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## Towards a Comprehensive Accountability Framework for the SSM?

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### Abstract

While the accountability of the Single Supervisory Mechanism (SSM) in the light of the European Parliament, the Court of Justice and the Administrative Board of Review has been widely examined, other accountability fora have been neglected. More specifically, the European Ombudsman and the European Court of Auditors have not been subject of thorough investigations. The paper provides an assessment of the accountability practices of those accountability forums concerning the SSM against a clearly defined notion of public accountability. The contribution concludes that a solid accountability framework occurs in theory, but that the actual accountability practices have scope for improvement.

### Keywords:

European Central Bank, Single Supervisory Mechanism, Accountability, European Ombudsman, European Court of Auditors, Banking Supervision

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## I. Introduction

Since 4 November 2014, the Single Supervisory Mechanism (SSM) has been responsible for banking supervision in the euro area, Bulgaria and Croatia.<sup>2</sup> It consists of the European Central Bank (ECB) and the National Competent Authorities (NCAs) of the participating Member States.<sup>3</sup> It aims to ensure ‘the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member States’.<sup>4</sup>

While the SSM acts independently,<sup>5</sup> it is also accountable to various accountability forums. The accountability practices of the European Parliament (EP),<sup>6</sup> the Court of Justice (CJEU)<sup>7</sup> and the Administrative Board of Review (ABoR)<sup>8</sup> have been widely examined, but the European Ombudsman (EO) and the European Court of Auditors (ECA)<sup>9</sup> have been neglected. Therefore, this paper assesses the accountability practices of the EO and the ECA.

The paper is structured as follows. First, a working definition of accountability is provided (II). Thereafter, the paper examines the accountability practices of the EO (III) and the ECA (IV). The last section summarizes the main findings of the paper (V).

## II. Accountability

For this paper, we use one of the leading definitions in accountability studies: ‘a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.’<sup>10</sup> Following this definition of accountability, five general criteria that are necessary to create a theoretically robust accountability framework can be discerned: (1) attribution of responsibility, (2) information provision, (3) debate, (IV) standard of review, and (5) consequences.

### 1. Attribution of Responsibility

It is important that the exercise of public power can be assigned to a particular actor. If it is not clear who is responsible for the decision or action, accountability cannot even emerge (so-called problem of many hands). This precondition is especially important in the EU, where an accountability forum might be unable to hold an actor to account because of the multilevel environment.<sup>11</sup> The SSM is an example of such an environment as it entails composite procedures: decision-making processes that include multiple jurisdictions, engaging at various moments and with various intensities,<sup>12</sup> such as the Joint Supervisory Teams.

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<sup>2</sup> Bulgaria and Croatia have joined the banking supervision in the vein of ‘close cooperation’, pursuant Article 7 SSM Regulation. As of 1 January 2023, Croatia will join the euro area.

<sup>3</sup> Art 1(9) SSM Regulation.

<sup>4</sup> Art 1 SSM Regulation.

<sup>5</sup> Art 19 SSM Regulation.

<sup>6</sup> A Akbik, *The European Parliament as an Accountability Forum. Overseeing the Economic and Monetary Union*, Cambridge University Press (2022) 234 p; F Amttenbrink and M Markakis, ‘Towards a meaningful prudential supervision dialogue in the Euro area? A study of the interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism’ (2019) 44(1) *European Law Review*, 3-23.

<sup>7</sup> For instance: C Zilioli and K-P Wojcik (eds), *Judicial Review in the European Banking Union*, (Edward Elgar 2021) 672 p.

<sup>8</sup> E.g. C B Morra, R Smits and A Magliari, ‘The Administrative Board of Review of the European Central Bank: Experience After 2 Years’ (2017) 18 *European Business Organization Law Review*, 576-589.

<sup>9</sup> Nonetheless, see P Nicolaidis, ‘Accountability of the ECB’s supervisory activities (SSM): Evolving and responsive’ (2019) 26(1) *Maastricht Journal of European and Comparative Law*, 136-150.

<sup>10</sup> M Bovens, ‘Analyzing and Assessing Public Accountability. A Conceptual Framework’ (2007) 13(4) *European Law Journal* 447, 450.

<sup>11</sup> M Scholten, M Luchtman and E Schmidt, ‘The proliferation of EU enforcement authorities: a new development in law enforcement in the EU’ in M Scholten and M Luchtman (eds) *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability* (2017 Edward Elgar) 1, 13.

<sup>12</sup> F Brito Bastos, ‘Judicial review of composite administrative procedures in the Single Supervisory Mechanism: Berlusconi’ (2019) 56(5) *Common Market Law Review* 1355, 1367.

## 2. Information Provision

Due to information-asymmetry, the actor must provide the accountability forum with information on its performance. This criterion includes the form of information, the type of information, whether the information is provided in a timely fashion and whether the accountability forum is actually satisfied with the information obtained.<sup>13</sup>

## 3. Debate

Debate is required for the accountability forum to verify whether its interpretation of the information aligns with the actor's purpose of the information provision. Therefore, the accountability forum needs to familiarize itself with often technical information by raising questions and seeking for clarification when needed. This way, it enters into debate with the actor. The actor can defend himself for the decisions taken and go deeper into the reasons and the interests that it has taken into consideration. The actor, in essence, justifies its performance by elucidating its process of reasoning. Ultimately, the actor and accountability forum use a 'shared language of justification'.<sup>14</sup>

## 4. Standard of Review

The accountability forum should ideally have a set of standards of review to make an objective assessment.<sup>15</sup> These standards are, among other things, affected by the accountability forum's nature, the actor's goal and its tasks. Specific goals facilitate a particular review standard and thus enable effective accountability.<sup>16</sup> The review of vague goals, as is the case in the SSM, is challenging for the accountability forum. It is difficult to verify whether the ECB has actually reached financial stability when no financial *instabilities* occur. Moreover, there is no clear hierarchy between the various goals; i.e. financial stability in the euro area and financial stability within each Member State.<sup>17</sup>

## 5. Consequences

Finally, the actor may encounter consequences. In turn, the accountability forum must evaluate the actor's justification and then attach consequences to it. These can be positive (rewards) as well as negative (sanctions). If no consequences are linked to the forum's conclusion, the reasons of this absence should be examined (e.g. independence). The mere absence of consequences does not suffice to qualify an accountability forum as inadequate. It is only when an accountability forum is dissatisfied with the actor's performance and fails to produce consequences, the functioning, the credibility and the adequacy of the accountability forum is hampered.

In the following sections the aforementioned accountability criteria are applied to the accountability practices of the EO and the ECA.

### **III. The European Ombudsman**

The European Ombudsman carries out all the enquiries that she considers justified to elucidate any suspected maladministration in the activities of EU institutions.<sup>18</sup> Since 2017 the Ombudsman has received 20

<sup>13</sup> M Busuioc, *European Agencies: Law and Practices of Accountability* (OUP 2013) 59-60.

<sup>14</sup> P Day and R Klein, *Accountabilities: Five Public Services* (Tavistock 1987) 5.

