues concerning *inter alia* bank resolution, monetary policy, state aid to banks, or consumer protection. While some questions overtly concern issues that fall outside the remit of the SSM, others touch upon issues falling outside the SSM's sphere of competence but are posed in a way that brings them within the SSM's remit. To provide an example of the latter case, the MEPs sometimes address issues relating to, say, monetary policy (e.g., the level of the interest rates) from a supervisory perspective: what are for example the consequences of a low-interest rate environment for bank profitability and what is the Chair's assessment of the situation?<sup>75</sup> Another example is the connection between decreasing profitability of banks and fin tech (the latter falling outside the SSM's remit).<sup>76</sup>

A third, distinct category concerns questions that touch upon cross-cutting issues that do not only fall within the remit of one institution, agency or body, such as where a bank was put into resolution and there were also questions about money laundering; or questions about whether low interest rates are having an impact on the profitability of banks.<sup>77</sup> In some cases, these issues concern both the tasks conferred upon the ECB's Supervisory Board and those given to another EU agency/body, such as in the case of a credit institution that is put into resolution, whereby questions are raised about the supervisor's role in preventing the failure of the bank.<sup>78</sup> In other cases, questions may concern the exercise of the duties of the Supervisory Board and the national authorities concerned, such as in the case of a bank which was recapitalised and there were also problems with money laundering. Money laundering can be a sign of poor risk management and internal control.<sup>79</sup> What can be observed is that the Chair of the Supervisory Board commonly refers to the limits of her mandate, and retorts that this is a question for the national justice concerned (in the case of money laundering), or the SRB (in the case of bank resolution), or the monetary policy function of the ECB (with respect to interest rates), and so on. From the standpoint

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<sup>74</sup> We are grateful to René Smits for this valuable observation.

<sup>75</sup> See, e.g., the meeting of 23/03/2017.

<sup>76</sup> See, e.g., the meeting of 19/10/2015.

<sup>77</sup> See, e.g., the meeting of 23/03/2017.

<sup>78</sup> See, e.g., the meeting of 19/06/2017.

<sup>79</sup> See the meeting of 19/06/2017.

of accountability, this practice raises the interesting question of what the appropriate forum then is for discussions on such cross-cutting issues with the relevant institutions, bodies or agencies – at least on those issues that are closely linked, such as in the case of supervision and resolution. This is all the more difficult whenever a question concerns different branches of government (e.g. the judiciary and the Executive) located at different levels of this system of governance (national and EU level). Questions that need an answer in this context are whether there are issues that therefore ‘slip through the cracks’ and what the implications are for institutional design in this area. Moreover, how would these problems be addressed (if at all) if there were to be a single European capital markets supervisor, as envisaged in the Five Presidents’ Report<sup>80</sup> and the Commission’s reflection paper on the future of EMU?<sup>81</sup>

Notwithstanding the questions that concern issues (partly or fully) falling outside the SSM’s remit, a qualitative assessment of these hearings allows the conclusion that overall the MEPs raise informed questions that show an understanding of the relevant issues. Moreover, an interesting feature of those hearings is that the MEPs follow up on questions asked by their colleagues when these were not answered to their satisfaction. It is also common in those meetings for the Chair of the ECON Committee to briefly comment (in 1-2 sentences) on the answer given by the Chair of the Supervisory Board, right after it is given, in order to indicate his disagreement with her assessment of the relevant issues. Furthermore, the members of the Committee sometimes repeat their question if they deem that it was not (adequately) answered by the Chair of the Supervisory Board in her reply.

While it can be observed that the ‘atmosphere’ in those meetings was, generally speaking, very polite and civil, the mood notably deteriorated whenever the MEPs sensed a failure of the SSM, such as was namely the case whenever a bank had run into difficulties and a meeting was held shortly afterwards, or whenever a bank had been preventatively recapitalised. Two prominent examples are the recapitalisation of Portuguese and Italian banks, as well as the resolution of *Banco*

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<sup>80</sup> Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, ‘Completing Europe’s Economic and Monetary Union’ (22 June 2015) <[https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf)>, at 12.

<sup>81</sup> European Commission, ‘Reflection Paper on the Deepening of the Economic and Monetary Union’ COM(2017) 291 of 31 May 2017, available at <[https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu_en.pdf)>, at 20.

