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Competences and alignment in an emerging future

After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop

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Abstract

Starting with a discussion of a recent court judgment on the prudential supervisory powers of the European Central bank (ECB), the *L-Bank* judgment of 16 May 2017 in Case T-122/15 (currently under appeal: Case C-450/17 P), this paper explores the development of the Single Supervisory Mechanism (SSM) and of the Eurosystem, as two formations of the ECB acting together with national authorities. The allocation of powers in both systems is analysed on the basis of the administrative and judicial reviewability of acts of the central banks and supervisory authorities; ‘intersection issues’ between national and Union competences in supervision; the role of national law in supervision and the national implementation of EU directives in the area of prudential supervision; and the measure of ‘Europeanisation’ of competences in respect of the holding of gold reserves and the provision of liquidity to banks (lender of last resort). A brief foray into the different supervisory liability regimes for the ECB and selected national supervisory authorities precedes concluding suggestions for further study and development of Europe’s Economic and Monetary Union (EMU).

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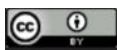
Keywords: accountability of central banks; administrative review of central bank acts; Agreement on Net Financial Assets (ANFA); delegated powers; Economic and Monetary Union (EMU); emergency liquidity assistance (ELA); European Central Bank (ECB); European Court of Justice (ECJ) European System of Central Banks (ESCB); exclusion of liability; exclusive powers; gold; implementation of directives; judicial review of central bank acts; juridification of central banking; lender of last resort (LOLR); monetary policy; National Central Banks (NCBs); National Competent Authorities (NCAs); official foreign reserve assets; Outright Monetary Transactions (OMT); prudential supervision; Quantitative Easing (QE); scope of ECB prudential powers; Single Rulebook; Single Supervisory Mechanism (SSM); supervisory liability; U Process.

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1. L-Bank as a watershed?

The interplay between European and national competences has been a feature of Union law since its inception, albeit under the different name of: Community law. In our community of law, public functions are exercised at various levels, including the Europe-wide and the State-wide, with the Euro Area-wide more and more an intermediate layer¹ in the multi-level governance of Europe. A recent judgment by the General Court, under appeal before the Court of Justice, highlights the allocation of powers in the area of banking union. The *L-Bank* judgment² of 16 May 2017 surprised practitioners and academics alike with its pronouncement of clarity on the award of competences to the European Central Bank (ECB): all prudential competences covered by Article 127(6) TFEU have been allocated exclusively to the ECB, with National Competent Authorities (NCAs) acting by delegation when executing their 'own' powers, hitherto considered 'reserved'. This judgment puts the division of power between the European and State level in the area of central banking into sharp focus. Similar 'skirmishes' between these levels, or pull and push factors between the *centre* and the *periphery* in the European System of Central Banks (ESCB) as I mischievously call them, have been the hallmark of developments since the establishment of Economic and Monetary Union (EMU). It is on either side of the 'Chinese wall' which separates the monetary policy and prudential supervision functions of the ECB³ that law and practice are in a continuous interplay around this theme. Is *L-Bank* a watershed in these developments?

This paper⁴ explores the competences of the ECB⁵ and its counterparts in the Eurosystem⁵, the National Central Banks (NCBs) and, in the Single Supervisory Mechanism (SSM), the NCAs⁶. An overview of the State actors in the Eurosystem and the SSM, indicating where these are not

¹ There are other intermediate layers, when one includes competences that do not encompass all EU States, e.g., in the area of the Schengen *acquis*, or of the area of freedom, security and justice. My focus is on EMU.

² Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank vs. ECB*, judgment of 16 May 2017, ECLI:EU:T:2017:337. Under appeal: Case C-450/17 P, the appellant alleging that the General Court did not assess whether *L-Bank*, on the basis of the specific factual circumstances put forward by it, is to be classified as a less significant entity; reliance on only the English version of the SSM Regulation; inadequate reasoning by the ECB not identified by the Court; introduction of elements which are not the subject of the proceedings.

³ Pursuant to Article 25 of the SSM Regulation (Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29 October 2013), the monetary policy and prudential supervision tasks of the ECB are separated. This 'Chinese wall' also raises questions on the relationship between the monetary and financial stability objectives, which deserves to be discussed separately and is the subject of other contributions.

⁴ Which includes Tables 1 (Overview of NCBs (Eurosystem) and NCAs (SSM)), 2 (ECB supervisory approach when confronted with deficient national law), 3 (List of competences in the scope of the ECB's tasks or underpinning the ECB's supervisory function) and 4 (Selected limitation of liability regimes for prudential supervisors).

⁵ The Eurosystem comprises the ECB and the NCBs of the Member States that have adopted the euro (Article 282(1) TFEU). It is to be distinguished from the European System of Central Banks (ESCB), which includes the NCBs of the ten <out> States who have retained their own currency, either because they are a Member State with a derogation (Article 139 TFEU) or they have an opt-out (United Kingdom and Denmark, in accordance with Protocol Nos. 15 and 16). In legal texts, notably of primary law, the term "ESCB" can denote either group.

⁶ Note that the national agencies denoted by either acronym may not always coincide. Table 1 [P36] gives an overview of the members of the Eurosystem and the national authorities in the SSM.

the same, is given in Table 1 [P36]. The allocation of powers between central banks, supervisory authorities and resolution authorities is subject to recurring waves of change, as a recently published excellent *White Paper*⁷ published by the *Banco de Portugal* makes clear.

After a very brief discussion of the *L-Bank* case (section 2), this paper explores the differences and similarities in terms of legal acts and their reviewability in both areas (section 3). Intersection issues in banking union are explored in section 4: which areas of competence are so close as to affect each other and call for close collaboration or, beyond this, re-allocation of powers? Instances of ‘clarification’ of the ECB’s competences are set against the attribution of powers in legal acts. Section 4 also explores the complexity of operating as a Union authority on the basis of national law, a specificity of banking union, and includes a bold, tentative approach on how to proceed when national law is inexistent or deficient. Returning to the monetary policy area, or at least to the other side of the Chinese wall⁸, two elements of ECB policies are scrutinised as to their proper classification under the law: is the treatment of gold and other foreign reserve assets appropriate or does it shy away from a full recognition of their ‘Europeanisation’, and how about liquidity assistance to banks in need? In this section 5, a full lender of last resort function for the ECB will be advocated. A brief excursion into supervisory liability regimes, different for the ECB and the NCAs, will be made in section 6 and in Table 4 [p37], again crossing the divide between monetary policy and supervision. The concluding section 7 closes with an inventory of issues for further study and calls for such study to be interdisciplinary and to go beyond the mere rational towards helping to realise an emerging future for the Eurosystem and the society it serves.

⁷ *White Paper on the regulation and supervision of the financial system*, 2016, at: https://www.bportugal.pt/sites/default/files/anexos/pdf-boletim/livro_branco_web_en.pdf. See, notably, Part VI, written by Professor Luís Morais, for an overview of developments and trends, which suggests specific proposals for the Portuguese situation.

⁸ As ‘monetary policy’ stands for all the “basic” and “other” tasks and functions of the Eurosystem which do not involve prudential supervision (Article 127(2), (5); 128; 138 and 219 TFEU; Articles 3.1; 3.3; 5; 16; 17-24; 25.1 ESCB Statute), including foreign-exchange operations, foreign reserve management and payment systems oversight. The advisory and regulatory tasks are generic and concern both sides of the Chinese wall (Articles 127(4) and 132 TFEU; Articles 4 and 34 ESCB Statute).

2. L-Bank: what does it stand for?

When the banking union was established, the Council⁹ conferred executive tasks in the area of prudential supervision upon the ECB and delineated the banking sector of the Euro Area in two classes: significant and less significant institutions (LSIs). The former would fall completely under the supervision of the ECB, where the latter would remain under national supervision¹⁰. Only the twin tasks of authorising all banks in the Euro Area and of assessing the suitability of their shareholders were conferred on the ECB¹¹, in addition to its task of direct supervision of significant banks. Additional ECB tasks in respect of the SSM as a whole should ensure consistency among the elements of the SSM¹²; they also allow the ECB to decide to exercise supervision directly itself.

When the effective date of prudential supervision by the ECB came near (4 November 2014)¹³, several significant entities resisted being submitted to the ECB's supervision. One such bank, *Landeskreditbank Baden-Württemberg – Förderbank*, requested a review of the decision determining it to be significant and went to court after being unsuccessful at the Administrative Board of Review (ABoR), established as an independent body of first review. (Disclosure: I have been involved as an Alternate Member of ABoR in the preparatory stages of this review.) The resulting judgment of the General Court contains a number of important points. It establishes that, for a request to be classified as less significant¹⁴ to be successful, the applicant needs to prove that direct ECB supervision is *less able* to ensure achievement of the SSM Regulation's objectives than national supervision; a significant entity cannot escape ECB purview by showing that national supervision is *just as able* to achieve the SSM Regulation's objectives. These latter are repeatedly described as: consistent application of high prudential standards¹⁵.

Beyond considerations on the role of the ABoR, whose Opinion was adopted by the Court as part of the reasoning for the ECB's second decision (after an ABoR review, the Supervisory

⁹ Article 127(6) TFEU. Note that, since the Maastricht Treaty, the activation of a prudential task for the ECB had required a legislative act by the Council and assent of the European Parliament (Article 105(6) EC Treaty: "The Council may, acting unanimously on a proposal from the Commission and after consulting the ECB and after receiving the assent of the European Parliament, confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."), whereas the Lisbon Treaty reduced Parliament's role to a merely consultative one.

¹⁰ Article 6(4) SSM Regulation.

¹¹ Article 4(1)(a) and (c) SSM Regulation, in conjunction with Article 6(4).

¹² Article 4(5) SSM Regulation.

¹³ Article 33(2) SSM Regulation.

¹⁴ In accordance with Article 70 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 141/1, 14 May 2014.

¹⁵ As in Article 5(b) SSM Regulation, and recitals 12 and 83: "supervision of the highest quality, unfettered by other, non-prudential considerations". "Consistent application of high supervisory standards" is also referred to in several provisions of the SSM Framework Regulation, notably in Article 70, which was at the core of the case.