<sup>15</sup> M Costa, *The Accountability Gap in EU Law* (Routledge 2017) 9.

<sup>16</sup> F Amtenbrink and R M Lastra, 'Securing Democratic Accountability of Financial Regulatory Agencies – A Theoretical Framework' in R V De Mulder (ed) *Mitigating Risk in the Context of safety and security. How Relevant is a Rational Approach?* (2008 Rotterdam: Erasmus School of Law & Research School for Safety and Security) 115, 124-125, at <www.ssrn.com>.

<sup>17</sup> F Amtenbrink and M Markakis, 'Towards a meaningful prudential supervision dialogue in the Euro area? A study of the interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism' (2019) 44(1), *European Law Review*, 3, 12.

<sup>18</sup> Arts 228(1) TFEU; 3.1 Statute Ombudsman. See also Arts 20; 24 TFEU. The legal texts mention 'Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role.' I omit the other bodies.

complaints, which is a high number compared to the complaints on the ECB's monetary policy (27 cases since 1998). As far as can be deduced from the cases, the complainants were individuals. Furthermore, the Ombudsman started an own initiative inquiry on the European Systemic Risk Board, which will not be further discussed, and met with the ECB's staff on the Supervisory Review and Evaluation Process (SREP). Additionally, the Ombudsman's office issued a staff working paper on the revision of the ECB's Ethics Framework following the ECB's tasks in banking supervision. Hereafter I will describe these all together as the Ombudsman's own investigations.

### 1. Attribution of Responsibility

The majority of the complaints (11) concerned access to documents or information (including delayed responses of the ECB). Two cases related to staff matters and are excluded from this research. The remaining complaints covered various topics, which fell outside the remit of the ECB's tasks. For instance, the Ombudsman opened an inquiry into a complaint stipulating that the ECB failed to intervene in the complaint's contractual dispute with a Dutch bank.<sup>19</sup> In a similar vein, a consumer had sent a complaint to the ECB with regard to technical malfunctioning of her bank.<sup>20</sup>

In turn, the Ombudsman's own investigations seek to contribute to the ECB's practices with its relevant experience and expertise. The working paper does not particularly fit within the Ombudsman's role as accountability mechanism. Instead, the Ombudsman offered her resources, i.e. her relevant experience and expertise in the ECB's process of revising its Ethics Framework. In particular, the Ombudsman's office advised on conflicts of interest, obligations of professional secrecy, private financial transactions, and whistleblowing.

### 2. Information Provision

The Ombudsman gathered information from the complainant and from the ECB.<sup>21</sup> More specifically, the Ombudsman('s team) carried out a thorough analysis of the correspondence exchanged between the ECB and the complainant before the complainant turned to the Ombudsman.<sup>22</sup> Also, it obtained further information from the ECB directly. Concerning access to documents, the Ombudsman's team examined the documents respecting confidentiality requirements. Afterwards, a redacted version was shared with the complainant during the inquiry.<sup>23</sup> Also, the Ombudsman's team organized meetings with the ECB to discuss the complaint in more detail. These meetings are further described in the following section.

### 3. Debate

The Ombudsman organized various meetings with the ECB's staff. Two meetings were organized following complaints. These meetings were summarized in reports published on the Ombudsman's website and sent to the complainant.

Furthermore, meetings were held concerning the ECB's draft Ethics Framework for banking supervision.<sup>24</sup> In the same vein, the Ombudsman's services met with the ECB to discuss the transparency of the SREP. More generally, the Ombudsman exchanged views on matters on which the office has relevant experience and

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<sup>19</sup> Decision of the EO in case 1669/2016/CEC on the European Central Bank's refusal to intervene in a dispute with a Dutch bank (13 June 2017), at <<https://www.ombudsman.europa.eu/en/decision/en/80207>>.

<sup>20</sup> Decision of the EO in the above case on how the European Central Bank dealt with correspondence concerning a consumer issue (16 July 2019), at <<https://www.ombudsman.europa.eu/en/decision/en/116637>>.

<sup>21</sup> Decision of the EO in the above case on how the European Central Bank dealt with correspondence concerning a consumer issue (16 July 2019), at <<https://www.ombudsman.europa.eu/en/decision/en/116637>>.

<sup>22</sup> Decision of the EO in case 449/2017/AMF on the European Central Bank's recruitment procedure for two positions in the Single Supervisory Mechanism (20 September 2017), at <<https://www.ombudsman.europa.eu/en/decision/en/83872>>; Decision EO in case 1669/2016/CEC on the European Central Bank's refusal to intervene in a dispute with a Dutch bank (13 June 2017), at <<https://www.ombudsman.europa.eu/en/decision/en/80207>>.

<sup>23</sup> Decision of the EO in case 1990/2020/MIG on the European Central Bank's (ECB) refusal of public access to documents concerning an alleged violation of EU law by a bank (19 February 2021), at <<https://www.ombudsman.europa.eu/en/decision/en/138389>>.

<sup>24</sup> Ombudsman, EO Staff Working Paper on the revision of the ECB's Ethics Framework (20 August 2014) at <[https://www.ombudsman.europa.eu/en/letter/en/60111#\\_ftnref3](https://www.ombudsman.europa.eu/en/letter/en/60111#_ftnref3)>.

expertise.<sup>25</sup> In this regard, the Ombudsman did not function as an accountability forum but had a proactive role to improve the ECB's functioning.

#### 4. Standard of Review

The European Ombudsman investigates whether maladministration occurs in the activities of the EU institutions.<sup>26</sup> The Ombudsman considers various standards of review, such as principles of good administration, of which the transparency principle is the most important one, and of legislation. One complainant relied on the SSM Regulation, yet the Ombudsman pointed out that the provision was interpreted incorrectly. She made use of the same Regulation to determine the goal of banking supervision. Moreover, the Ombudsman concluded that the ECB provided reasonable and appropriate replies (i.e. the ECB is not responsible for the issues in point). More specifically, its explanation about its role and responsibilities was correct. Hence, there was no maladministration on behalf of the ECB.<sup>27</sup>

The ECB could adjust its statement of reasons on why it had not provided any information on the requested document. This is also the reason why four out of eleven cases were settled. The standard of review boils down to a procedural one. The standard, however, appears easier to be reached as professional secrecy takes a particular role in banking supervision.<sup>28</sup>

Finally, the Ombudsman addressed the ECB in one of her speeches on the challenges to trust in the government. While she underscored that the ECB is independent and she cannot affect it, she expressed her opinion that the ECB should be more cooperative and participate in the banking inquiry to strengthen its legitimacy and credibility.<sup>29</sup> The Ombudsman assesses whether the ECB's reply is appropriate and reasonable or clear and comprehensive for the complainant.<sup>30</sup>

Overall, the Ombudsman expressed the need for a high degree of confidentiality in the field of banking supervision. With regard to the SREP, the Ombudsman took a tough but fair supervisor as a standard. In this regard, there must be sufficient guarantees of confidentiality.