*Popular*.<sup>82</sup> Such events are evidently deemed by (at least some) MEPs to indicate a failure of the SSM. In this connection, it can be noted that even a ‘failure’ in this sense is not always regarded as a failure of the European supervisor by the Chair of the Supervisory Board. By the same token, the resolution of a bank was ‘modestly’ seen as a success.<sup>83</sup>

Other, more ‘critical’, questions asked by MEPs concern the issue of equal treatment of banks across Member States (clearly a very sensitive topic). Questions in this direction can be linked to the broad objective stated in the SSM Regulation and in particular the duty of the ECB to have ‘full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage.’<sup>84</sup>

The efficiency of the SSM’s operations and the treatment of smaller banks have also been a focal point of those discussions (e.g., with respect to ‘burdensome’ reporting obligations incumbent on those banks). On some occasions, MEPs use statements made by officials from (national or EU) institutions other than the ECB to raise an issue with the Chair of the Supervisory Board.<sup>85</sup> The Chair of the Supervisory Board is also frequently asked to comment on the actions of the monetary policy function of the ECB – an issue clearly falling outside her mandate, which nevertheless touches upon bank profitability.

Overall, the impression one gets from a first qualitative analysis of these hearings is that the MEPs do not (explicitly) ask questions on the achievement of the SSM’s objectives, but rather focus on the overall performance of the banking sector or the financial health of individual banks.<sup>86</sup> Accordingly, the Chair of the Supervisory Board is asked to give an assessment of the situation in the banking sector in the SSM countries or to give an account for the Board’s action or inaction with respect to individual banks. The Chair is further asked to comment on issues that fall squarely within her mandate (for example, non-performing loans)<sup>87</sup> or issues that can have an impact on

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<sup>82</sup> See the meeting of 19/06/2017.

<sup>83</sup> See the reply by the Chair of the Supervisory Board to the follow-up question asked by the Chairman in the meeting of 19/06/2017.

<sup>84</sup> See section 3 above.

<sup>85</sup> See, e.g., the meeting of 25/06/2015.

<sup>86</sup> See, e.g., the meeting of 25/06/2015.

<sup>87</sup> Among the very many examples, see, e.g., the meeting of 23/03/2017.

objectives falling within the Board's mandate (for example, a lack of investor and consumer protection can have an impact on financial stability).<sup>88</sup> This makes for a rather contextual discussion, which does not sharply focus on whether the ECB has achieved its objectives as a prudential supervisor of credit institutions. To be sure, this might be an inevitable consequence of the young age of the SSM, which has only been operating for less than three years. It should further be noted that the MEPs are clearly very grateful for the work done by the SSM officials, and they have repeatedly made that clear, especially in the very first hearings.<sup>89</sup> Be that as it may, they can also be very critical of the performance of the SSM, as noted above.

Moreover, considering the questions asked by the MEPs so far, there is no (explicit) dissatisfaction shared among them with the accountability arrangements for the SSM that are currently in force or with the role given to the European Parliament in holding the Supervisory Board to account for the exercise of its duties.<sup>90</sup> This is not to say that there are no references to accountability or transparency. However, such terminology seems to be used to bolster a substantive point made by MEPs or when more information is requested on a specific issue. On very few occasions, the MEPs have asked for (or recommended) the publication of reports by private entities<sup>91</sup> or lobbying letters.<sup>92</sup> On a related matter, there are a small number of questions on whether the Chair of the SSM feels independent enough (from the ECB) to exercise her supervisory duties.<sup>93</sup> It is no secret, and indeed it is hardly a surprise, that some MEPs do not seem to be satisfied with the institutional form that the Supervisory Board took, i.e. as a body of the ECB, rather than as a separate institution.

As regards the use made of the *internal* and *external* briefing papers referred to in the beginning of this section, the MEPs mostly draw on issues discussed in the notes (or briefing papers) prepared by the Economic Governance Support Unit in advance of the meetings of the ECON Committee.

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<sup>88</sup> See the meeting of 22/03/2016.

<sup>89</sup> See, e.g., the hearings of 18/03/2014 and 03/11/2014.

<sup>90</sup> It is worth noting that in the beginning of the meeting of 22/03/2016, the President thanked the Chair of the Supervisory Board 'for the very open and transparent dialogue with the European Parliament'. For a rare exception, see the meeting of 18/03/2014 (concerning the frequency at which the record of the proceedings of the Supervisory Board is made available to Parliament).

<sup>91</sup> See the meeting of 19/06/2017.

<sup>92</sup> See the meeting of 22/03/2016.

<sup>93</sup> See, e.g. the meeting of 25/06/2015.