Board proposes a new decision to the Governing Council on the issue¹⁶, such second decision being amenable to judicial review in Luxembourg¹⁷¹⁸, the judgment is noticeable for its finding that the tasks of the ECB are of an exclusive nature and that the functions of the NCAs concern the exercise of delegated powers. Basing itself on the wording of Article 4(1) SSM Regulation, “that, ‘[w]ithin the framework of Article 6, the ECB shall ... be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States’, followed by a list of nine tasks.”¹⁹, the Court finds “that it is apparent from the examination of the interaction between Article 4(1) and Article 6 of the [SSM] Regulation (...) that the logic of the relationship between [ECB and NCAs] consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation.”²⁰

Concerning the core provision at issue, the Court finds: “Similarly, under Article 6(4), second subparagraph, of that same regulation the ECB has exclusive competence for determining the ‘particular circumstances’ in which direct supervision of an entity which should fall solely under its supervision might instead be under the supervision of a national authority.” The General Court concludes as follows: “It follows from all the foregoing that the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the [SSM] Regulation and that the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the [SSM] Regulation²¹, whilst conferring on the ECB exclusive competence for determining the content of the concept of ‘particular circumstances’ within the meaning of Article 6(4), second subparagraph, of that same

¹⁶ Article 24(9) SSM Regulation; Article 17(1) Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) (2014/360/EU): ABoR Establishment Decision.

¹⁷ Article 24(11) SSM Regulation; Article 19 ABoR Establishment Decision.

¹⁸ Paragraph 127 of the *L-Bank* judgment: “in so far as the contested decision ruled in conformity with the proposal set out in the Administrative Board of Review’s Opinion, it is an extension of that opinion and the explanations contained therein may be taken into account for the purpose of determining whether the contested decision contains a sufficient statement of reasons.” This language sounds less encompassing in the original French: « *dans la mesure où la décision attaquée a statué dans un sens conforme à la proposition figurant dans l’avis de la commission administrative de réexamen, elle s’inscrit dans le prolongement dudit avis et les explications qui y figurent peuvent être prises en compte aux fins d’examiner le caractère suffisamment motivé de la décision attaquée* » (underlining added, RS).

¹⁹ Paragraph 20 of the *L-Bank* judgment.

²⁰ Paragraph 54 of the *L-Bank* judgment (underlining added, RS). The Court uses the term ‘Basic Regulation’ when referring to the SSM Regulation; the quotes in this paper employ the usual citation of this fundamental legal act.

²¹ So, all tasks except those listed in Article 4(1)(a): authorising credit institutions and withdrawing authorisations, and Article 4(1)(c): assessment the acquisition and disposal of qualifying holdings in credit institutions.

regulation, which was implemented through the adoption of Articles 70 and 71 of the SSM Framework Regulation.”²²

Reading the recitals of the SSM Regulation underpins the Court’s interpretation²³. Among these recitals is no. 28 which I will come back to below²⁴: its reservation of certain tasks to national authorities notably fails to include any of those enumerated in Article 4(1), or the direct supervision of LSIs²⁵. The General Court sees the ECB having “important prerogatives even when the national authorities perform the supervisory tasks laid down in Article 4(1)(b) and (d) to (i) of the [SSM] Regulation”²⁶, which it considers “indicative of the subordinate nature of the intervention by the national authorities in the performance of those tasks”²⁷. The ECB’s competence to issue regulations, guidelines or general instructions to NCAs is relevant and, while there is no “possibility for the ECB to issue individual guidelines to a national authority, that is compensated for by the possibility offered by Article 6(5)(b) of the [SSM] Regulation²⁸ to remove direct prudential supervision of an entity from the competence of a national authority”.²⁹

In rejecting a comparison with competition law competences that *L-Bank* brought forward and which the Court finds inapplicable, the judgment³⁰ makes quite clear that “under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence.”

These considerations place the division of powers in the SSM and, thereby, the relationship between the ECB and the NCAs in a different light: exclusive competences at the centre, partially delegated to the State agencies involved in the SSM. How to look at decentralised performance of central bank tasks in the Eurosystem and the SSM after *L-Bank*? Does *L-Bank* also affect the relationship between the ECB and the NCBs in the Eurosystem³¹?

²² Paragraph 63 of the *L-Bank* judgment (underlining added, RS).

²³ Notably, it reads recital 37 (which includes the following: “in order to ensure high-quality, Union-wide supervision, national competent authorities should be responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of the ECB supervisory tasks.”) such “that direct prudential supervision by the national authorities under the SSM was envisaged by the Council of the European Union as a mechanism of assistance to the ECB rather than the exercise of autonomous competence.”

²⁴ See under: *Conflicting, adjacent or overlapping competences*.

²⁵ Paragraph 57 of the *L-Bank* judgment.

²⁶ Again, all tasks except those listed in Article 4(1)(a): authorising credit institutions and withdrawing authorisations, and Article 4(1)(c): assessment the acquisition and disposal of qualifying holdings in credit institutions.

²⁷ Paragraph 59 of the *L-Bank* judgment.

²⁸ “(...) (b) when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM;” (underlining added, RS)

²⁹ Paragraphs 60-61 of the *L-Bank* judgment.

³⁰ Paragraph 72 of the *L-Bank* judgment.

³¹ Which is based on the ESCB Statute that specifically grants competences to ECB and NCBs alike.

3. Differences and similarities across the Chinese wall

Discussing the decentralised framework of the Eurosystem after the *L-Bank* judgment, one sees differences and similarities between the two areas from the perspective of the use of legal acts and their reviewability. This section explores these differences.

In the not too distant past, monetary policy was hardly a legal subject. Decisions and transactions were perhaps seen in the context of constitutional law and private law, respectively, but that concerned their embedment in the set-up of the State or the position of the central bank in commercial transactions, including the issue of the immunity of its assets from execution (or even the central bank's immunity from jurisdiction)³². Since the Maastricht Treaty and the subsequent establishment of the European Monetary Institute (EMI) and its successor, the ECB, this has changed profoundly.

In an earlier publication³³, I set the transition towards a much more rule-based monetary policy in the context of the 'jurification' of society. Whereas, within separate States, central banks may have relied on the 'nod and wink' or on informal arrangements to conduct their policies, in the context of the European Union (EU), a more solid legal basis was deemed necessary. The alignment of national laws, including on the organisation and independence of central banks, which the Treaty requires³⁴ for the adoption of the single currency in each Member State³⁵, led to a wide-ranging harmonisation among EU States concerning the functioning of central banks, albeit that national specificities and competences beyond the ESCB competences remained. At the outset, prudential supervisory competences, if at all allotted – even partially – to the national central bank, remained outside this harmonisation; the introduction of banking union has changed this fundamentally, at least for the Euro Area Member States, a process of alignment that is still on-going.

Not only 'constitutional' central bank law, i.e. statutes and relationships with the government and with parliament, were affected by the transition to the third stage of EMU, also other

³² For an overview of the approach in US litigation applying the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891, at: <https://www.gpo.gov/fdsys/pkg/STATUTE-90/pdf/STATUTE-90-Pg2891.pdf>. See: *Too Sovereign To Be Sued: Immunity Of Central Banks In Times Of Financial Crisis*, *Harvard Law Review* 124.2 (2010): 550-571. For the situation in respect of the ECB, headquartered in Germany, see: Georg Gruber and Martin Benisch, *Privileges and immunities of the European Central Bank*, *ECB Legal Working Paper Series*, No. 4, June 2007. For the United Kingdom, an important jurisdiction in view of London's preeminent position as a financial market place, the State Immunity Act 1978 is relevant; at: <https://www.legislation.gov.uk/ukpga/1978/33>.

³³ *The European Central Bank – Institutional Aspects*, 1997, PhD thesis, p. 320.

³⁴ Article 140 TFEU requires that convergence towards the adoption of the single currency is examined on the basis of the four convergence criteria (elaborated in Protocol No. 13 on the Convergence Criteria), an examination which is to include "the compatibility between national legislation (...), including the statutes of its national central bank, and Articles 130 and 131 and the Statute of the ESCB and of the ECB" (hereafter: ESCB Statute). Article 130 concerns the independence of the central banks in the ESCB (also set out in Article 7 of the ESCB Statute), whereas Article 131 prescribes that "[e]ach Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the [ESCB Statute]". These requirements therefore extend to all Member States, except the United Kingdom and Denmark.

³⁵ Except the United Kingdom and Denmark; see footnote 5 above.

monetary policy and related issues became the subject of ‘legal encroachment’. The EMI devoted a lot of attention to ensuring that the ECB would be able to operate on financial markets from the outset on the basis of legal documentation that was fit for its supranational status and purpose. Amendments to standard agreements used in market practice, such as ISDA³⁶ master agreements, were negotiated and draft general documentation (the standard terms at which the ECB and NCBs enter into transactions with counterparties) was drawn up. Non-exhaustive instances of such agreements to be used in Eurosystem operations under Articles 17-24 of the ESCB Statute may be found in the ECB guideline³⁷ on management of foreign reserves by NCBs. A whole body of (amendments or annexes to) market legal instruments was created that did not pre-exist. This process is on-going: as recently as 2015, the ECB restated the minimum standards for Eurosystem market operations to reflect the Eurosystem Ethics Framework³⁸. A General Documentation Guideline³⁹ sets out “the uniform rules for the implementation of the single monetary policy by the Eurosystem throughout the [Euro Area]” and contains minute details of the documentation for monetary policy operations.

From ‘juridification’ to reviewability

An immediate difference between the two areas (monetary policy and prudential supervision) is the difference in reviewability of legal acts. Whereas the ECB largely acts through legal acts when conducting prudential supervision (its decisions on authorisation and withdrawal of authorisation of banking licences; acceptance – or not – of persons as ‘fit and proper’ and shareholders as ‘suitable’; its decisions mandating capital increases or governance changes, notably as a result of the SREP⁴⁰ process; its imposition of sanctions, to mention the most prominent), under monetary policy, its decisions may not amount to a challengeable legal act.

First and foremost, interest rate decisions are only official announcements of its readiness to enter into transactions, pursuant to Article 18 ESCB Statute, with financial market parties.

³⁶ International Swaps and Derivatives Association; see: <http://www2.isda.org/about-isda/>.

³⁷ Guideline of the ECB of 20 June 2008 on the management of the foreign reserve assets of the ECB by the national central banks and the legal documentation for operations involving such assets (recast) (ECB/2008/5), OJ L 192/63, 19 July 2008. See, notably, Article 3 and Annex I with an “ECB Annex” to market documentation on confidentiality and immunity; and a master netting agreement in Annex II to the Guideline.

³⁸ Guideline (EU) 2015/855 of the European Central Bank of 12 March 2015 laying down the principles of a Eurosystem Ethics Framework and repealing Guideline ECB/2002/6 on minimum standards for the European Central Bank and national central banks when conducting monetary policy operations, foreign exchange operations with the ECB’s foreign reserves and managing the ECB’s foreign reserve assets (ECB/2015/11), OJ L 135/23, 2 June 2015.

³⁹ ECB Guideline (EU) 2015/510 of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (recast), OJ L 91/3, 2 April 2015, as amended. Latest consolidated version in the OJ: 02014O0060 — EN — 21.07.2017 — 005.001 — 1, at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014O0060-20170721&qid=1509115716139&from=EN>. An overview of the monetary policy framework can be found at the ECB’s website: <https://www.ecb.europa.eu/ecb/legal/1002/1014/html/index-tabs.en.html>.