In her role as an advisor, the Ombudsman recommended to look for inspiration in the high level ethical principles enshrined in the Ombudsman's Public Service Principles for EU civil servants to serve as guidelines for the interpretation of rules. In a similar vein, the Ombudsman sought to broaden the discussion to the wider public.<sup>31</sup> Further, the ECB must find a right balance between confidentiality and transparency. The Ombudsman opened the path for further investigation.<sup>32</sup> Yet, so far she has not done so.

#### 5. Consequences

The Ombudsman's decisions are not binding for the ECB. The Ombudsman has not identified maladministration so far. In such cases, the Ombudsman often closes with the following phrase: 'While you

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<sup>25</sup> Ombudsman, Letter from the EO to the ECB on the Supervisory Review and Evaluation Process - SI/10/2016/EA (5 October 2017), at <<https://www.ombudsman.europa.eu/nl/correspondence/en/71844>>.

<sup>26</sup> Art 228(1) TFEU.

<sup>27</sup> Decision of the EO in case 1669/2016/CEC on the European Central Bank's refusal to intervene in a dispute with a Dutch bank (13 June 2017), at <<https://www.ombudsman.europa.eu/en/decision/en/80207>>.

<sup>28</sup> For instance: Decision of the EO in case 1990/2020/MIG on the European Central Bank's (ECB) refusal of public access to documents concerning an alleged violation of EU law by a bank (19 February 2021), at <[https://www.ombudsman.europa.eu/en/decision/en/138389#\\_ftnref6](https://www.ombudsman.europa.eu/en/decision/en/138389#_ftnref6)>.

<sup>29</sup> E O'Reilly, 'Address at Edelman Trust Barometer Event – Trust in Government – Challenges' (25 February 2015) *Speech in Dublin*, at <<https://www.ombudsman.europa.eu/fr/speech/en/59066>>.

<sup>30</sup> E.g. Decision of the EO in case 1069/2018/DR on the European Central Bank's failure to give an adequate reply to the complainant's request for information concerning a mortgage loan (24 August 2018), at <<https://www.ombudsman.europa.eu/en/decision/en/102214>>.

<sup>31</sup> Ombudsman, EO Staff Working Paper on the revision of the ECB's Ethics Framework (20 August 2014) at <[https://www.ombudsman.europa.eu/en/letter/en/60111#\\_ftnref3](https://www.ombudsman.europa.eu/en/letter/en/60111#_ftnref3)>.

<sup>32</sup> Ombudsman, EO Staff Working Paper on the revision of the ECB's Ethics Framework (20 August 2014), at <<https://www.ombudsman.europa.eu/en/letter/en/60111>>.

may be disappointed with this outcome, we nevertheless hope you find these explanations helpful.<sup>33</sup> This closing aligns with the Ombudsman's role to mediate between the ECB and the citizens.

As already discussed, if the complaint points out that the ECB did not react and the ECB responds during the Ombudsman's inquiry, she deems the case settled. Consequently, she closes the inquiry.<sup>34</sup> In the same spirit, the Ombudsman's intervention can also provide clarity. For instance, with the transfer of banking supervision to the ECB a complainant was not informed on the outcome of its complaint. After having been contacted by the European Ombudsman's office, the ECB apologized for the 'administrative oversight' which caused the delay and conveyed the information to the complainant.<sup>35</sup>

With regard to the SREP investigation, the Ombudsman sent a letter to Ms. Nouy, the Chair of the Supervisory Board. With this letter she thanked the ECB for its cooperation, summarized her office's findings and made two recommendations. The Ombudsman framed the recommendation in a way that highlighted the benefits for the ECB.<sup>36</sup> It is remarkable how respectful and thankful the Ombudsman is towards the ECB. In turn, Ms Nouy was equally polite in her reply

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#### 6. Observations

The EO is only now and then activated. This could relate to the fact that the EU citizens are not familiar with the work of the Ombudsman. When it is activated, the majority of cases concern access to documents, but no maladministration was found or the complaints were settled, hinting at the Ombudsman's genuine role as a mediator between the ECB and EU citizens. It appears from the analysis above that the EO was not able to impact the ECB's practices in the area of banking supervision. This may be explained by the salience of the Ombudsman's engagement with the ECB in banking supervision, having to deal with a delicate balance between secrecy and transparency. Furthermore, EU citizens can be confused on the ECB's responsibilities, as illustrated by two cases before the EO in which EU citizens complained on issues falling outside the ECB's competencies.

### IV. The European Court of Auditors

Article 20(7) SSM Regulation stipulates:

'When the European Court of Auditors examines the operational efficiency of the management of the ECB under Article 27.2 of the Statute of the ESCB and of the ECB, it shall also take into account the supervisory tasks conferred on the ECB by this Regulation.'

This implies, due to the ECB's independence, that its role is more limited in relation to the ECB as a banking supervisor than to other EU institutions. The ECA has welcomed its role as an accountability forum in the light

<sup>33</sup> Decision of the EO in the above case on how the European Central Bank dealt with correspondence concerning a consumer issue (16 July 2019), at <<https://www.ombudsman.europa.eu/en/decision/en/116637>>.

<sup>34</sup> For instance: Ombudsman, 'Entscheidung der Europäischen Bürgerbeauftragten über das Versäumnis der Europäischen Zentralbank (EZB), Korrespondenz betreffend der unverbindlichen Empfehlung an alle Banken keine Dividenden auszuzahlen, zu beantworten (16 October 2020), at <<https://www.ombudsman.europa.eu/en/decision/de/132322>>.

<sup>35</sup> Decision of the EO in case 604/2018/JAP on the European Central Bank's failure to provide information about the processing of a complaint concerning alleged irregularities by a Spanish bank (26 April 2018), at <<https://www.ombudsman.europa.eu/en/decision/en/96935>>.

<sup>36</sup> Ombudsman, Letter from the EO to the ECB on the Supervisory Review and Evaluation Process (5 October 2016), at <<https://www.ombudsman.europa.eu/en/correspondence/en/71844>>.

of the principles of separation and democratic accountability.<sup>37</sup> It should already be noted that in the ECA's view, Article 27(2) ESCB Statute is limited to the ECB's monetary policy. Later on this viewpoint is discussed in more detail.

The ECA has published two reports – classified as 'special reports' – on the audit of the operational efficiency of the management of the ECB in the area of banking supervision in accordance with Article 287(4), second subparagraph, TFEU: the start of the SSM<sup>38</sup> and the ECB's crisis management of banks.<sup>39</sup> These are rather long audit reports, which may be explained by the fact that the ECA's audits are not limited to a specific financial year, but cover generic topics. While the ECA had scheduled the publication of a first special report on the SSM in 2015,<sup>40</sup> it was reiterated in the work programme of 2016, the year in which it eventually had been published.<sup>41</sup> The second special report was planned and issued in 2018.<sup>42</sup>

In four other special reports, the ECB is mentioned because of its role in the EBU. More specifically, the reports touch upon the relation between the ECB and the European Banking Authority,<sup>43</sup> the ECB and the Single Resolution Board (SRB),<sup>44</sup> the ECB's role in stress testing,<sup>45</sup> and anti-money laundering in the banking sector.<sup>46</sup> Another special report on the SRB of 2019 excludes the ECB from the scope of audit, yet refers to the caselaw of the CJEU considering the ECB's FoLF decisions. In exceptional circumstances, the SRB can also carry out FoLF assessments.<sup>47</sup>

### 1. Attribution of Responsibility

Prior to the start of the SSM, the President of the ECA declared that the operational efficiency of the management of the ECB 'encompasses the audit of sound financial management as applies to other bodies

<sup>37</sup> V Caldeira, 'The European Court of Auditors' audit powers under the proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions' (7 February 2013) at <[https://www.eca.europa.eu/lists/ecadocuments/pl13\\_letter/pl13\\_letter\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/pl13_letter/pl13_letter_en.pdf)>.

