The Relationship between the ECB, the EBA and the NCAs in the SSM

Which Way to Complementarity?

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Abstract

The aim of this paper is to analyse the co-ordination of the competences and activities of the ECB, the EBA and the NCAs in the SSM.
Firstly, it will evaluate the division of tasks among these authorities and the way in which the ECB is entitled to participate in the decision-making of the EBA. Within this ambit, it will show that the latter plays an active role in the establishment of shared regulatory and supervisory standards and practices. Since the EBA may both identify best practises concerning prudential supervision and develop implementing technical standards, it will try to demonstrate that the EBA has the power to enact legal acts binding on the ECB.
Secondly, it will ascertain whether the ECB is subject to the above-mentioned overshadowing and *de facto* powers of the EBA. It will also detect whether the ECB is subject to the EBA's decisions in cases where disagreements between NCAs in cross-border situations were settled.
Thirdly, it will evaluate whether the ECB is placed, in the relationship with the EBA, at the same level of NCAs and with what consequences. In particular, it will survey whether the decisions that the EBA may make in place of the NCAs, if necessary conditions are met, would be adopted even with regard to the ECB.
Fourthly, it will assess whether the unification of the monetary function with that of prudential supervision – through the SSM – and the previous establishment of the EBA, lead to a system that under several profiles appears fragmented, incomplete and incoherent.
Finally, it will draw a prospective picture of greater complementarity between the authorities involved.

Keywords:

European Central Bank – European Banking Authority – National Competent Authorities – Supervision

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I. Introduction

The Single Supervisory Mechanism (SSM), established by Regulation No. 1024/2013[1], formally comprises the ECB and the national competent authorities (NCAs) of participating Member States. As stated in Article 2, para. 1, these are Member States whose currency is the euro as well as those whose currency is not the euro but which has established a "close cooperation" with the ECB. Substantially, it also includes the European Banking Authority (EBA).
Pursuant to Article 1, the SSM is responsible for prudential supervision of the credit institutions in the participating Member States, in order to contribute to their safety and soundness as well as the stability of the financial system within the Union and each Member State. This is carried out 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 of preventing regulatory arbitrage.
The SSM ensures that the EU's policy on prudential supervision is implemented in an effective and coherent manner and that credit institutions are subject to supervision of the highest quality.
As the Euro area's central bank - with extensive expertise in macroeconomic and financial stability issues - the ECB is well placed to carry out clearly defined supervisory tasks with a focus on protecting the stability of the financial system of the Union. Within this ambit, its assignments include the reduction of the supervisory burden for cross-border credit institutions. As a result, Regulation No. 1024/2013 confers on the ECB specific supervisory duties which are crucial to ensure a coherent and effective implementation of the Union's policy relating to the prudential supervision of credit institutions, while other tasks remain with national authorities.
In carrying out its prudential supervision charges, the ECB applies all pertinent EU laws. Where applicable, it also applies the national legislation transposing them into Member State law. Furthermore, where the relevant law grants options for Member States, the ECB applies the internal legislation exercising those options.
As stated in Article 3, para. 1, the ECB shall cooperate closely with EBA, ESMA, EIOPA and the European Systemic Risk Board (ESRB) as well as the other authorities which form part of the ESFS. This should ensure an adequate level of regulation and supervision in the Union considered as a whole. Moreover, it is subject to technical standards developed by EBA and adopted by the European Commission. It is also subject to the EBA's European Supervisory Handbook. It is for these reasons that one must affirm that EBA is substantially part of the SSM. Furthermore, even if the ECB has a leading role in the SSM, the functions on the matter of EBA and of NCAs are crucial and the co-ordination of the respective competences and activities - which would ensure the correct and efficient performing of the SSM - are not always clear. As a result, their relationship must be analysed in order to establish their potential complementarity.
Bearing this in mind, it should be observed how - and in which terms - in areas not covered by the legal framework at issue, or if a need for further harmonisation emerges in the conduct of the day-to-day supervision, the ECB will issue its own standards and methodologies, while considering EBA rules and Member States' national options and discretions under EU legislation.