⁴⁰ Supervisory Review and Evaluation Process. See the SSM SREP Methodology Booklet, at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/srep_methodology_booklet_2016.en.pdf.

Furthermore, decisions on allotting amounts to credit institutions under tender procedures are, similarly, decisions of a quasi-commercial nature: lending to commercial banks through an announced mechanism of allocation of funds. Finally, non-standard monetary policy measures also concern market transactions, with the operational framework announced in press releases or embodied in legal acts that precede actual transactions in the market.

One can hardly imagine a court case against the central bank for a ‘wrong’ decision on the discount rate, or whichever is the main interest rate set by the central bank. This is for two reasons. Determination of the ‘correct’ interest rate is a policy decision resulting from a complex assessment of the needs of society and of the financial system at that particular juncture in time (specific moment in the business cycle) – hardly an issue which lends itself to judicial scrutiny. Also, who would have standing in court to attack the interest rate decision? ‘Standing’ is a high threshold, presumably in any jurisdiction but certainly so in the EU, as Article 263 TFEU requires ‘direct and individual concern’ for a natural or legal person to start a case on a legal act and the Court’s case law requires ‘interest’⁴¹. Even if one were to consider setting the main interest rate a ‘regulatory act’ (itself a far-fetched approach), the ‘direct and individual concern’ requirement will bar litigation against the ECB under this heading⁴².

As to allotment decisions, these would seem to be more easily identifiable as challengeable in court but here – barring a manifest error or a deep dispute between the commercial and the central bank – a judicial case is unlikely to arise: the commercial bank will seek redress in an informal manner if it has been negatively affected more than its peers in an allotment decision. Continued good relationships with the central bank would seem to argue against going to court. This consideration plays a role in any challenge against the central bank and supervisory authority, in whichever field of the latter’s (disputed) competence.

Nevertheless, monetary policy decisions are not taken in a legal vacuum. Open market transactions are subject to private-law agreements between the central bank and its counterparties, whose features are harmonised across the Eurosystem in the General Documentation Guideline⁴³. It is noteworthy that this Guideline, in Article 1(3), requires

⁴¹ The ‘direct and individual concern’ requirement goes as far back as the judgment of 15 July 1963 in Case 25/62 (*Plaumann v Commission*), EU:C:1963:17 and has recently been restated in the Order of the General Court of 12 September 2017 in Case T-247/16 (*Trasta Komercbanka AS v ECB*), ECLI:EU:T:2017:623; since named: *Fursin and Others v ECB*, as the General Court struck out the bank’s case against the withdrawal of its license but allowed its shareholders to proceed. Case law on the requirement of an interest in proceedings go back to Case 53/85 (*AKZO Chemie v Commission*) [1986] ECR 1965, and has recently been restated in the judgment of 8 May 2013 in Case C-239/12 P (*Abdulrahim v Council and Commission*), EU:C:2013:331.

⁴² And, having jumped the admissibility bar, any claim would probably fail because of the wide discretion in areas of complex economic decision-making that the Court allows the EU institutions.

⁴³ See Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (recast); consolidated version at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505642301727&uri=CELEX:02014O0060-20170721>. The Guideline *inter alia* establishes the governing law, contains minimum common features applicable to both repurchase and collateralised loan agreements and minimum common features applying exclusively to repurchase agreements and contains a wide array of other elements that contractual (and regulatory) arrangements between NCBs and counterparties should comply with.

translation by Eurosystem NCBs into “contractual *or regulatory* arrangements” (italics added, RS), to be “applied by the [each] NCB, in which the provisions of this Guideline are implemented accordingly”. As indicated before, transactions between the ECB and NCBs with counterparties will be conducted under standard market conditions, such as model ISDA contracts. Thus, subject to the specificity of the clauses governing dispute settlement in such agreements, access to courts is in principle open to counterparties⁴⁴. Again, the likelihood of litigation is low, with central bank immunity provisions applying and continued good relations with the central bank a major consideration while, probably, the extensive regulation of all possible kinds of market occurrences in the documentation will reduce the need for third-party interference in the relationship, such as by courts.

On the basis of their specific properties, one might expect a slightly different outcome for TLTROs, the Targeted Long-Term Refinancing Transactions⁴⁵, which are conducted at very generous terms provided the funds are on-lent to the real economy; reporting on this lending activity may reveal that the commercial bank underperformed, whereupon it needs to repay the amounts lent. Such a mechanism, dependent as it is on *ex post* evaluation of compliance with a criterion for cheap finance, may prove more likely to lead to litigation with the central bank, especially as a financial penalty may be imposed⁴⁶. Notably, TLTROs are subject to “mandatory early repayment in September 2016 if the eligible net lending of a participant that has borrowed in the TLTROs (...) is below its applicable benchmark”. TLTROs are meant “to support bank lending to the non-financial private sector, meaning households and non-financial corporations”, excluding loans for house purchases.

Beyond interest rate decisions and commercial transactions, monetary policy is also conducted these days through other means. Apart from the operative Quantitative Easing programmes (asset purchase programmes for covered bonds (CBPP3)⁴⁷, corporate sector bonds (CSPP)⁴⁸ and public sector bonds (PSPP)⁴⁹, which are based on legal acts whose

⁴⁴ But see point 4 of the “ECB Annex” to standard market documentation in Guideline ECB/2008/5, which implies that the ECB will not waive immunity from jurisdiction and execution.

⁴⁵ Decision (EU) 2016/810 of the European Central Bank of 28 April 2016 on a second series of targeted longer-term refinancing operations (ECB/2016/10), OJ L 132/107, 21 May 2016.

⁴⁶ Annex VII to Guideline (EU) 2015/510 (ECB/2014/60), referring to Article 154 of Guideline 2014/60.

⁴⁷ Decision of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme (ECB/2014/40) (2014/828/EU), OJ L 335/22, 22 November 2014, as amended by ECB Decision (EU) 2017/101 of 11 January 2017 amending Decision ECB/2014/40 on the implementation of the third covered bond purchase programme (ECB/2017/2), OJ L 16/53, 20 January 2017; and by ECB Decision (EU) 2017/1360 of 18 May 2017 amending Decision ECB/2014/40 on the implementation of the third covered bond purchase programme (ECB/2017/14), OJ L 190/22, 21 July 2017.

⁴⁸ Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16), OJ L 157/28, 20 January 2017, as amended by ECB Decision (EU) 2017/103 of 11 January 2017 amending Decision (EU) 2016/948 on the implementation of the corporate sector purchase programme (ECB/2017/4), OJ L 16/57, 20 January 2017; and by ECB Decision (EU) 2017/1359 of 18 May 2017 amending Decision (EU) 2016/948 on the implementation of the corporate sector purchase programme (ECB/2017/13), OJ L 190/20, 21 July 2017.

⁴⁹ Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121/20, 14 May 2015, as amended by ECB Decision (EU) 2015/2101 of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset

reviewability in court will be as limited as the General Documentation Guideline (but see the German Constitutional Court (GCC or *BVerfG*)’s reference to the Court of Justice of the European Union (CJEU)⁵⁰ in the context of a constitutional complaint)⁵¹, the ECB acts on the basis of ‘press releases’. Influencing market behaviour, by financial sector players as much as by corporations and consumers, takes place through a wide array of ‘instruments’, from press conferences and speeches through consistent market behaviour to appearances before parliaments. (Nowadays, beyond the European Parliament, appearance before national parliaments occurs with a certain frequency⁵²: introduced as an express option in the SSM Regulation⁵³, this method of including national parliaments has taken root in the monetary policy area.)

purchase programme (ECB/2015/33), OJ L 303/106, 20 November 2015; by ECB Decision (EU) 2015/2464 of 16 December 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/48), OJ L 344/1, 30 December 2015; by ECB Decision (EU) 2016/702 of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2016/8), OJ L 121/24, 11 May 2016; and by ECB Decision (EU) 2017/100 of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2017/1), L 16/51, 20 January 2017.

⁵⁰ Case C-493/17 (*Weiss and Others*). The CJEU rejected the *BVerfG*’s request for expedited proceedings; see its Order of 18 October 2017: *Beschluss des Präsidenten des Gerichtshofs 18. Oktober 2017 „Beschleunigtes Verfahren“ in der Rechtssache C-493/17 (Heinrich Weiss u. a., Bernd Lucke u. a., Peter Gauweiler, Johann Heinrich von Steinu. u. a. vs. Bundesregierung, Bundestag, Europäische Zentralbank, Deutsche Bundesbank)*; *Ordonnance du Président de la Cour 18 octobre 2017 « Procédure accélérée », dans l’affaire C-493/17*; ECLI:EU:C:2017:792. While an expedited preliminary ruling procedure as set out in Article 105 of the Rules of Procedure has been declined, the President of the Court decided to give it priority over other cases, as provided for in Article 53(3).

⁵¹ The second reference by the *Bundesverfassungsgericht* to the CJEU was announced in a Press Release No. 70/2017 of 15 August 2017 *Proceedings on the European Central Bank’s Expanded Asset Purchase Programme are Stayed: Referral to the Court of Justice of the European Union*, at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html>. The Order of 18 July 2017 (2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15) is partially translated in English on this same page and can be found in full in German at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/07/rs20170718_2bvr085915.html;jsessionid=F29025B2A4B105EED7DB4DC0EF67B7D1.1_cid392.

⁵² I count six such appearances in recent years, to State parliaments in Germany, Spain, France, Finland, Italy and the Netherlands. See the overview below:

1. *Opening statement at Deutscher Bundestag*, Speech by Mario Draghi, President of the ECB, Discussion on ECB policies with Members of Parliament, Berlin, 24 October 2012, at: <https://www.ecb.europa.eu/press/key/date/2012/html/sp121024.en.html>.
2. *Introductory Statement at the Congreso de los Diputados de España*, Speech by Mario Draghi, President of the ECB, Meeting with Members of Parliament, Madrid, 12 February 2013, at: https://www.ecb.europa.eu/press/key/date/2013/html/sp130212_1.en.html.
3. *Introductory remarks at the French Assemblée Nationale*, Speech by Mario Draghi, President of the ECB, Paris, 26 June 2013, at: <https://www.ecb.europa.eu/press/key/date/2013/html/sp130626.en.html>.
4. *Introductory remarks at the Finnish parliament*, Speech by Mario Draghi, President of the ECB, Helsinki, 27 November 2014, at: <https://www.ecb.europa.eu/press/key/date/2014/html/sp141127.en.html>.
5. *Introductory statement at the Italian Parliament*, Speech by Mario Draghi, President of the ECB, at the Italian Parliament, Rome, 26 March 2015, at: <https://www.ecb.europa.eu/press/key/date/2015/html/sp150326.en.html>.
6. *Introductory remarks at the House of Representatives of the Netherlands*, Introductory remarks by Mario Draghi, President of the ECB, at the *Tweede Kamer der Staten-Generaal*, The Hague, 10 May 2017, at: <https://www.ecb.europa.eu/press/key/date/2017/html/ecb.sp170510.en.html>.