<sup>38</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>39</sup> ECA, 'The operational efficiency of the ECB's management for the crisis management of banks' (2018) *Special Report*, no. 2, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR18\\_02/SR\\_SSM2\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR18_02/SR_SSM2_EN.pdf)>.

This interpretation is confirmed by the ECA's annual report of 2019. ECA, 'Annual Report on the implementation of the budget concerning the financial year 2018, together with the institutions' replies' 8 October 2019, vol 62, OJ L C340, 1, 77.

<sup>40</sup> ECA, 'Work Programme 2015', 13, at <[https://www.eca.europa.eu/lists/ecadocuments/wp2015/wp2015\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/wp2015/wp2015_en.pdf)>: 'a special report on SSM with the aim to verify the effectiveness of the supervisory process in practice.'

<sup>41</sup> ECA, 'Work Programme 2016', 13, <[https://www.eca.europa.eu/lists/ecadocuments/wp2016/wp2016\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/wp2016/wp2016_en.pdf)>: 'special report on the SSM to investigate whether Joint Supervisory and On-Site Inspection Teams of the Single Supervisory Mechanism have been set up to work efficiently within an appropriate governance, audit and accountability environment.'

<sup>42</sup> ECA, 'Work Programme 2018', 6, <[https://www.eca.europa.eu/lists/ecadocuments/wp2018/wp2018\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/wp2018/wp2018_en.pdf)>.

<sup>43</sup> ECA, 'European banking supervision taking shape — EBA and its changing context' (2014) *Special Report*, no. 5, at <[https://www.eca.europa.eu/lists/ecadocuments/sr14\\_05/sr14\\_05\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/sr14_05/sr14_05_en.pdf)>.

<sup>44</sup> ECA, 'Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go' (2017) *Special Report*, no. 23, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR17\\_23/SR\\_SRB-BU\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR17_23/SR_SRB-BU_EN.pdf)>.

<sup>45</sup> ECA, 'EU-wide stress tests for banks: unparalleled amount of information on banks provided but greater coordination and focus on risks needed' (2019) *Special Report*, no. 10, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR19\\_10/SR\\_EBA\\_STRESS\\_TEST\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR19_10/SR_EBA_STRESS_TEST_EN.pdf)>.

<sup>46</sup> ECA, 'Report on EU efforts to fight money laundering in the banking sector are fragmented and implementation is insufficient' (2021) *Special Report*, no. 13, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR21\\_13/SR\\_AML\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR21_13/SR_AML_EN.pdf)>.

<sup>47</sup> ECA, 'Report on any contingent liabilities arising as a result of the performance by the Single Resolution Board, the Council or the Commission of their tasks under this Regulation for the financial year 2019. Together with the replies of the Single Resolution Board, the Commission and the Council' at <[https://www.eca.europa.eu/lists/ecadocuments/srb\\_2019\\_contingent\\_liabilities/srb\\_2019\\_contingent\\_liabilities\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/srb_2019_contingent_liabilities/srb_2019_contingent_liabilities_en.pdf)>, 20-21.

held accountable to the European Parliament and Council under the provisions of Article 287 TFEU.<sup>48</sup> In this way, the ECA appears to allude that it will not apply the same restraint as it does with regard to the ECB's monetary policy. At the same time, the ECA is of the opinion that it requires a more extended mandate with regard to banking supervision because in the current stance audit gaps occur. This is later discussed.

So far, the ECA has examined two general topics. Firstly, whether the SSM Joint Supervisory Teams (JSTs) and on-site inspections teams were set up to work efficiently within an appropriate governance, audit and accountability environment.<sup>49</sup> Secondly, whether the ECB managed to establish an operationally efficient framework for crisis management procedures in its supervisory role.<sup>50</sup>

The ECA also excludes various aspects of its audit. For instance, it did not regard the crisis management for LSIs. This exclusion is legally inspired as the ECB does not have direct responsibility over LSIs. Nor did the ECA assess the appropriateness of individual supervisory decisions. Doing so would intervene with the ECB's policy decisions. As a result, the ECA investigates the processes in place that enable the ECB to take decisions at the right time and whether the assessments prior to the decisions allow for well-informed judgments to make.<sup>51</sup>

## 2. Information Provision

The audit approach sketches the way in which the ECA has acquired information and the ECA combines various information provision tools. The special reports of 2016 and 2018 demonstrate the foregoing: the ECA collected audit evidence through meetings and interviews with key ECB supervisory staff and a review of internal documents and publicly available data.<sup>52</sup> In order to ensure the protection of confidential data and the smooth flow of documentation, the ECA established collaborative arrangements with the ECB.<sup>53</sup> Yet, it is unclear what that actually involves. Furthermore, the special report of 2016 contains a questionnaire that the ECA sent to the NCAs and the latter's responses.<sup>54</sup> For the special report of 2018, the ECA sent a survey to all SIs to receive input on the standards set for recovery planning and their interaction with the ECB as part of the process.<sup>55</sup> The ECA conveyed the survey to all 125 SIs and received replies from 64 of them.<sup>56</sup> In the special report of 2021, the ECA used a sample of 12 banks directly supervised by the ECB. It picked that sample 'on a risk basis focusing on banks where the ECB had most communication with national supervisors, while also ensuring geographical spread.'<sup>57</sup>

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<sup>48</sup> V Caldeira, 'The European Court of Auditors' audit powers under the proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions' (7 February 2013) <[https://www.eca.europa.eu/lists/ecadocuments/pl13\\_letter/pl13\\_letter\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/pl13_letter/pl13_letter_en.pdf)>.

<sup>49</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 19, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>50</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 17, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>51</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 17, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>52</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 16, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>; ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 19, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>53</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 17, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>54</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 100-119, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>55</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 16, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>56</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 31, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>57</sup> ECA, 'Report on EU efforts to fight money laundering in the banking sector are fragmented and implementation is insufficient' (2021) *Special Report*, no. 13, 37, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR21\\_13/SR\\_AML\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR21_13/SR_AML_EN.pdf)>.