II. The ECB and the EBA in the European System of Financial Supervision (ESFS)

The establishment of the SSM requires the examination of the relationships between it and the European System of Financial Supervision (ESFS). The latter is a network centered around the European Systemic Risk Board (ESRB), the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), the European Securities and Markets Authority (ESMA) and National Competent Authorities of the Member States.
The relation at issue must be analysed under two profiles. The first concerns the division of tasks between the ECB and the EBA, and their potential overlaps. The second concerns the ways in which the ECB can participate in the decision-making process of the EBA.
With regard to the first profile, it must first be noted that the ESFS does not draw up prudential policies, nor does it have regulatory powers. Rather, it is a coordination and support tool for the national competent authorities themselves. On the other hand, the EBA, like the other agencies composing the ESFS, has a precise regulatory power that Article 4, par. 3, Regulation 1024/2013 also recognises to the ECB if the related exercise is necessary to organise or to specify the procedures for carrying out its tasks.

[1] 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* 20 October 2010, L 287, 63-89.

A further overlap of responsibilities between the ECB and the EBA could take place with reference to interventions towards banking institutions, in three specific circumstances. They are provided for by Regulation 1093/201043[2]. First of all, pursuant to Article 17, in the event of an alleged breach or non-application of Union law, the EBA is vested with investigative powers, the exercise of which may lead to the adoption of an act of guidance towards the National Competent Authorities and, in the event of their inaction, to a recommendation to the Commission which can be followed by direct action on the credit institutions concerned. Secondly, based on Article 18, in the case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the EBA may facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant National Competent Authorities. Furthermore, it can take a decisive role in the event of conflicts between the latter, intervening directly on the credit institutions involved if they do not comply with its decisions. Finally, according to Article 19, in disputes between National Competent Authorities in cross-border situations, the EBA must play a mediating role assisting them in reaching an agreement. In the event of irreconcilability, it may take a decision requiring them to take specific action or to refrain from action in order to settle the matter, with binding effects for the National Competent Authorities concerned, in order to ensure compliance with Union law.

The relations between the ECB and the ESFS are regulated by Articles 3, paras. 1 and 3, and 4, para. 3, Regulation 1024/2013. The first provision, in addition to providing for a general principle of close cooperation, specifies that the ECB, exercises its functions without prejudice to those of the ESFS. The second subordinates the activity of ECB on the matter to the binding regulatory and implementation technical standards drawn up by the EBA and adopted by the Commission pursuant to Regulation 1093/2010. Within this ambit, it must be noted that, whereas no. 32 the SSM Regulation considers inappropriate for the ECB to take over from the EBA in the tasks entrusted to it concerning the preparation of draft technical standards as well as guidelines and recommendations aimed at convergence in prudential supervision and the consistency of the related results within the Union. The ECB should exercise the power to adopt regulations pursuant to Article 132 TFEU in accordance with the EU acts adopted by the Commission on the basis of the projects drawn up by the EBA.

It seems possible to affirm, therefore, that the ECB, despite its heading role in the prudential supervision of EMU, is placed on the same level as the national authorities vis-à-vis the EBA, with two kinds of consequences. First of all, even against the ECB, if specific conditions are met, the acts that the EBA may issue to replace the National Competent Authorities would be adoptable. Furthermore, the EBA would be given the role of regulatory authority of prudential supervision for the Union considered a s a whole, ending up by representing the main guarantor of the financial stability of the Union itself, having specific powers of intervention over the National Competent Authorities and financial institutions of all Member States.

Furthermore, following their adoption by the Commission, its draft regulatory and implementing technical standards would have a higher position in the hierarchy of sources than the guidelines, recommendations and regulations adopted by the ECB within the ambit of the SSM. This solution, however, would seem to be in contrast with the integrated supervisory system established with Regulation 1024/2013 and herald of conflicts between the ECB and the EBA. For example, in a situation of emergency pursuant to Article 19, Regulation 1093/2010, a divergence of assessment between them would automatically place the EBA, within the SSM, in a higher position than the ECB which represent, in any case, the head of the SSM itself. Furthermore, the EBA could in any case assess an inaction of the ECB as a breach of EU law intervening, consequently, as established in Article 17, Regulation 1093/2010.