These are, largely speaking, the ‘issues of the day’, which makes for a rather contextual discussion. That being said, there are clearly many questions that do not specifically draw on the issues discussed in those internal briefing papers. Moreover, there are very few explicit references to the *external* briefing papers drawn up by experts in the questions asked by the MEPs. There are, however, a number of questions that touch upon the issues ‘flagged’ in those papers. Clearly, a better use could have been made of those papers, in order to facilitate an informed discussion on the relevant issues. To be sure, this is not a problem that is specific to the ECON Committee’s interaction with the SSM. Previous research has identified this problem also with respect to the ECB’s monetary dialogue with the European Parliament.<sup>94</sup>

## V. Preliminary conclusions

The inclusion of explicit provisions on the accountability of the ECB for the conduct of the supervisory tasks in the framework of the SSM may not only be an acknowledgement of the difference in quality of the tasks of banking supervision from the conduct of monetary policy, but in a broader sense also evidence for the evolving role of the European Parliament in the monitoring of the performance of European institutions and bodies in European monetary, economic and financial governance that has commenced with the initiation by the European Parliament of the monetary dialogue, which has previously been extended to economic policy coordination in the European Semester.<sup>95</sup>

As the only directly elected Union institution, the European Parliament may seem predestined to take centre stage in the accountability of a Union institution which –in exercising public power– has been deliberately positioned at arm’s length from other Union institutions and bodies, as well as from national governments. Yet, the extent to which the European Parliament can fulfil a meaningful role in this regard depends on several variables that are closely linked to the conceptualisation of the appropriate type of accountability.

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<sup>94</sup> Amttenbrink and Van Duin (2009), op. cit. supra note 44, 579-581.

<sup>95</sup> The latter refers to the economic dialogue *inter alia* referred to in Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1, as amended, Article 2ab; Council Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6, as amended, Article 2a.

Leaving aside for the moment the pertinent question about if and to what extent the necessary preconditions are in place, the most blatant shortcoming of the current accountability relationship between the European Parliament and the ECB is the absence of meaningful instruments that would allow the European Parliament to assign consequences to its judgment of the performance of the ECB. Differently from what can be observed for the monetary policy tasks of the ECB, the legal basis of the SSM has not been insulated from amendments through constitutionalisation. Yet, whereas the legal basis of the Single *Resolution* Mechanism puts the European Parliament on an equal footing with the Council in the legislative process through the application of the ordinary legislative procedure,<sup>96</sup> this is not the case for the SSM as a result of the use of Article 127(6) TFEU. Considering the position of the European Parliament in the European constitutional construct, it is difficult to justify why its formal rights in the legislative procedure establishing or amending the SSM do not even exceed those assigned to the ECB itself. Referring in this context to the independent position of the ECB is somewhat misplaced, as the role accorded to the Council under Article 127(6) TFEU means that another Union political institution can amend the legal basis. The European Parliament does have a substantial role in the appointment and dismissal of the Chair and Vice-Chair of the Supervisory Board. Yet, the function of this involvement as an accountability instrument is impaired by the fact that a performance-based dismissal is excluded. What is more, formally speaking it is the Governing Council of the ECB rather than its Supervisory Board that adopts supervisory decisions.

This rather sober assessment of the instruments at the disposal of the European Parliament to hold the ECB to account for the exercise of its duties is all the more regrettable considering that it derives from a first analysis that the information requirements under the SSM Regulation and the Interinstitutional Agreement paired with the (internal organisation of the) regular hearings and *ad hoc* exchanges do provide for a robust beginning for the European Parliament to understand and evaluate policy decisions and their rationale and, more generally, to remove information asymmetries also with regard to the public at large. This positive picture is somewhat mitigated by the relative vagueness of the SSM's objective(s), as well as the parallel existence of other Union bodies and agencies which pursue partially overlapping objectives.

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<sup>96</sup> Regulation 806/2014 is based on Article 114 TFEU.

As has been emphasised in the introduction, this paper is work in progress. Thus, additional analytical work is required with regard to the conceptual approach to accountability (e.g. the role of public opinion and credibility in the market as accountability mechanisms), the accountability framework of the SSM Regulation, and the actual exchanges between the European Parliament and the ECB. With regard to the accountability framework, a closer look at the broad objective(s) stated in the SSM Regulation is needed,<sup>97</sup> including the function of the duties referred to in this context, i.e. unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage. As regards the actual practice, in this first version of the working paper, the focus has been on a qualitative assessment mainly of the Question & Answer Sessions that form part of the regular hearings and *ad hoc* exchanges between the European Parliament's ECON Committee and the Chair of the ECB's Supervisory Board. In order to get a fuller picture of the scope of the European Parliament's monitoring of the ECB's banking supervisory function, a closer look also has to be taken at the written answers provided by the ECB in response to questions by the European Parliament, as well as the internal and external briefing papers.

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<sup>97</sup> On financial stability, see generally Gianni Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Wolters Kluwer, 2017).