Although the ECA obtained a lot of information, the ECB refused to present all the requested information. For the special report of 2016, the ECA did not get all the relevant information to examine the efficiency of the management of the ECB's comprehensive assessments, the operational efficiency of JSTs, the operational efficiency of the planning and implementation of supervisory activities, the decision-making process and the actual work done in the context of on-site inspections. While the ECA elaborated on the lack of information in Annex II, it made a summary in its report.<sup>58</sup>

In this regard, the ECA stressed that the external auditor has a stronger mandate over micro-prudential supervision in other jurisdictions, such as in the USA and Canada.<sup>59</sup> The ECA even raised the possibility of bringing a case before the CJEU if the ECB would continue to reject the ECA's requests for information in following audits.<sup>60</sup>

As for the special report of 2018, the ECB did not provide information on tests of controls and substantive testing. Therefore, the ECA was not able to investigate the operational efficiency of the implementation in practice of recovery plans and other crisis management activities.<sup>61</sup> The ECA created an overview of the obtained information in Annex I.

The ECB proclaimed, however, that it cooperated fully with the ECA and invested a considerable amount of time and resources to provide the ECA's team with a substantial number of documents and explanations. More specifically, the ECB gave 509 documents (totalling approximately 5 800 pages), and had 38 meetings with the ECA's audit team. The ECB further declared that some documents on individual SIs could not be provided in full or were provided in a sanitized form.<sup>62</sup> In fact, the ECB stated that '[t]he redaction of documents was very limited, taking into account the ECA's strict confidentiality rules, and was aimed only at concealing each bank's identity, which was not needed for the purposes of the audit.'<sup>63</sup> In this way, the ECB advocates that the ECA could fulfil its audit mandate.<sup>64</sup>

The foregoing paragraphs show that the ECA and the ECB disagree on the ECA's mandate, especially on the scope of operational efficiency and the related rights to access to documents. As to the latter, the ECA deems that it is the auditors' prerogative to define which documentation is necessary to carry out the audit.<sup>65</sup> This is in line with Article 287(3) TFEU: the investigated institution is obliged to provide all the facilities and all the information which is necessary for the ECA to fulfil its task.<sup>66</sup> The Commission underscores this point of view as well.<sup>67</sup>

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<sup>58</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 20-21, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>59</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 45-46, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>60</sup> ECA, *Communication to the European Parliament concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC))* (13 December 2018), 8, at <[https://www.eca.europa.eu/Other%20publications/PL19\\_ECB/PL19\\_ECB\\_EN.pdf](https://www.eca.europa.eu/Other%20publications/PL19_ECB/PL19_ECB_EN.pdf)>.

<sup>61</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 17, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>62</sup> ECB's replies, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 2-3, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>63</sup> ECB's replies, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 3, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>64</sup> ECB's replies, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 2-3, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>65</sup> ECA, 'Special Report No 29/2016: "Single Supervisory Mechanism - Good start but further improvements needed' (2017) *Journal European Court of Auditors*, no. 1, 14, <[https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL17\\_01/ECA\\_journal\\_January\\_2017.pdf](https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL17_01/ECA_journal_January_2017.pdf)>.

<sup>66</sup> See also Art 257(1) Financial Regulation.

<sup>67</sup> Commission, *Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant Regulation (EU) No 1024/2013*. COM(2017) 591 final, 11 October 2017, 10; it adds three other legal provisions to substantiate this conclusion: Article 27(2) SSM Regulation and Articles 56 and 57 of the CRD.

Given the disagreement between the ECA and the ECB on the mandate of the ECA, the ECA demanded to adjust the SSM Regulation in order to strengthen and clarify the ECA's mandate. In particular, it would like the Regulation to specify that it has the mandate to conduct performance audits and is endowed with full rights to access any document it considers necessary.<sup>68</sup> In the same vein, the Task Force on Banking Union, set up by the Contact Committee of the Supreme Audit Institutions of the EU,<sup>69</sup> was of the opinion that the ECA's audit mandate need to be clearly defined by means of an amendment to secondary law and possibly primary law to generate greater legal certainty and create a sustainable solution.<sup>70</sup> In fact, the Task Force endorsed a broader mandate for the ECA because it deems Article 27(2) of the ESCB Statutes to merely protect the independence of monetary policy. Prudential supervision should be subject to more stringent control and accountability.<sup>71</sup>

In turn, the Commission encouraged the ECB and the ECA to conclude an inter-institutional agreement to stipulate the modalities of information exchange to allow the ECA access to all information required for carrying out its audit mandate.<sup>72</sup>

The ECA sent a draft proposal for a MoU in February 2018 but did not receive feedback from the ECB by December 2018.<sup>73</sup> Moreover, the ECA's appearances in the Council's Financial Services Committee were pivotal to reach an agreement.<sup>74</sup> After arduous negotiations, the ECA and the ECB concluded a MoU in 2019.

The MoU's introduction describes both institutions' independence, their preparedness to collaborate, the ECA's mandate covering operational efficiency and stipulates that all language versions of the relevant legislation are equally authentic.<sup>75</sup>

The MoU consists of 15 articles. The most important provisions for the current discussion are the following ones. The ECA must list up its audit questions and can request documents and information within its mandate. Following such a request, the ECB may demand an explanation from the ECA as to the relevance of the information to its mandate. Nonetheless, such demand should not be systematic in nature.<sup>76</sup> The MoU includes a non-exhaustive list of documents and information on the supervisory process, the policy and bank specific features that can shared with the ECA. In addition, the MoU establishes a regime for special treatment of highly confidential documents and information. For example, only a strictly necessary number of nominated ECA

<sup>68</sup> ECA, *Communication to the European Parliament concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC))* (13 December 2018), 9, at <[https://www.eca.europa.eu/Other%20publications/PL19\\_ECB/PL19\\_ECB\\_EN.pdf](https://www.eca.europa.eu/Other%20publications/PL19_ECB/PL19_ECB_EN.pdf)>.

<sup>69</sup> "[I]nviting Member State SAIs to take part in the planned collaborative audit of the supervision of individual non-significant banks in selected EU countries to be started in 2015, the results of which will be presented to the Contact Committee;" The Contact Committee of the Supreme Audit Institutions of the European Union, *Statement* (2015) at <[https://www.eca.europa.eu/sites/cc/Lists/CCDocuments/CC\\_STATEMENT\\_2015/CC\\_SSM\\_statement\\_EN.pdf](https://www.eca.europa.eu/sites/cc/Lists/CCDocuments/CC_STATEMENT_2015/CC_SSM_statement_EN.pdf)>.

<sup>70</sup> Task Force on Banking Union, *Report of the Task Force on European Banking Union to the Contact Committee of Supreme Audit Institutions of the European Union and the European Court of Auditors on prudential supervision of medium-sized and small ("less significant") institutions in the European Union after the introduction of the Single Supervisory Mechanism* (14 December 2017) 57, at <[https://www.eca.europa.eu/sites/cc/Lists/CCDocuments/Task\\_Force\\_EBU/Task\\_Force\\_EBU.pdf](https://www.eca.europa.eu/sites/cc/Lists/CCDocuments/Task_Force_EBU/Task_Force_EBU.pdf)>.

<sup>71</sup> *Ibid.*, 45.