The relations between the ECB and the EBA therefore end up representing one of the most complex issues of the integrated prudential supervision system. On the one hand, the SSM regulation designates the ECB as the authority responsible for prudential supervision in the EMU without attributing to it, however, the appropriated functions. On the other hand, the ESFS - at the top of which there is the EBA - is competent for macroprudential analysis. This overlap was already known - and probably feared - by the European legislator. Indeed, Article 32 Regulation 1024/2013 provides that, by 31 December 2015 and every three years thereafter, the Commission publishes a report on the application of the same regulation, evaluating, among other things, the activities of the SSM within the ESFS and relations between the ECB and the EBA.

[2] 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, 15.12.2010, 12–47.

III. The ECB in the decision-making process of the EBA

Another issue of considerable complexity is represented by the modalities of the ECB's participation in the decision-making process of the EBA. The difficulty of drawing a clear dividing line between the supervisory function and the observation that a significant part of the prudential rules originates precisely from supervisory practice, makes it at least desirable for the ECB to play a driving role within the EBA. It should exercise - both on the decision-making processes and on the exercise of regulatory power - an influence which is proportional to the importance of the tasks assigned to it.
On closer inspection, according to Article 4, para. 3, Regulation 1024/2013, the ECB contributes, if necessary and playing any participatory role, to the elaboration of draft regulatory or implementing technical standards of the EBA, or draws its attention to the advisability of submitting to the Commission projects that modify the regulatory or implementing technical standards in force. The provision, however, has a modest practical significance. Indeed, Article 40, Regulation 1093/2010 provides that only one representative of the ECB may participate in the meetings of the Council of national authorities who, however, does not have the right to vote. As a result, the role and importance of the ECB in the prudential supervision of the Union considered as a whole are, from this point of view, greatly downsized. Paradoxically, despite the fact that it exercises the control function over the main EMU credit institutions, its level would even be lower than that of the National Competent Authorities of the participating Member States which can, autonomously and with the right to vote, contribute to the implementation of common prudential rules within the competent body of the EBA.

IV. Hierarchy of sources in prudential supervision

At this point, an attempt can be made to establish a pattern in the hierarchy of sources for EMU prudential supervision.
At the top there is the enabling clause referred to in Article 127, para. 6, TFEU. Subsequently, there are the EU regulations and directives, followed by the regulatory and implementing technical standards adopted by the Commission on the projects drawn up by the EBA and, finally, the ECB regulations, decisions and guidelines concerning, specifically and exclusively, prudential supervision.
Within this ambit, on can affirm that, although the acts adopted by the ECB - pursuant to Article 288 TFEU - have the same legal value as those of the other institutions of the Union, in the matter in question the former are subordinate to the latter, with particular reference to those of the Commission. Furthermore, the acts of the ECB, despite being valid for all Member States joining the SSM, would be formally equated, again on a legal level, with those of the National Competent Authorities of the Member States not participating in the same SSM.

V. Structure of EMU financial supervision

The structure of financial supervision that is outlined by Regulation 1024/2013 appears to be somewhat fragmented. First of all, it is limited to the micro-prudential profiles of supervision and, within the latter, it does not even operate a complete transfer of competences to the ECB, as it reserves important functions for the National Competent Authorities, including consumer protection and the fight against money laundering. Furthermore, the SSM operates only with regards to the Member States of the EMU which, as is well known, constitute only a part of those of the Union and with the Member States which eventually establish a "close cooperation" with the ECB provided for in Article 7, regulation 1024/2013. This makes the national economic systems further asymmetrical and breaks down the European financial and banking market not only in relation to the monetary function but also to the supervisory function. Indeed, in addition to the mentioned "close cooperation" one must note a specific procedure for enhanced cooperation which would extend the scope of application of the MSU. The conferral of responsibilities on the ECB and the ESCB also concerning these Member States does not resolve the question - posed before the establishment of the Banking Union - of the need to have an integrated supervisory system[3].
Pursuant to Article 9, para. 1, Regulation 1024/2013, the ECB concentrates in itself both the role of competent authority and that of designated authority of the participating Member States. The first is that of the authority