⁵³ Article 21(4) SSM Regulation.

One such ‘instrument’ was the press release of 6 September 2012, on Outright Monetary Transactions (OMT). The announced transactions were not actually entered into; their mere announcement served the purpose of the OMT scheme of restoring the transmission channel for monetary policy (disturbed by the redenomination angst in respect of <peripheral> States’ assets) and defusing the expectations of the euro’s reversibility. Although during the subsequent court proceedings⁵⁴, it became clear that the ECB had prepared draft legal acts (which the CJEU has read, academic outsiders have not), the litigation centred around the press release. Thus, there has been ‘judicial accountability’ for press releases as Professor Alexander Türk called it during the recent ECB Legal Conference (4 September 2017)⁵⁵.

This accountability was established in the same fashion as the judicial challenge against the PSPP is conducted: for (national) constitutional reasons, before the German Constitutional Court. It goes beyond the current contribution to discuss the OMT case in full⁵⁶. Suffice it here to summarise the Court’s reasoning why the press release was justiciable. Countering the argument that “a question concerning validity cannot (...) be directed at an act which, like the OMT decisions, is preparatory or does not have legal effects”⁵⁷, the Court finds that the relevant (German) national law permits what it calls “preventive legal protection”⁵⁸ under certain conditions, and relies on previous cases in which the intention of the UK government to legislate in a certain manner was sufficient for a preliminary ruling reference to be made by an English court⁵⁹. Whether a direct challenge of an ECB press release explicating policy might have been possible, e.g. by a Member State or another EU institution, remains to be seen.

It may be recalled that, in the very area of EMU law, the Court has previously been liberal in allowing a judicial challenge, namely of the conclusions of the Ecofin Council on the excessive deficits of France and Germany in the context of their assessment under the Stability and Growth Pact (SGP)⁶⁰. Closer to the ECB, the Court has held that a ‘Policy Framework’ which contained requirements on localisation within the Euro Area of business engaging in settlement of euro-denominated claims (Eurosysteem Oversight Policy Framework in respect

⁵⁴ Judgment of 16 June 2015 in Case C-62/14 (*Peter Gauweiler and Others v Deutscher Bundestag*); ECLI:EU:C:2015:400.

⁵⁵ [reference to the book with the conference proceedings, likely to be published in December 2017]

⁵⁶ See, *inter alia*, Vestert Borger, *Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler*, *Common Market Law Review* 53: 139–196, 2016. Forthcoming: my chapter *A central bank in times of crisis: the ECB’s developing role in the EU’s currency union* in *Handbook of Central Banking*, edited by Rosa Lastra and Peter Conti Brown (2017).

⁵⁷ Paragraph 23 of the *Gauweiler* judgment.

⁵⁸ Paragraph 27 of the *Gauweiler* judgment.

⁵⁹ Paragraph 29 of the *Gauweiler* judgment.

⁶⁰ Case C-27/04 (*Commission vs. Council*), judgment of 13 July 2004; ECLI:EU:C:2004:436, notably paragraph 50, in which the Court finds that a Council act which puts an SGP procedure in abeyance and effectively amends a previous recommendation that the Council issued to two Member States, is intended to have legal effects.

of payment, clearing and settlement systems⁶¹) constitutes a challengeable act⁶². Returning to the ‘judiciability’ of ECB press releases, I consider that ECB policy measures in the form of press releases may be challenged in court, by the appropriate applicant with ‘preferential’ status, such as the Council, the Commission, the European Parliament, or a Member State, provided the ECB intends its announcement to produce effect which, in many cases, may be presumed.

Finally, the ECB also acts in a different capacity from strictly monetary policy (beyond prudential supervision) in its role in the troika. In essence, as the Advocate General in the OMT Case has suggested⁶³, this is an economic policy role. In view of the ECB’s secondary objective to support the general economic policies in the Union with a view to achieving the Union’s objectives as laid down in Article 3 TEU⁶⁴, and considering the crisis circumstances, I consider the excursions of the ECB into quite specific economic policy advice to be within its mandate⁶⁵.

In this capacity, the ECB has been engaged in litigation for alleged damages of the conditionality and because of alleged illegality of the conditions imposed. Although, in the *Ledra* Case⁶⁶, the CJEU finally fully accepted potential liability of the ECB, and of the Commission, for infringements of the Charter of Fundamental Rights of the European Union (Charter), in most cases the applicants were considered not to have standing, the acts contested were considered not to be imputable to an EU institution, or their claims were otherwise found inadmissible⁶⁷. An additional difficulty for the applicants to bring their claims in court consisted in the role of the European Stability Mechanism (ESM), an international organisation closely linked with but formally outside the Union’s Treaty framework, and the decision-making in the Eurogroup, the informal gathering of the Ministers of Finance of the Euro Area, which is not an EU institution. It is remarkable that this additional hurdle stands in the way of judicial scrutiny of conditionality imposed on Euro Area citizens whilst similar conditionality is considered by the Court to be part of Union law when it was requested to rule

⁶¹ For the present-day version of this text, see:

<https://www.ecb.europa.eu/pub/pdf/other/eurosystemoversightpolicyframework201509.en.pdf?97da90823319143cf6814165b521bc7a> and

<https://www.ecb.europa.eu/pub/pdf/other/eurosystemoversightpolicyframework201607.en.pdf>.

⁶² Case T-496/11, (*United Kingdom of Great Britain and Northern Ireland v European Central Bank*), judgment of 4 March 2015, ECLI:EU:T:2015:133, paragraphs 29-68.

⁶³ Opinion of Advocate General Cruz Villalón, delivered on 14 January 2015; ECLI:EU:C:2015:7.

⁶⁴ Article 127(1) TFEU; Article 2 ESCB Statute.

⁶⁵ See, more extensively, my chapter in the *Handbook of Central Banking* (footnote 44 above).

⁶⁶ Joined Cases C-8/15 P to C-10/15 P (*Ledra Advertising Ltd and Others v European Commission and European Central Bank*), judgment of 20 September 2016; ECLI:EU:C:2016:701.

⁶⁷ See, *inter alia*, Case T-541/10 (*Anotati Dioikisi Enoseon Dimosion Ypallilon (AEDDY) and Others v Council*), Order of 27 November 2012; ECLI:EU:T:2012:626; Case T-327/13 (*Mallis and Malli v Commission and ECB*), EU:T:2014:909; Case T-328/13 (*Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB*), EU:T:2014:906; Case T-329/13 (*Chatzithoma v. Commission and ECB*), EU:T:2014:908; Case T-330/13 (*Chatziioannou v Commission and ECB*), EU:T:2014:904 and Case T-331/13 (*Nikolaou v Commission and ECB*), EU:T:2014:905. See, also, the Orders of 16 October 2014 in Case T-332/13 (*Christodoulou and Stavrinou v Commission and ECB*), ECLI:EU:T:2014:910; and Case T-330/13 (*Chatziioannou v Commission and ECB*), ECLI:EU:T:2014:904.

on a Memorandum of Understanding with Romania⁶⁸. The formal distinction between action under Article 143 TFEU (the basis of mutual assistance to <out> Member States⁶⁹) and under the separate ESM Treaty may legally be sufficient for this difference of approach but is hardly explainable to affected citizens. It is another example of the uneven status before the law of European citizens in the area of EMU, where economic policy prescriptions have sharp effects in States that need financial support whereas similar economic policy guidance from Brussels (and Frankfurt) can go unheeded in creditor Member States.

Reviewability of legal acts in the area of prudential supervision

In respect of banking supervision, the reviewability of legal acts is quite differently organised than in the monetary policy sphere. The ECB operates through decisions which are challengeable, before the ABoR and/or the CJEU. ECB supervisory decisions contain a closing paragraph which draws the attention of the addressee to the options of administrative and judicial review which exist separately: an applicant may opt for a quick independent administrative review, leading to a second decision in three months' time⁷⁰, after which it may go to the European Court (as *L-Bank* did), or may directly address the Luxembourg judges. Time and space do not permit to discuss reviewability of supervisory acts more in-depth here. Suffice it to draw the reader's attention to a joint contribution on ABoR in the *European Business Organisation Law Review*⁷¹, and to the overview of judicial cases on the website of the European Banking Institute which I regularly update together with Federico Della Negra⁷².

⁶⁸ Judgment of 13 June 2017 in Case C-258/14 (*Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others*); ECLI:EU:C:2017:448.

⁶⁹ Further elaborated in Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, OJ L 53/1, 23 February 2002, lastly amended by Council Regulation (EC) No 431/2009 of 18 May 2009, OJ L 128/1, 27 May 2009.

⁷⁰ See Articles 16 and 17 of the ABoR Establishment Decision (ECB/2014/16).

⁷¹ Concetta Brescia Morra, Andrea Magliari, René Smits, *The Administrative Board of Review of the European Central Bank: experience after two years*, *Eur Bus Org Law Rev* (2017) 18:567–589; DOI 10.1007/s40804-017-0081-3. Accessible at: <http://rdcu.be/wNwg>.

⁷² See the section "Banking Union and Union Courts" on the website of the European Banking Institute, contributed by myself and Federico Della Negra: <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.

4. Intersection issues between national and Union law: competences and application of national law

In a composite system of law, such as the EU legal system, layers of rule-making overlap. Employing State agencies to implement Union (Community) law has long been a feature of the EU, as it is now called, but Union authorities and agencies have blossomed⁷³. With the introduction of banking union, not only EU supervisory authorities – the European Supervisory Authorities in the European System of Financial Supervision (ESFS), EBA, ESMA and EIOPA – but, also, EU institutions came to be involved on a day-to-day basis with executing supervision and the tail-end of this competence: (deciding on) resolution. The Commission, in the area of resolution together with the Single Resolution Board (SRB), and the ECB are the major players in the oversight of the banking industry. For the ECB, its role is defined as both a direct supervisory function and an oversight role for the National Competent Authorities (NCAs) within the Single Supervisory Mechanism (SSM). The *L-Bank* judgment reformulates the relationships between the ECB and the NCAs in a manner which makes it much closer to the relationship between the ECB and the NCBs. (The reader is reminded again that the classes of NCBs and NCAs only partially overlap; Table 1 [P36]). This state of affairs leads to issues of competence and, in the case of the ECB's own powers, to the peculiar situation of a European institution applying national law. I will discuss these in reverse order.