<sup>72</sup> European Commission, 'Report from the Commission to the Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013' (11 October 2017) COM2017 591 final, 5, at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0591&from=EN>>.

<sup>73</sup> In the meantime, however, the ECB consulted stakeholders, but it did not always proactively kept the ECA informed. For a timeline, see ECA, *Communication to the European Parliament concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC))* (13 December 2018), 11-12, at <[https://www.eca.europa.eu/Other%20publications/PL19\\_ECB/PL19\\_ECB\\_EN.pdf](https://www.eca.europa.eu/Other%20publications/PL19_ECB/PL19_ECB_EN.pdf)>.

<sup>74</sup> D Meijers and G Moonen, 'Well on track, but not there yet! Interview with Rimantas Šadžius' (2019) *Journal European Court of Auditors*, no. 4, 52, at <[https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL19\\_04/JOURNAL19\\_04.pdf](https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL19_04/JOURNAL19_04.pdf)>.

<sup>75</sup> Footnote 4 MoU ECA and ECB.

<sup>76</sup> Art 4 MoU ECA and ECB.

staff can access such ECB documents. Another precautionary measure amounts to the prohibition to release the acquired information to any third party without the prior written consent of the ECB.<sup>77</sup> The ECA and the ECB will review the cooperation and information exchange every three years, or earlier if deemed necessary by both parties.<sup>78</sup>

Although we welcome the MoU, it shows the subordinate role of the ECA vis-à-vis the ECB in especially two instances. In the first instance, the ECA's reasoning on the limits of its mandate through the language versions has been removed. In the second instance, the MoU derogates from the ECB's obligation to provide the ECA with all the requested information: the ECB may demand an explanation from the ECA as to the relevance of the information to its mandate. The ECA's crumbling right has been tempered by the fact that the ECB cannot deny access to documents in a systematic way.

As to the other special reports for which the ECA demanded information from the ECB, no problems have been reported. For instance, the ECA had meetings with staff of, *inter alia*, the ECB to gather information<sup>79</sup> and reviewed relevant documentation from, among others, the ECB.<sup>80</sup> The first report after the conclusion of the MoU, namely the special report on anti-money laundering in the banking sector, does not complain about the ECB's information provision.<sup>81</sup>

### 3. Debate

The special reports contain few elements of debate. The most visible one relates to the ECB's replies to the ECA's conclusions and recommendations, which are addressed under the criterion of 'consequences'. In the special reports that merely examined the ECB in an accessory way, the ECB also contributes to the replies where relevant.<sup>82</sup>

Another element of debate concerns the ECA's meetings and interviews with key ECB supervisory staff. Although the special reports do not entail details on the content or the quality of these meetings, the JSTs 'verified via interviews [...] the need for additional help in order to enhance the quality of the information provided in recovery plans. [...]'.<sup>83</sup> Also, 'oral feedback from JST coordinators confirmed that they viewed the simplified template positively.'<sup>84</sup> These sentences indicate fruitful interviews and meetings with the ECB staff.

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<sup>77</sup> Art 7 MoU ECA and ECB.

<sup>78</sup> Art 11 MoU ECA and ECB.

<sup>79</sup> ECA, 'EU-wide stress tests for banks: unparalleled amount of information on banks provided but greater coordination and focus on risks needed' (2019) *Special Report*, no. 10, 16, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR19\\_10/SR\\_EBA\\_STRESS\\_TEST\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR19_10/SR_EBA_STRESS_TEST_EN.pdf)>; ECA, 'European banking supervision taking shape — EBA and its changing context' (2014) *Special Report*, no. 5, 20, 42, 43, at <[https://www.eca.europa.eu/lists/ecadocuments/sr14\\_05/sr14\\_05\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/sr14_05/sr14_05_en.pdf)>.

<sup>80</sup> ECA, 'EU-wide stress tests for banks: unparalleled amount of information on banks provided but greater coordination and focus on risks needed' (2019) *Special Report*, no. 10, 16, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR19\\_10/SR\\_EBA\\_STRESS\\_TEST\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR19_10/SR_EBA_STRESS_TEST_EN.pdf)>.

<sup>81</sup> ECA, 'Report on EU efforts to fight money laundering in the banking sector are fragmented and implementation is insufficient' (2021) *Special Report*, no. 13, 37, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR21\\_13/SR\\_AML\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR21_13/SR_AML_EN.pdf)>. The ECA did criticize the information provided by the national supervisors, see nr. 103.

<sup>82</sup> Special Report 10/2019, P 2 of the EBA's reply. E.g.: 'The ECB and the ESRB find that the ECA's statement that the involvement of national authorities in the process was not conducive to an objective scenario does not provide a full description of the scenario development process'; Special Report 10/2019, p 5 of the EBA's reply.

<sup>83</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 28, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>84</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 28, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

#### 4. Standard of Review

The ECA's audit approach and methodology includes an overview of the audit questions and the audit criteria and is followed by the actual analysis, i.e. the ECA's observations. The latter mainly consists of qualitative analysis of information, in comparison with other similar institutions and interviews.<sup>85</sup>

The ECA derives audit criteria from various sources. First of all, the ECA relies on the relevant legislation, such as the SSM Regulation,<sup>86</sup> the CRD IV, the relevant Commission delegated regulations and EBA guidelines.<sup>87</sup> Secondly, the ECA includes relevant global standards, e.g. the Core Principles for Effective Banking Supervision issued by the Basel Committee for Banking Supervision,<sup>88</sup> the Institute of Internal Auditors (IIA) standards and the Minimum Requirements for Risk Management issued by the German Federal Financial Supervisory Authority.<sup>89</sup> Further, the ECA considers the ECB's internal rules and procedures.<sup>90</sup> Ultimately, the ECA uses accepted best practices<sup>91</sup> or (legal) frameworks of other jurisdictions as a benchmark.<sup>92</sup>

#### 5. Consequences

The ECA ends its audit with conclusions and recommendations. Target implementation dates accompany the recommendations.

In its first special report on the SSM, the ECA praised the ECB's creation of a supervisory structure in a short period of time, yet shortcomings were signalled and improvements were recommended in each of the investigated domains: governance, accountability, JSTs, and on-site inspections.<sup>93</sup> From a practical point of view, the ECA emphasized the lack of information in order to perform a thorough audit. Nonetheless, the ECA concluded that the ECB's management and staff were cooperative in the creation of the report and mindful of raised concerns.<sup>94</sup>

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<sup>85</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 87, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>86</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 19, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>87</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 16, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>88</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 16, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>; ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 19, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>89</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 16, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>; ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 19, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>90</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 16, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>; ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 19, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>91</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 19, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>92</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 20, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>; The ECA compared the accountability and external audit arrangements with those employed in Australia, Canada and the USA.

<sup>93</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 80-86, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

A Brenninkmeijer and E van Gelder, 'The European Court of Auditors: the guardian of EU finances' in M Scholten and M Luchtman (eds) *Law Enforcement by EU Authorities – Implications for Political and Judicial Accountability* (2017 Edward Elgar) 305, 324, conclude that the ECB lacks a clear performance framework.