[3] Report of the High-Level Group on Financial supervision in the EU, 25th February 2009, point 171.

which, as an institution belonging to the supervisory system in force in the Member State concerned, is authorised - by virtue of national law - to exercise prudential supervision. The second is that of the authority of a participating Member State established in accordance with the relevant EU law. To the extent necessary for the performance of its tasks, it may request the National Competent Authorities - by means of instructions - to exercise their powers in accordance with the conditions established by national law, if the same powers are not conferred on it by Regulation 1024/2013 or by other acts of EU secondary law. Among the powers directly conferred to it one must observe the request for information, the conduct of general investigations and the completion of on-site inspections, respectively provided for by Articles 10, 11 and 12, Regulation 1024/2013.

The National Competent Authorities, on the other hand, are entrusted, on a residual basis, with the control over less significant supervised entities on a consolidated basis, with the consequent conferral of all supervisory powers and tasks, with the exception of those mentioned in Article 6, para. 6, Regulation 1024/2013. The most important are:

i) "for credit institutions established in a participating Member State, which wish to establish a branch or provide cross- border services in a non-participating Member State, to carry out the tasks which the competent authority of the home Member State shall have under the relevant Union law";

ii) "to ensure compliance with the acts (…), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters";

iii) "to ensure compliance with the acts (…), which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models".

Furthermore, as stated is Article 6, para. 3, the National Competent Authorities are entrusted with the task of assisting the ECB in the preparation and implementation of the acts inherent to its exclusive competences, under the conditions established by the SSM Framework Regulation[4] and in compliance with its instructions, including assistance in verification activities.

The shortcomings of the SSM emerge clearly in the control over cross-border banks. Prior to its entry into force and even before the establishment of EMU, both at the EU and national levels, banking supervision was entirely conceived on the basis of the home country control principle. According to it, the prudential control of branches is in the responsibility of the supervisory authorities of the parent credit institution and that of subsidiaries is in the National Competent Authorities of the Member State in which they operate. This principle has inspired numerous acts of secondary law, such as the Second Council Directive 89/646/EEC [5], Directive 2000/12/EC [6] and Directive 2006/48/EC[7].

The transfer of the control functions from the National Competent Authorities to the ECB, therefore, should involve the modification of the same acts, an operation already partly provided for in Regulation 1024/2013 and in any case feasible through ordinary legislative procedure. This would be in contrast, however, with two different regulatory trends that have emerged, even if in an inconsistent manner, with the legislative interventions on prudential control in more or less recent years. The first tents towards the consolidation of the role of a single National Competent Authority with respect to the other National Competent Authorities involved in the supervision of cross-border banks, in the framework of the cooperation envisaged by the unification of the European banking market. The second is aimed at imposing the intervention of the European authorities in extraordinary cases of conflict between National Competent Authorities, breaches of EU law and urgency.

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[4] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), *OJ* L 141, 14.5.2014, 1–50.

[5] Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, *OJ* L 386 , 30/12/1989, 1-13.

[6] Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, OJ L 126 , 26/05/2000 P. 0001 - 0059

[7] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), *OJ* L 177, 30.6.2006, 1–200.

With reference to the first trend, the main aspect of the change in supervision of cross-border banking groups operating in the EMU, consisting of branches and subsidiaries, has basically concerned consolidated supervision. Since the risks of insolvency and turbulence depend on the entire structure of the group, the assets of its individual components cannot be valued only individually. Rather, they must be considered as part of an overall system, which involves the application of capital requirements and other prudential instruments on a consolidated basis. Legislative intervention in this area was imposed because the aforementioned home country control principle outlines a somewhat fragmented and complex prudential control which, in any case, is determined by the sometimes unconventional and conflicting action of a plurality of National Competent Authorities.