Reliance on national law with no, incorrect or varied implementation of directives

A lot has been written on this which needs no repetition here⁷⁴. The focus in this paper is on the intersection issues, where the boundaries between European and national competences may be blurred, and on what one may expect the ECB to do when confronted with national law that has not, or incorrectly, implemented Union law. Incorrect transposition includes cases where the ECB, as a European institution, cannot but find that there has been an incorrect implementation. This latter case can be distinguished from the many cases where implementation cannot be said to be incorrect but simply to deviate from the approach taken in other Member States (varied implementation). As there is no independent manner to establish the approach followed by the ECB when confronted with these situations, one may surmise – subject to verification – the following approaches, shown in Table 2 below. In case the ECB is confronted with national law which does not implement a directive, likely CRD IV⁷⁵,

⁷³ On EU agencies, a wealth of legal writing is available. I note here: Miroslava Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies*, 2014; Edoardo Chiti, *European Agencies' Rulemaking: Powers, Procedures and Assessment*, *European Law Journal*, Vol. 19, No. 1, January 2013, pp. 93–110; Madalina Busuioc, *Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope*, *European Law Journal*, Vol. 19, No. 1, January 2013, pp. 111–125; Merijn Chamon, *EU agencies between Meroni and Romano or the devil and the deep blue sea*, *Common Market Law Review* 48: 1055–1075, 2011.

⁷⁴ Restricting myself to two sources here: Gijsbert Ter Kuile, Laura Wissink, Willem Bovenschen, *Tailor-made accountability within the Single Supervisory Mechanism*, *Common Market Law Review* 52: 155–190, 2015; and Andreas Witte, *The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?*, 21 MJ 1 (2014).

⁷⁵ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending

the ECB may be expected to draw the Member State's attention to this situation and request it be remedied. Beyond this conciliatory approach, the ECB may find occasion to draw the Commission's attention to the non-transposition as it is the Commission's role to act as guardian of the Treaties. Yet, when exercising an executive function in day-to-day supervision, relying on the Commission to (try to) remedy non-compliance may be ineffective, at least in the short term. Infringement proceedings take long.

Alternative approaches to absent, incorrect or varied implementation of CRD IV

A daring approach might be for the ECB, in appropriate cases of utmost urgency where applying national law that has failed to implement a directive (*no implementation*) would lead to obviously incorrect results while making it impossible for the ECB to implement its task of providing "supervision of the highest quality, unfettered by other, non-prudential considerations"⁷⁶ to apply (its reading of) the relevant directive, basing itself on its European mandate to supervise⁷⁷. Supervisory action would be based on the combined legal basis of the directive and the SSM Regulation, thus circumventing the prohibition of inverse vertical effect of directives⁷⁸, i.e. the tenet of EU law that directives cannot be invoked against individuals.

Of course, the credit institution concerned, or the intended board member or prospective shareholder affected, may challenge the ECB in court and rely on the clear wording of the SSM Regulation to have the decision quashed as illegal. This risk may be one the ECB can take, for two reasons. First, judicial proceedings take long and, barring a successful request for suspension, the decision stands until declared invalid – this may provide sufficient 'breathing space' for the supervisor to correct the intolerable situation at the supervised entity. Even prior administrative proceedings before ABoR, which also provide for the option of suspension of the act concerned⁷⁹, may give the supervisory authority enough time to intervene in an extreme case. Second, such a course of action enables the Court to assess the legality of the central bank's action in a case of acute need. It should be remembered that the affected party, i.e. the potential applicant in a judicial or administrative review proceedings, would be confronted with *action which is in line with the intentions of the European legislator*, intentions that the national legislator has failed to translate into national law. Thus, it is not as if the ECB 'invents' law: it relies on Union law to perform its task in the interest of the beneficiaries of prudential supervision: society at large and the depositors of the credit institution concerned.

Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338, 27 June 2013; *corrigendum* in OJ L 208/73, 2 August 2013, and *addendum* in L 60/69, 28 February 2014.

⁷⁶ Recitals 12 and 83 of the preamble to the SSM Regulation.

⁷⁷ The following section has been inspired by the research undertaken by a student in my last EMU Law class at the University of Amsterdam, in the Spring of 2017: Joep de Wit's unpublished master thesis *Dependency on national law in the SSM: the liabilities under Article 4(3) of the SSM Regulation* discusses the options for the ECB when confronted with national law that does not, or incorrectly, transpose EU banking law couched in a directive. De Wit's findings do not include the approaches I propose here but my thinking is indebted to his master thesis.

⁷⁸ Case 152/84 (*Marshall*); [1986] ECR 723; ECLI:EU:C:1986:84.

⁷⁹ By the Governing Council on a proposal by ABoR: Article 9(2) ABoR Establishment Decision (ECB/2014/16).

It is clear that only an *urgent* and *evident* case of non-implementation is appropriate for such a course of action. Also, one needs to remember that the peculiar state of affairs in the Euro Area – where European supervision is exercised partially on national law, and where a process of alignment of national rules and practices is underway – may give rise to a course of action as suggested and, indeed, considered justified, here.

In a less extreme case of *incorrect implementation*, a similar approach may be followed where the ECB, again basing itself on the joint effect of the SSM Regulation and the relevant directive provision, applies national law in a harmonised manner, agreed as ‘best practice’, either on the basis of EBA recommendations or guidelines, or on consensus within the SSM. Such a case could arise where such an agreed approach has not yet been translated into national legislative (or, if national administrative authority is involved: regulatory) action and urgent correction of a major supervisory issue is at stake. Again, the guarantees for effective remedies are available, as in the case of ‘no implementation’ just discussed.

Finally, if the ECB is confronted with *varied implementation* where a single approach seems justified and has been agreed by the majority of supervisors as the appropriate manner of transposition, applying this harmonised approach may be the way out for the ECB. Again, such a course of action is advisable only when faced with an urgent supervisory issue and deficient national implementation, which is at variance with what is considered ‘best practice’. Remedies against this approach are again available, as in the two cases discussed before.

Table 2 – ECB supervisory approach when confronted with deficient national law			
	No implementation	Incorrect implementation	Varied implementation
Approach taken (?)	Drawing MS attention?	Drawing MS attention?	Pleading for harmonisation
Approach possible	Applying directive & SSMR?	Applying agreed approach	Applying uniform approach

A development in which supervisory practices converge, and national rules are aligned, should assist the ECB in avoiding supervisory dilemmas as severe as sketched here. In the meantime, a robust and self-conscious approach to what the ECB considers ‘correct’ implementation of CRD IV is called for, to avoid both supervisory lapses and uneven application of supervisory standards across the Euro Area. It is the inequality before the law that most offends one’s sense of justice when one oversees the current functioning of EMU. Just as economic policy prescriptions apply with different vigour and effect across Europe – between Germany and the Netherlands where Commission and Council recommendations can go unheeded with impunity, and Greece or Portugal, where deviations from the conditionality⁸⁰ (aligned with

⁸⁰ Included in Memoranda of Understanding and in EU legal acts, in different manners – a subject worthy of a separate paper. To be noted here that the Greek public sector deficit had improved such that the excessive deficit procedure in respect of the Hellenic republic has been abrogated. See: Council Decision (EU) 2017/1789 of 25 September 2017 abrogating Decision 2009/415/EC on the existence of an excessive deficit in Greece, OJ L 256/5, 4 October 2017, OJ L 256/5. On the Greek public debt, the preamble to this Council decision laconically recalls that Greece needs to “comply with the debt criterion in accordance with Article 2(1a) of Regulation (EC) No 1467/97”, i.e. the differential with the reference value of 60% of GDP should in principle decrease by one-

and derived from economic policy choices made for Europe as a whole) would have immediate repercussions –, banking supervision may still be varied instead of largely uniform across the Euro Area due to deficient national law. This state of affairs is at variance with the equal treatment of citizens and companies in the single market and does not do justice to the objective of high-quality supervision in the banking union.

Application of national law - supervisory competences under national law declared within the ECB's scope of powers

Beyond core areas that are 'adjacent' to prudential supervision, which I will discuss below, there are a number of supervisory competences which the ECB has declared to fall within its remit. In letters of the summer of 2016 and the spring of 2017, the ECB has 'clarified' which "specific supervisory powers granted under national law which are not explicitly mentioned in Union law" nevertheless fall within the scope of the ECB's direct powers⁸¹. The ECB calls this a "clarify[cation of] the delineation of competences between the ECB and the [NCAs] as regards the exercise of certain supervisory powers granted under national law" which it has carried out in cooperation with the Commission. The supervised entities are requested⁸² to address the relevant Joint Supervisory Team (JST) on such matters (with certain exceptions⁸³, in which cases they still need to involve the NCA as the first contact point). National law continues to apply. Notably, State procedural provisions will determine the outcome of the ECB's assessments, which will be carried out in compliance with the national legal provisions.

twentieth per year, counted over a three year period, with "sufficient progress towards compliance" as assessed by the Council may count as such for States, like Greece, that were subject to an EDP on 8 November 2011.

⁸¹ See: *Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law*, letter SSM/2017/0140 of 31 March 2017, at: https://www.bankingsupervision.europa.eu/banking/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?abdf436e51b6ba34d4c53334f0197612. The previous letter (summer 2016) is not separately available on the banking supervision website (<https://www.bankingsupervision.europa.eu/banking/letterstobanks/html/index.en.html>), but is contained in Annex I to the 2017 letter.

⁸² With a reference to Article 95 SSM Framework Regulation.

⁸³ Several of which are based on the SSM Framework Regulation: fit & proper assessments (Article 93) and common procedures, i.e. related to licensing (Article 73), qualifying holdings (Article 85), and passporting (Article 11); while other cases for which the NCAs remain the entry point are introduced in the spring 2017 letter itself. One such notable exception concerns the approval of key function holders. The legal basis for the latter exception remains unclear.

Table 3 - List of competences in the scope of the ECB's tasks or underpinning the ECB's supervisory function

Summer 2016 'clarification':

- (i) activities of significant institutions in countries outside the European Union
- (ii) outsourcing of activities
- (iii) powers vis-à-vis shareholders;
- (iv) requests for information to auditors
- (v) licencing - ancillary conditions to licences [*authorisations, RS*]
- (vi) credits to related parties.

Spring 2017 'clarification':

- (vii) approval of acquisitions by significant institutions of holdings in a non-credit institution or a credit institution outside the EU;
- (viii) approval of mergers/de-mergers involving significant institutions;
- (ix) approval of asset transfers/divestments involving significant institutions;
- (x) approval of a significant institution's statutes;
- (xi) approval of the appointment of key function holders in significant institutions;
- (xii) approval of/objection to the appointment of external auditors (to the extent such powers are linked to ensuring compliance with prudential requirements) of significant institutions;
- (xiii) approval of specific banking activities relating to licensing;
- (xiv) approval of strategic decisions of significant institutions

The above list of in total fourteen instances contains core issues of prudential supervision. It includes outsourcing; requests for information to auditors; approval of holdings in non-banks or in banks outside the EU; mergers or asset transfers; the appointment of external auditors; and of key function holders. Most relate to significant institutions only, while others concern all credit institutions – this distinction goes back to the fact that the ECB exercises full supervision of significant institutions but is also responsible for authorisation and assessment of the suitability of shareholders of *all* credit institutions. The legislator has made the ECB the gate-keeper of the banking market across the Euro Area. Because of the central importance of these competences to the soundness of banks, I consider the ECB competent to apply these national provisions, and to specify so to the supervised entities. The European legislator has not been able to identify all the applicable national provisions in advance and to determine which were to be exercised by the ECB and which by NCAs. Instead, it relied on a wide description of the relevant laws the ECB is to apply⁸⁴.