<sup>94</sup> ECA, 'Special Report No 29/2016: "Single Supervisory Mechanism - Good start but further improvements needed' (2017) *Journal European Court of Auditors*, no. 1, of 15, <[https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL17\\_01/ECA\\_journal\\_January\\_2017.pdf](https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL17_01/ECA_journal_January_2017.pdf)>.

The ECB responds to concrete paragraphs of the ECA's audit report and the recommendations made. As to the latter, it states whether it accepts or does not accept the recommendation and elucidates this decisions where it deems necessary. With regard to the special report of 2016, the ECB accepted 11 out of 13 recommendations. The following is an example of how the ECB deals with the ECA's recommendations. The ECA argued that the ECB had to alter the SSM Framework regulation to formalize commitments by participating NCAs and safeguard that all participate fully and proportionately in the work of the JSTs before the end of 2017.<sup>95</sup> Although the ECB accepted the recommendation, it was of the opinion that this may not require a change of the SSM Framework regulation because the regulation already includes various provisions in this regard. Firstly, NCAs are required to assist the ECB in the performance of its tasks.<sup>96</sup> Secondly, a general duty of cooperation in good faith is enshrined in Article 6(2) SSM Regulation. Also, the NCAs have the obligation to make staff available for the JSTs.<sup>97</sup> Finally, the ECB and the NCSs must consult each other and agree on the use of NCA resources with regard to JSTs.<sup>98</sup> The SSM Framework Regulation has not been amended since.

As to the information provision, the ECB explicitly disagreed with the ECA. It opined that it provided all the necessary information that related to the ECA's mandate of operational efficiency. In this respect, it set out that the minutes of the Supervisory Board's meetings and individual supervisory decisions do not fall under the ECA's mandate.<sup>99</sup>

The ECB advanced sharp standpoints with regard to the ECA's conclusions on the ECB's accountability framework.<sup>100</sup> The ECB did not only refute the ECA's standards, but bluntly disagreed with the general conclusion that an audit gap had occurred since the establishment of the ECB. This was *inter alia* due to the ECB's 'tailor-made' accountability framework.<sup>101</sup>

Besides the eleven recommendations that were accepted, the ECB partially accepted one other recommendation. The ECB claimed that a separate reporting line for shared services would increase costs and raise costs and reduce efficiency.<sup>102</sup> However, the ECA only requested that risks following from the shared services would be acknowledged and investigated.<sup>103</sup> Additionally, the ECB argued that the Chair and Vice-Chair are already involved with respect to control over the supervisory budget, but cannot have a more decisive role as the Supervisory Board is a subsidiary body installed by secondary legislation.<sup>104</sup> Finally, the ECB took note of another recommendation, namely the ECA's request to full cooperation.<sup>105</sup> With regard to the

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<sup>95</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 83, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>96</sup> Art 6(2) SSM Framework Regulation.

<sup>97</sup> Arts 3 ff. SSM Framework Regulation.

<sup>98</sup> Art 4(5) SSM Framework Regulation.

ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 131, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>99</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 123, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>100</sup> For instance: 'The existing [accountability] framework foresees detailed accountability rules that were specifically designed for the ECB and are therefore more relevant than the Court's 'landscape review on EU accountability'. [...] 'The ECB observes that the IMF technical note quoted was prepared by IMF staff and does not constitute an official IMF stance. The ECB therefore objects to such working papers being considered a relevant point of reference.' ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 125, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>101</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 128, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>102</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 129, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>103</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 80, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>104</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 129, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>105</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 130, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

disagreement on the provision of information, the ECB's answer boiled down to a gentle rejection of the recommendation.

In the special report of 2018, the ECB advanced that it did provide sufficient information in the light of the ECA's mandate. In general, the ECB clarified its way of practice in order to improve the view the ECA has sketched of the ECB. For instance, while the ECA suggested to introduce a procedure requiring banks to apply a specific provisioning policy, the ECB noted that no special procedure needs to be created as the ECB's general decision-making process covers this.<sup>106</sup> By the foregoing, the ECB aimed to reframe the information and conclusions of the ECA in a more positive way, e.g. 'This should be compared with the positive comments elsewhere in the report'<sup>107</sup>

Overall, the ECB accepted the ECA's recommendations, save for two. The first rejection regarded the flow of information. The second rejection concerned the guidance on FOLTF assessments. While the ECA's recommendation emphasized the lack of additional operational guidance, the ECB was of the view that it had issued guidance supplementing the EBA's FOLTF guidelines.<sup>108</sup>

Even though the ECA has not carried out any follow-up reports, it does include previous findings where it deems this relevant. In its report of 2018, the ECA referred to its conclusions in the 2016 report, where it was argued that the ECB had insufficient control over the numbers and skills of the national staff members in the JSTs.<sup>109</sup> Yet, it did not consider whether meanwhile, this shortcoming had been remedied. Another reference to the 2016 report was made where the ECA addressed the use of national experts in the assessment of recovery plans. More specifically, the ECA alluded to the conflicting reporting lines determined in the 2016 report.<sup>110</sup> The ECB disagreed with this description and called it 'parallel' reporting lines.<sup>111</sup>

In its review of 2020 on the lessons learned from the financial crisis, the ECA referred multiple times to its 2016 and 2018 reports. For example, it mentioned the ECB's limited control over the JSTs for on-site inspections. It added that '[t]he ECB points out that it has in the meantime followed up on the findings of the report with a number of measures.'<sup>112</sup> Another illustration relates to the absence of clear criteria and indicators in the light of the ECB's crisis management for banks. In this respect, the ECB indicated that it had in the meantime followed up on the findings of the report with a number of measures.<sup>113</sup> Although these remarks cannot be perceived as follow-up investigations, they indicate that the ECA considers its previous assessments.

Also, where necessary, the ECA includes the ECB in recommendations in the other special reports. For instance, to create a successful banking union and effective banking supervision a clear division of roles and responsibilities between EBA, the ECB and the NSAs is required. These roles and responsibilities should be clarified in the legislation or memoranda of understanding between the institutions and authorities concerned.<sup>114</sup>

<sup>106</sup> ECB's replies, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 9, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>107</sup> ECB's replies, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 10, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>108</sup> ECB's replies, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 12, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>109</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 18, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>110</sup> ECA, 'The operational efficiency of the ECB's crisis management for banks' (2018) *Special Report*, no. 2, 27, <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556>>.

<sup>111</sup> ECA, 'Single Supervisory Mechanism – Good start but further improvements needed' (2016) *Special Report*, no. 29, 127, at <[https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_29/SR\\_SSM\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf)>.

<sup>112</sup> ECA, 'How the EU took account of lessons learned from the 2008-2012 financial and sovereign debt crises' (2020) *Review*, no 5, at <[https://www.eca.europa.eu/lists/ecadocuments/rw20\\_05/rw\\_financial\\_crisis\\_prevention\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/rw20_05/rw_financial_crisis_prevention_en.pdf)>, 22.