To remedy this fragmentation, Directive 2009/111/EC established the Colleges of supervisory authorities involved in the control of a transnational banking group[8]. It moves in a different direction from overcoming the division between monetary and supervisory functions. It seems to implement the model of the authority responsible for the consolidated supervision which - pursuant to articles 125-126, Directive 2006/48/EC - is the one that issued the authorisation to the parent company of the banking group. This is not a simple coordinator *primus inter pares* but, rather, a consolidated supervisor capable of imposing its decision on the other authorities involved in the supervision of the same credit group.

Furthermore, the SSM regulation must be analysed with reference to the recent regulatory developments concerning the colleges of national supervisors, since - following the transfer of supervisory tasks to the ECB - the nature of the relations between them and the central Authority should be clarified. In particular, one must observe whether they should be abolished or whether the ECB should be part of them, and in the latter hypothesis, with what powers and in what relations with the consolidated supervisor and the other supervisory authorities.

To this end, Regulation 1024/2013 integrates the provisions of Directive 2006/48/EC as amended by Directive 2009/111/EC for cross-border banking groups of Member States adopting the euro, since the ECB has taken over the functions of the respective National Competent Authorities. In particular, pursuant to Article 4, para. 1, lett. g), the ECB has the task to carry out prudential supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States, including over financial holding companies and mixed financial holding companies. It also has the task to participate in supervision on a consolidated basis, including in colleges of supervisors without prejudice to the participation of National Competent Authorities in those colleges as observers, in relation to parents not established in one of the participating Member State.

The rule seems not to abolish the colleges of supervisors but, rather, to replace the National Competent Authorities of the participating Member States with the ECB. The same colleges of supervisors would maintain, therefore, a central role with reference to banking groups operating in Member States that do not participate in EMU. Actually, they would be equally important for the banking group operating in non-participating Member States since the ECB will not play all supervisory functions, keeping the National Competent Authorities responsible for important aspects of prudential control.

The establishment of the SSM suggests a series of application and coordination problems which should be solved with the issue of substantive legislation on prudential supervision. Until this stage, the ECB should act derogating Article 4, Regulation 1024/2013, through the National Competent Authorities in the colleges of supervisors. Within the latter, the first and the second should coordinate their activity for the joint exercise of banking control and according to their respective powers.

The new powers of the ECB in supervisory matters must be related not only to the interventions of the legislator to strengthen the cooperation between the National Competent Authorities and the role of the consolidated supervisor, but also - and above all - to those moving in the opposite direction. They must confirm and sanction the role of Union in the control of cross-border banks and in the stabilization of financial markets which first of all include the regulations establishing the ESFS. From this point of view, it should be noted the existence of a real overlap of competences between the ECB and the EBA. This should be a harbinger of probable conflicts of not simple resolution, despite Article 3, para. 1, Regulation 1024/2013 provides for a general principle of close cooperation and the following para. 3 specifies that the former, in the exercise of its functions, safeguards those of the latter.

[8] Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management, *OJ* L 302, 17.11.2009, 97–119.

Furthermore, the SSM, according to Article 127, para. 6, TFEU, limits its scope of application to credit institutions. In relation to financial conglomerates - which include insurance companies - the ECB ends up exercising a complementary supervisory activity. As a result, the prudential control over them is absolutely fragmented. Indeed, due to the enabling clause, the ECB is solely responsible for the supplementary supervision of financial conglomerates at group level, when control over individual insurance companies is in the responsibility of the National Competent Authorities.

The unification of the monetary function with that of prudential supervision operated with the SSM leads - for the aforementioned reasons - to a system that, from various profiles, appears fragmented and incomplete. Moreover, it is rather unusual that an activity of such importance in the context of the European integration process takes place through an act of secondary law, i.e. Regulation 1024/2013, which would hardly overcome the intrinsic rigidity of the legal-institutional structure of the EMU outlined by the Treaty of Maastricht and mostly confirmed by that of Lisbon.