To my mind, the ECB is correct to state that it “may also exercise supervisory powers granted under national law, even if they are not explicitly mentioned in Union law as they (i) fall within the scope of the ECB's tasks under Articles 4 and 5 of the SSM Regulation and (ii) underpin a supervisory function under Union law.” Nevertheless, a certain ‘competence creep’ may seem to be implied for the supervised entities as they had to adapt to different modes of operations in the winter of 2014, the summer of 2016 and, again, in the spring of 2017. Further alignment of supervisory practices may lead to harmonisation of national rules, even when not

⁸⁴ Article 4(3) SSM Regulation provides: “For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options. (...)”

implementing one-to-one provisions of CRD IV. Personally, I would welcome a tendency towards directly applicable prudential rules, i.e. a Single Rulebook consisting of regulations only⁸⁵.

In the latest of the two letters, the ECB helpfully attaches an overview of the national provisions which, henceforth, are considered ECB competences. This list gives a very useful insight into national prudential law, and may inspire the European legislator to adopt these standards and make them its own.

Very useful, as well, is a footnote in this latest ‘power letter’ which indicates the areas which remain the exclusive competence of NCAs⁸⁶. The main fields that the ECB ‘footnoted’ as not its own, because neither falling within the scope of the ECB’s tasks nor underpinning the ECB’s supervisory function, are macro-prudential tasks; the oversight of external auditors (beyond the approval of their functioning as the bank’s accountants – which already involves a supervisory assessment of the auditor firm); competition-law related tasks; and conduct of business supervision. Note that the ECB itself also has a macro-prudential function pursuant to Article 5(2) SSM Regulation, so that the ‘exclusivity’ of macro oversight for NCAs is rather tenuous. This enumeration of ‘reserved’ national competences brings me to a discussion of other adjacent powers which, although reserved by the legislator for national authorities, will by their very nature also affect ECB competences and, hence, need to be closely followed by the ECB – they are likely ultimately to be scooped up by the Frankfurt-based institution.

Conflicting, adjacent or overlapping competences

The European legislator has not attributed all supervisory competences to the SSM: “[s]upervisory tasks not conferred on the ECB should remain with the national authorities”, as recital 28 of the preamble to the SSM Regulation states. Among the eight areas mentioned as reserved for national supervision, three stand out: supervision of payments services, compliance with conduct of business rules⁸⁷, and supervision with respect to the prevention of money laundering and terrorist financing (AML/CTF)⁸⁸. A brief word on each of these

⁸⁵ Similarly, Danièle Nouy, in a recent speech: “So what we need are more EU Regulations and fewer EU Directives.” *Everything is connected - the international dimension of banking regulation and supervision*, Speech by Danièle Nouy, Chair of the Supervisory Board of the ECB, King's College, London, 23 October 2017, at: <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp171023.en.html>.

⁸⁶ Footnote 4 in the letter of 31 March 2017 reads as follows: “Conversely, national authorities remain exclusively competent to exercise powers which do not fall within the scope of the ECB’s tasks or which do not underpin the ECB’s supervisory function. This applies in particular to (i) macroprudential supervisory tasks, (ii) the approval of mergers from a competition law, (iii) the “supervision” of external auditors, (iv) the imposition or enforcement of conditions attached by regulation to banking activities such as product rules; and (v) the imposition of penalties to absorb the economic advantage gained from the breach of prudential requirements (which primarily serve competition law purposes).”

⁸⁷ As I read the reference to the following competence which recital 28 specifies as ‘reserved’: “to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments”.

⁸⁸ In the terms of recital 28: “the prevention of the use of the financial system for the purpose of money laundering and terrorist financing”.

‘reserved competences’ in the context of them being close to ECB competences and, hence, prone to lead to conflict between the federal and State levels of supervision.

The exclusion of *payment systems oversight* has always struck me as remarkable in view of the express competence of the ECB in this area. Article 127(2), fourth indent, TFEU⁸⁹ includes “to promote the smooth operation of payment systems” among the four *basic* tasks that the Eurosystem is to perform. Article 22 of the ESCB Statute differentiates between the ECB and NCBs, with both enabled to provide facilities, and the ECB granted the power to adopt regulations, “to ensure efficient and sound clearing and payment systems within the Union and with other countries”⁹⁰. The ECB’s role in payment systems oversight deserves a monograph and is beyond the scope of this paper. It involves issues such as localisation of financial services, notably settlement of transactions, in euro and the extent of the central bank’s competences in clearing⁹¹. Suffice it to say that the exception for payment services supervision in secondary legislation activating the ECB’s prudential supervisory tasks sits uncomfortably with the Treaty-based competence allotted to the same institution at the other side of the Chinese wall, and is bound to lead to disputes over areas of competence which are adjacent. My view is that a single currency area needs single payment systems oversight.

As to *conduct of business* rules, it is clear that prudential and business conduct regulation are different fields, with supervisory authority allotted to different agencies at national and Union level. Yet, conduct by financial market players may give an insight into their ethics and affect assessment of board members and Key Function Holders, which the ECB is to appreciate in respect of significant institutions⁹². The assessment as fit and proper (FAP) of bank managers and non-executive directors is the subject of pan-European harmonisation⁹³ and Euro Area

⁸⁹ Repeated in Article 3.1, fourth indent, ESCB Statute.

⁹⁰ For a proposed extension of the ECB’s regulatory powers in respect of clearing systems, see the ECB’s Recommendation for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (ECB/2017/18), OJ C 212/14, 1 July 2017. This recommendation seeks to remedy the legal situation after Case T-496/11 (see note 51 above).

⁹¹ There have been three cases between the United Kingdom and the ECB on the latter’s localisation policy, in respect of its *Eurosystem Oversight Policy Framework* for payments and settlements systems (2011), its *Standards for the use of central counterparties in Eurosystem foreign reserve management operations* of the same year, and on the ECB’s Guideline of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (recast) (ECB/2012/27) (2013/47/EU), OJ L 30/1, 30 January 2013. These cases led to a judgment of 4 March 2015 in Case T-496/11, and to Orders of 8 May 2015 in Case T-45/12 and Case T-93/13 to remove them from the register. The Bank of England and the ECB issued a joint press release on 29 March 2015: European Central Bank and Bank of England announce measures to enhance financial stability in relation to centrally cleared markets in the EU; see: <http://www.bankofengland.co.uk/publications/Documents/news/2015/044.pdf>. The ECB presented a Recommendation for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (ECB/2017/18) (2017/C 212/04), OJ C 212/14, 1 July 2017.

⁹² Element (xi) in the list of competences in the scope of the ECB’s tasks or underpinning its supervisory function.

⁹³ See the *Joint ESMA EBA Guidelines on suitability of management body*, consultation paper of 28 October 2016, at: <https://www.esma.europa.eu/regulation-and-policy/internal-governance/joint-esma-and-eba-guidelines-on-the-assessment-of-the-suitability-of-members-of-the-management-body/-/regulatory-activity/consultation-paper>.

practice⁹⁴. Suppose, a supervised entity has engaged in fraudulent or misleading selling practices in respect of its own services⁹⁵ – this interests the prudential supervisor who may insist on governance changes and provisions for resulting claims and fines. Also, the ECB may impose sanctions for infringement of supervisory standards which additionally apply as conduct of business rules and are sanctioned by the relevant national market oversight agency, which may give rise to *ne bis in idem* questions. Apart from appropriate channels of communications which are necessary even if only for these two examples, there is a clear interest on the part of the ECB in exemplary behaviour by the supervised entity in this other field of supervisory concern. These concerns come close to another area of supervision excluded from the ECB's concerns: consumer protection.

Finally, supervision with respect to *AML/CTF*. It is clear that the ECB is not a 'competent authority' in the sense of the anti-money laundering directive currently applicable (AMLD4)⁹⁶. The SSM Regulation merely prescribes 'full cooperation' with the relevant national authorities⁹⁷. Yet, its assessment of the suitability of shareholders of significant banks needs to include the risk of money laundering⁹⁸. Thus, the area of *AML/CTF* is one for the ECB to closely watch, and to include in its assessment of the suitability of shareholders and board members⁹⁹. Again, one may expect this shared interest between the national competent

⁹⁴ ECB Guide to fit and proper assessments, May 2017, at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705.en.pdf.

⁹⁵ Two recent examples may be given. Outside the Euro Area, the mis-selling of payment protection insurance (PPI) in the United Kingdom which the Financial Services Authority (FSA) acted against; see: http://www.fsa.gov.uk/consumerinformation/product_news/insurance/payment_protection_insurance.

Inside the Euro Area, the selling of mortgages with floor clauses, considered contrary to EU law by the European Court. See Judgment of 21 December 2016 in Joined Cases C-154/15 (*Francisco Gutiérrez Naranjo v Cajasur Banco SAU*), C-307/15 (*Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA*) and C-308/15 (*Banco Popular Español SA v Emilio Irlés López and Teresa Torres Andreu*); ECLI:EU:C:2016:980. The accompanying press release 144/16 (*Spanish case-law placing a temporal limitation on the effects of the invalidity of 'floor clauses' included in mortgage loan contracts in Spain is incompatible with EU law*) is available here: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160144en.pdf>.

⁹⁶ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141/73, 5 June 2015. Note that an amendment is in the course of the legislative process: *AML5*: see: [http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-revision-of-the-anti-money-laundering-directive-\(aml\)](http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-revision-of-the-anti-money-laundering-directive-(aml)).

⁹⁷ Recital 29 of the preamble to the SSM Regulation: "The ECB should cooperate, as appropriate, fully with the national authorities which are competent to ensure a high level of consumer protection and the fight against money laundering."

⁹⁸ Article 23(1) (e) CRD IV requires suitability also on the basis of "whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive [(EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing] is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof."

⁹⁹ For the obvious reason that involvement in money laundering or terrorist financing affects the 'good repute' required of board members (Article 91(1) CRD IV), which is an authorisation requirement (Article 13(1) CRD IV). See, specifically, paragraph 70 of the draft Guidelines on fit and proper of EBA and ESMA.

authorities and the ECB to make this issue one of common concern as, indeed, the law prescribes, and of overlapping powers.