<sup>113</sup> ECA, 'How the EU took account of lessons learned from the 2008-2012 financial and sovereign debt crises' (2020) *Review*, no 5, 34-35, at

<[https://www.eca.europa.eu/lists/ecadocuments/rw20\\_05/rw\\_financial\\_crisis\\_prevention\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/rw20_05/rw_financial_crisis_prevention_en.pdf)>.

<sup>114</sup> ECA, 'European banking supervision taking shape — EBA and its changing context' (2014) *Special Report*, no. 5, 36 and 40, at <[https://www.eca.europa.eu/lists/ecadocuments/sr14\\_05/sr14\\_05\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/sr14_05/sr14_05_en.pdf)>.

As to the effect of the ECA's reports beyond the ECB, the 2018 special report was one of the three ECA reports that has the most media coverage in 2018.<sup>115</sup> This special report was also mentioned in the ECA's annual report, in which it reiterated that the ECB needs to address some design flaws and signs of inefficient implementation.<sup>116</sup> In addition, the ECA's activity report of 2018 listed this report without going into the content.<sup>117</sup>

Furthermore, the issue of access to information has raised concerns in the European Parliament and the Council.<sup>118</sup> In a (non-binding) resolution, the former urged the ECB to cooperate with the ECA to increase its accountability in 2017.<sup>119</sup> In its resolution of 2019 it took a more critical stance. Notwithstanding its worries on the cooperation between the ECA and the ECB, it pointed out, 'with regret',<sup>120</sup> that the ECA is not the chief external auditor and that the ECA's mandate is restricted to operational efficiency of the management of the ECB. In this regard, it alluded to 'an apparent inter-institutional imbalance'<sup>121</sup> in which the CJEU has a dominant role in supervising the ECB's activities. As a result, it invited Member States and EU institutions to develop the ECA's role in the next revision of the Treaties.<sup>122</sup>

## 6. Observations

The ECA decides autonomously when to investigate the ECB. The special reports have not been published on a regular basis and the ECA's work programmes do not clarify the reasons for those audits.<sup>123</sup> The 2016 special report, however, identified the importance of the project as a rationale of the investigation.<sup>124</sup>

The implementation of the legal provisions has created tensions between the ECA and the ECB and revealed one problem in particular: information provision. The MoU specifies the ECA's access to information and documents and improves the accountability framework of the ECB.<sup>125</sup> While the ECA still depends heavily on the ECB's willingness to obtain information (the so-called interpretative audit gap), it appears that the MoU strengthens the ECA's audits in practice. Nevertheless, if necessary, the ECA should be willing to bring legal challenges before the CJEU. Yet, the ECA was accused of performing a more political role as an accountability forum: Pervenche Berès, a MEP, criticized the ECA's report on the SSM, for being 'more concerned with politics than the accounts.'<sup>126</sup>

From the information deficit case we learn that the ECA passes on problematic behaviour to the European Parliament and the Council, but that these institutions do not take strong action. The ECB, not being forced to

<sup>115</sup> ECA, Activity report 2018, 54, at <[https://www.eca.europa.eu/lists/ecadocuments/aar18/aar18\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/aar18/aar18_en.pdf)>.

<sup>116</sup> Annual report of the Court of Auditors on the implementation of the budget concerning the financial year 2018, together with the institutions' replies (8 October 2019) OJ C 340/01, 62, 77.

<sup>117</sup> ECA, *Activity Report 2018*, 74, at <[https://www.eca.europa.eu/lists/ecadocuments/aar18/aar18\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/aar18/aar18_en.pdf)>.

<sup>118</sup> Council, Conclusions of 21 February 2017 on the European Court of Auditors' Special Report No 29/2016: "Single Supervisory Mechanism - Good start but further improvements needed".

<sup>119</sup> European Parliament Resolution of 15 February 2017 on Banking Union – Annual report 2016 (P8\_TA-PROV(2017)0041, para 23.

<sup>120</sup> European Parliament Resolution of 26 March 2019 on the Court of Auditors' special reports in the context of the 2017 Commission discharge (2018/2219(DEC)), para 51. It refers to Article 27 of the ESCB and ECB Statute.

<sup>121</sup> European Parliament Resolution of 26 March 2019 on the Court of Auditors' special reports in the context of the 2017 Commission discharge (2018/2219(DEC)), para 52; with reference to Article 35 of the ESCB and ECB Statute.

<sup>122</sup> European Parliament Resolution of 26 March 2019 on the Court of Auditors' special reports in the context of the 2017 Commission discharge (2018/2219(DEC)), para 53.

<sup>123</sup> ECA, 'Work Programme 2018', 6, at <[https://www.eca.europa.eu/lists/ecadocuments/wp2018/wp2018\\_en.pdf](https://www.eca.europa.eu/lists/ecadocuments/wp2018/wp2018_en.pdf)>.

<sup>124</sup> ECA, 'Special Report No 29/2016: "Single Supervisory Mechanism - Good start but further improvements needed" (2017) Journal European Court of Auditors, no. 1, 14, at <[https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL17\\_01/ECA\\_journal\\_January\\_2017.pdf](https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL17_01/ECA_journal_January_2017.pdf)>.

<sup>125</sup> E.g. R Debets, 'ECB and ECA sign memorandum of understanding on access to information' (2019) *Journal European Court of Auditors*, no. 4, 137, at <[https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL19\\_04/JOURNAL19\\_04.pdf](https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL19_04/JOURNAL19_04.pdf)>.

<sup>126</sup> P Berès, 'Monetary Dialogue' (28 November 2016), 22, at <[https://www.europarl.europa.eu/cmsdata/112169/Monetary%20dialogue%2028112016\\_EN.pdf](https://www.europarl.europa.eu/cmsdata/112169/Monetary%20dialogue%2028112016_EN.pdf)>.

account for its attitude and to justify its position, emerges as the strongest actor. The ECA had to raise pressure by reiterating the problem in various ways (e.g. two special reports, letters and statements).

To conclude, the legal mandate of the ECA in banking supervision mirrors the one with regard to monetary policy. From this section's analysis it emerges that the ECA's claim for legal changes to its mandate is founded. The current legal framework together with the MoU do not provide the ECA with the strong accountability mandate required to address the ECB's genuine role in banking supervision. Until the spirits are ripe for Treaty changes, the ECA can strengthen its own mandate by performing its audits on a regular basis and by highlighting the importance of such audits. Also, it could have taken a more rigorous position during the negotiations of the MoU. The current one demonstrates an imbalance between the ECB and the ECA.

## V. Conclusions

Although the accountability forums, except for the ABoR, are firmly anchored in the EU Treaties their practices can be less adequate as seemed at first sight. Firstly, the accountability forums, except for the European Parliament, assess the ECB's actions on an *ad-hoc* basis. Secondly, the ECB appears more often than not the dominant actor in the accountability relationship, underpinned by its independence. Its attitude towards the ECA with regard to access of supervisory documents is illustrative. Even if the MoU can solve the disinformation convincingly, the ECA should introduce a more regular review of the ECB's banking supervisory practices.

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