5. LOLR and gold holdings: two issues of divergence between law and practice?

Turning our attention back to the other side of the Chinese Wall, the question of competences and their delineation plays out in the monetary policy sphere, as well. With the Treaty injunction of a decentralised implementation¹⁰⁰ of centralised decision-making¹⁰¹, the boundaries between centre and periphery are not always clear. Again, a special monograph could be devoted on this. In this paper, I highlight two elements: the powers over gold holdings and the competence to provide lender of last resort assistance to banks in need of liquidity.

Gold and foreign reserve assets

During the financial crisis, gold on central banks' balance sheets drew attention, as is usual in times of budgetary needs. The independence of the central banks guarantees that these assets cannot be impounded by the government of the day for budgetary outlays. But could gold be 'used' otherwise, e.g. as collateral for State lending? Use of a 'nation's' gold holdings became an issue of interest. The inverted commas in the previous sentence relate to the ownership and the holding and management of NCBs' gold. This is the focus of investigation here: the precious metal's qualification as an asset of national or Union competence. Gold is an official foreign reserve asset. In so far as gold has not been transferred to the ECB in accordance with Article 30 ESCB Statute, gold held by the NCBs forms part of the official foreign reserves of the Member States. The Treaty provides that these reserves are held and managed by the Eurosystem¹⁰². "The" official foreign reserves of the Member States have been entrusted to the Eurosystem for "holding and management". The Treaty does not envisage holding of gold or other official foreign reserves by others than the central banks, with the exception of "foreign exchange working balances" allowed to national governments¹⁰³. These 'working balances' are subject to ECB approval of transactions beyond a certain threshold in order to ensure consistency with the Union monetary and foreign

¹⁰⁰ Article 12.1, third subparagraph, ESCB Statute provides: "To the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB."

¹⁰¹ Article 8 (*General principle*) ESCB Statute: "The ESCB shall be governed by the decision-making bodies of the ECB." See, also, Article 14.3 ESCB Statute: "The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it." Finally, note the separate access to the CJEU for the ECB in case of non-compliance of an NCB with the Treaty or the ESCB Statute (Article 271(d) TFEU; Article 35.6 ESCB Statute), with the ECB in the role of guardian of the Treaty that normally the Commission assumes (Article 258 TFEU) but that other Member States may also take up (Article 259 TFEU). Outside of the Treaty framework, see the option for a Contracting Party to the Fiscal Compact Treaty (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) to bring compliance before the CJEU (Article 8).

¹⁰² Article 127(2), third indent, TFEU; Article 3.1, third indent, ESCB Statute: "(...) the basic tasks to be carried out through the ESCB shall be: (...) to hold and manage the official foreign reserves of the Member States (...)"

¹⁰³ Article 127(3) TFEU; Article 3.2 ESCB Statute.

exchange policies¹⁰⁴. (The mutual undertaking by central banks on their gold sales policy is beyond our interest here¹⁰⁵.)

The terms used by the TFEU and the ESCB Statute (“to hold and manage”) suggest the most complete rights in respect of the official foreign reserves of the Member States. Whether these rights extend to ‘naked ownership’ is unclear and has been left unanswered in the sole judicial decision concerning the interpretation of the terms “to hold and manage the official foreign reserves of [a Member State]” by a national court that I am aware of. The Court in this case did confirm the status of such reserves as having a public interest function¹⁰⁶.

There are indications that gold is considered a national reserve asset with the Eurosystem’s role underplayed or even going unmentioned. When rebutting criticism by the German Public Auditor, the Bundesbank insisted¹⁰⁷ that it “holds and manages the national foreign reserves of the Federal Republic of Germany with the greatest of care”. When publishing details of the gold it holds in 2015, the German central bank again failed to mention that these reserves are managed and held by the Eurosystem and thus are to be seen in the Euro Area context, when it added that “Germany [is] the second largest holder of gold in the world”¹⁰⁸.

ANFA

Similarly, in an internal agreement¹⁰⁹ of the Eurosystem central banks, made public in February 2016, the eighth recital of its preamble and the accompanying explanation on the ECB’s website make clear that “gold or foreign currency reserves” are apparently considered assets that NCBs hold for their own, non-Eurosystem purposes: “the NCBs currently hold assets not related to monetary policy and foreign exchange rate policy, such as: gold or foreign

¹⁰⁴ Article 31.2 ESCB Statute provides that foreign reserve operations and national governments’ working balances in foreign exchange above a certain limit are subject to ECB approval to ensure consistency with the Union monetary and foreign exchange policies. See Guideline of the ECB of 23 October 2003 for participating Member States’ transactions with their foreign exchange working balances pursuant to Article 31.3 of the Statute of the European System of Central Banks and of the ECB (ECB/2003/12), OJ L 283/81, 31 October 2003.

¹⁰⁵ *ECB and other central banks announce the fourth Central Bank Gold Agreement*, press release of the ECB, 19 May 2014, at: <https://www.ecb.europa.eu/press/pr/date/2014/html/pr140519.en.html>. See, also: https://www.snb.ch/en/mmr/reference/pre_20140519_1/source/pre_20140519_1.en.pdf.

¹⁰⁶ Belgian Constitutional Court (previously called: Court of Arbitration), Decision 160/2003 of 10 December 2003 in Case No. 2577, French text of the decision. See: <http://www.const-court.be/> (accessed on 16 September 2017).

¹⁰⁷ *Statement by the Deutsche Bundesbank on the accounting treatment of the gold reserves*, 22 October 2012, at: https://www.bundesbank.de/Redaktion/EN/Pressemitteilungen/BBK/2012/2012_10_22_gold.html.

¹⁰⁸ *Bundesbank publishes gold bar list*, 7 October 2015, at: https://www.bundesbank.de/Redaktion/EN/Topics/2015/2015_10_07_gold.html: “The Bundesbank currently holds around 3,384 tonnes of gold. At the end of 2014, these gold holdings were worth approximately €107 billion. This makes Germany the second largest holder of gold in the world after the United States. These holdings account for two-thirds of Germany’s foreign reserves. The Bundesbank holds and manages the country’s gold, which it keeps in storage with four custodians worldwide, as part of these reserve assets.”

¹⁰⁹ Notice that this agreement is governed by German law: Article 8(1).

currency reserves”.¹¹⁰ The Agreement on Net Financial Assets (ANFA)¹¹¹ regulates the oversight by the ECB of net financial assets held by NCBs, with a view to ensuring a sufficient collective liquidity deficit for the banking sector vis-à-vis the Eurosystem. Such a liquidity deficit sustains the effectiveness of monetary policy as the banks need to rely on borrowing from the Eurosystem to manage their liquidity needs. Gold and foreign reserves are clearly indicated as ‘NFA’ items on the Eurosystem’s balance sheet and indicated as “financial assets not relating to monetary policy” and “national, non-monetary policy tasks”. With respect to gold and foreign reserve assets, this seems in clear contradiction with the Treaty and Statute which mandate holding these as a *basic* task of the Eurosystem, not as a national task in the sense of Article 14.4 ESCB Statute which the ANFA explainer invokes as a principle underlying NCBs’ preserved functions which predate monetary union. I consider this intriguing. While I fully understand the sensitivity of these issues, the approach followed by the ANFA seems to have a shallow legal basis and to directly contradict the Treaty authors’ plain wording and intentions, even when the same eighth recital pays lip service to the status of official foreign reserves and the application of Articles 30.4 (further calls of foreign reserve assets by the ECB) and 31 (management of foreign reserve assets by NCBs) of the ESCB Statute. There is also a contradiction with the weekly statement¹¹² of the Eurosystem, published in accordance with Article 15.2 ESCB Statute, which correctly does include gold and foreign reserves. Also, the consolidated balance sheet of the Eurosystem that the Executive Board needs to draw up for analytical and operational purposes¹¹³ “compris[es] those assets and liabilities of the national central banks that fall within the ESCB”¹¹⁴, wording that contradicts ANFA.

Without going deeper into this, I submit that the status of gold and foreign reserves is another area where European competences and national sensitivities collide and competences seem to shift, albeit in the reverse direction of what can be noticed on the other side of the Chinese wall. My hypothesis would be that further integration will reverse the emphasis on national prerogatives and restrict the room for Article 14.4, which is erroneously invoked thus far. This brings me to another instance of erroneous interpretation of Article 14.4.

Lender of Last Resort (LOLR) assistance / Emergency Liquidity Assistance (ELA)

In what I qualified elsewhere as “a remarkable act of auto-limitation”, the ECB qualified ELA as a “function other than those specified [in the ESCB Statute]” that NCBs perform. Such ‘national tasks’ may continue to be performed unless the Governing Council, by a two-thirds

¹¹⁰ *What is ANFA?*, Q&As on the ECB’s website, at: https://www.ecb.europa.eu/explainers/tell-me-more/html/anfa_qa.en.html.

¹¹¹ Q&As on the ECB’s website: “ANFA limits the amount of NFA that national central banks can hold. This is necessary to ensure that the Governing Council of the ECB is in full control of the size of the Eurosystem’s balance sheet, thus enabling the effective implementation of monetary policy.”

¹¹² See: <https://www.ecb.europa.eu/press/pr/wfs/2017/html/ecb.fs170912.en.html>.

¹¹³ Article 26.3 ESCB Statute.

¹¹⁴ Note that the ESCB Statute uses the abbreviation “ESCB” to denote both the Eurosystem and the entire ESCB.

majority, finds that they “interfere with the objectives and tasks of the ESCB”¹¹⁵. Such remaining ‘national tasks’ are for the account of the NCB which undertakes them.

This allocation of responsibilities has been applied from the outset, that is since 1999. It was only explained¹¹⁶ in 2007 and clarified in 2013¹¹⁷. In its 2007 publication, the ECB highlighted that ELA¹¹⁸ constituted “exceptional and temporary liquidity provision”, which should respect the prohibition of monetary financing. Emphasising the very exceptional nature of ELA, the ECB declared that a “private sector solution is preferable whenever possible”¹¹⁹. It further elaborated that “the provision of ELA is within the discretion of the national central bank, which will consider the relevant factors that may justify the access to this lending of last resort”.

After the 2013 clarification came, as recently as 17 May 2017, the publication of the ELA Agreement¹²⁰. It is not clear whether this is the same ELA Agreement mentioned in the ANFA¹²¹: there, reference is made to a 2014 agreement with subsequent amendments which, to my knowledge, has not been published. This paper is not the place for an extensive discussion of ELA; the paper by Napoleon Xanthoulis does that¹²². Suffice it here to state, in the context of decentralisation and exclusive competences that I consider, and have considered since my initial contributions¹²³, that the ECB is competent to provide LOLR assistance itself and that the auto-limitation of qualifying ELA a ‘national competence’ amounts to an “erroneous interpretation” of the law¹²⁴. This “incorrect reading of the legal

¹¹⁵ Article 14.4 ESCB Statute.

¹¹⁶ In an article in the *Monthly Bulletin* of February 2007 which explained the crisis management arrangements in the EU that were to fail so miserably just months later: *The EU arrangements for financial crisis management*, notably pages 80-81. See: <https://www.ecb.europa.eu/pub/pdf/mobu/mb200707en.pdf>.

¹¹⁷ *ELA Procedures*, 17 October 2013, at:

https://www.ecb.europa.eu/pub/pdf/other/201402_elaprocedures.en.pdf?10cc0e926699a1984161dc21722ca841.

¹¹⁸ Defined as: “providing liquidity support in exceptional circumstances to a temporarily illiquid credit institution which cannot obtain liquidity through either the market or participation in monetary policy operations”

¹¹⁹ “Central bank liquidity support should not be seen as a primary means of managing financial crises, since it is limited to the temporary provision of liquidity in very exceptional circumstances. Hence if, despite preventive arrangements, a crisis at a financial institution occurs, a private sector solution is preferable whenever possible.”

¹²⁰ Agreement on emergency liquidity assistance, 17 May 2017, at:

https://www.ecb.europa.eu/pub/pdf/other/Agreement_on_emergency_liquidity_assistance_20170517.en.pdf.

¹²¹ Article 1(1)(d) of which defines ‘ELA Agreement’ as the Agreement approved by the Governing Council on 19 February 2014, as subsequently amended.

¹²² Napoleon Xanthoulis, *ECB as lender of last resort, The evolution of ELA and the quest for a new function in the SSM era: legal basis, institutional cooperation, risk allocation and judicial review*, paper for the Florence Conference.

¹²³ Seen my thesis, *The European Central Bank – Institutional Aspects*, 1997, p. 269; and *The role of the ESCB in banking supervision* in *Legal Aspects of the European System of Central Banks Liber Amicorum Paolo Zamboni Garavelli*, ECB, 2005, pp. 199-212, where I wrote: “I consider providing lender-of-last-resort assistance a core central banking function that also pertains directly to its monetary functions, as it may both concern general liquidity supervision to the financial system and assistance to individual financial institutions experiencing liquidity problems.

¹²⁴ See my *European supervisors in the credit crisis: issues of competence and competition*, chapter 15 in Mario Giovanoli and Diego Devos (eds.), *International Monetary and Financial Law in the light of the Global Crisis*, 2010, pp. 305-327.

provisions” should be remedied, with direct ECB responsibility for ELA acknowledged, initially at least for the significant banks under its direct supervision.

6. Liability regime

An area where the regimes applying to the various participants in the SSM diverge is liability. As per the counsel of the Basle Committee on Banking Supervision (BCBS)¹²⁵ and the IMF¹²⁶, many jurisdictions have excluded supervisory liability¹²⁷ or, at least limited it to matters of intent or gross negligence. Examples¹²⁸ are Belgium¹²⁹, the Netherlands¹³⁰, Luxembourg¹³¹, and – outside the Benelux – Germany¹³², Ireland¹³³ and, beyond the Euro Area, the United Kingdom¹³⁴. An overview of this selection of supervisory liability provisions is given in the Table 4 [p37]. The limitation of liability in Europe’s financial centre is particularly interesting for two reasons. It concerns the largest financial sector, by far, in the Union, at least until the day (if it comes) that the United Kingdom leaves the EU, and it has a specific exception, not only for acts in bad faith but, also, for human rights infringements which – in view of the current UK Government’s aversion from European human rights protection is a curious remnant of different dispositions that were only recently prevalent across the Channel.

¹²⁵ See Principle 2 of the *Basle Core Principles of Effective Banking Supervision* (BCPs), September 2012, at: <http://www.bis.org/publ/bcbs230.pdf>. It includes the following: “The legal framework for banking supervision includes legal protection for the supervisor.” This is expanded on further on in the BCPs: “Laws provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith. The supervisor and its staff are adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith.”

¹²⁶ The IMF’s advice may have been inspired by concerns for dominant and resourceful interests in emerging markets acting against independent supervision through the threat of, or actual, litigation.

¹²⁷ See: Robert J. Dijkstra, *Essays on financial supervisory liability*, PhD thesis (2015), at: https://pure.uvt.nl/portal/files/13415553/Dijkstra_Essays_13_10_2015_emb_tot_13_10_2016.pdf and, by the same author: *Accountability of financial supervisory agencies: An incentive approach*, *Journal of Banking Regulation* Vol. 11, 2, 115–128. On accountability of financial supervisory authorities, see: Eva Hüpkens, Marc Quintyn, and Michael W. Taylor, *The Accountability of Financial Sector Supervisors: Principles and Practice*, IMF WP/05/51, at: <https://www.imf.org/external/pubs/ft/wp/2005/wp0551.pdf>.

¹²⁸ This enumeration is not to be considered exhaustive.

¹²⁹ Section 68 of the *Loi relative à la surveillance du secteur financier et aux services financiers* (Act on the supervision of the financial sector and of financial services) See: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2002080264&table_name=loi. In the context of the SSM, the National Bank of Belgium, not the FSMA, is NCA. See the *Loi fixant le statut organique de la Banque Nationale de Belgique* (Act on the Statutes of the National Bank of Belgium), section 12 bis. See: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1998022247&table_name=wet.

¹³⁰ Section 1:25d (1) of the *Wet op het financieel toezicht* (Wft; Financial Supervision Act). See: <http://maxius.nl/wet-op-het-financieel-toezicht/artikel1:25d>.

¹³¹ Section 20 of the *Loi du 23 décembre 1998 portant création d’une commission de surveillance du secteur financier* (Act of 23 December 1998 on the establishment of a commission for the supervision of the financial sector), consolidated version, at the website of the *Commission de Surveillance du Secteur Financier* (CSSF, the Commission for the Supervision of the Financial Sector): http://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_231298_cssf_upd170517.pdf.

¹³² Section of 4(4) the *Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht* (*Finanzdienstleistungsaufsichtsgesetz – FinDAG*, or Act on the Federal Financial Supervisory Authority, or BaFin). See: <https://www.gesetze-im-internet.de/findag/BJNR131010002.html>.

¹³³ The Central Bank Act, 1997 section 25A. See: <http://www.irishstatutebook.ie/eli/1997/act/8/section/69/enacted/en/html>.

¹³⁴ Schedule I, Article 19, Financial Services and Markets Act 2000. See: <https://www.legislation.gov.uk/ukpga/2000/8/schedule/1>.

The scope of this exclusion (whether substantive or procedural) and its continuation after Brexit is far beyond this paper¹³⁵.

A rationale for this exclusion of liability except in gross cases of misconduct on the part of the authority is to ensure that supervisors are not inclined to take private interests unduly into account: they should act in the general interest and be free to decide in situations of supervisory dilemma. Such situations arise when a bank is in difficulty and early intervention may harm the shareholder whereas late intervention may also affect the depositors and, nowadays¹³⁶, unsecured¹³⁷ creditors.

The ECB's liability regime is one of full liability pursuant to Article 340 TFEU and, thus, contradicts these national regimes. The ECB itself had argued for a limitation of liability: "The ECB considers that the liability of the ECB, the national competent authorities and their respective officials should only be incurred in cases of intentional misconduct or gross negligence."¹³⁸ Even though civil liability under Article 340 TFEU is hard to get, with three elements to prove by the claimant: "namely the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of"¹³⁹, and the burden to prove "a sufficiently serious breach of a rule of law intended to confer rights on individuals"¹⁴⁰. Therefore, the fear of liability should not unduly hinder the ECB's supervision.

And, yet, liability *is* an issue when discussing supervisory action. The 'supervisor's dilemma' arises: to take incisive action early on may harm the shareholders unduly (and the other 'bail-inable' interests), whereas waiting too long to see if the situation can be remedied may lead to losses for uncovered¹⁴¹ depositors. Therefore, on my wish-list for the EU legislator would be a clarification and precision of the liability regime within the SSM – undoubtedly a matter of complexity and endurance in view of the disparity in statutory provisions.¹⁴² In the

¹³⁵ See Charles Proctor, *Regulatory Liability for Bank Failures - The Peter Paul Case*, *Euredia* 2005 (1).

¹³⁶ In these days of 'bail-in', meant to make private investors 'bleed' before the public purse is involved, if at all.

¹³⁷ Also in the sense of not covered by deposit insurance.

¹³⁸ See paragraph 1.7 of the Opinion of the European Central Bank of 27 November 2012 on a proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (CON/2012/96) (2013/C 30/05), C 30/6, 1 February 2013, available at: https://www.ecb.europa.eu/ecb/legal/pdf/c_03020130201en00060011.pdf.

¹³⁹ Paragraph 64 of the *Ledra* judgment, with references to previous case law.

¹⁴⁰ Paragraph 65 of the *Ledra* judgment, with references to previous case law.

¹⁴¹ That is not covered by deposit insurance.

¹⁴² Two arguments put forward by the ECB in its 2012 Opinion on the draft SSM Regulation merit to be cited: "clarifying the liability regime within a SSM operating in a multi-jurisdictional environment would contribute to (...) (ii) preserving the integrity of the SSM's capacity to act, since a too stringent and diversified liability regime within the SSM's complex structure could weaken a SSM supervisory authority's resolve to take the necessary action; and (iii) limiting speculative legal proceedings based on alleged liability for an action or omission of an SSM authority."

meantime, I would not go as far as one author¹⁴³, who has questioned whether the liability regime for the ECB would pass the test of an IMF FSAP¹⁴⁴ in respect of BCP No. 2.

¹⁴³ Raffaele D'Ambrosio (2016) *The Single Supervisory Mechanism (SSM): Selected Institutional Aspects and Liability Issues* in: Mads Andenas, Gudula Deipenbrock (eds), *Regulating and Supervising European Financial Markets*, pp 299-336.

¹⁴⁴ The Financial Sector Assessment Program (FSAP) is an in-depth analysis of each IMF member's financial sector. Such analysis usually includes an assessment of compliance with the *Basle Core Principles of Effective Banking Supervision*. See: <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program>.

7. Concluding remarks

This paper has indicated the shifting lines of competence between the federal and State level in EU central banking. Taking the *L-Bank* judgment as a point of departure, the state of affairs on both the ‘monetary policy’ side (in the large sense of the term) and the prudential supervision side of the ECB was explored.

Sharp differences in reviewability between acts of a supervisory nature and other central bank acts and instruments are noticeable, albeit that the ‘juridification’ of monetary policy allows more interpretation and adjudication even on the monetary policy side than often assumed. References for a preliminary ruling provide the occasion for the CJEU to have its say, and the ECB’s foray into economic policy prescriptions during the crisis led to numerous litigation, albeit with limited result for the applicants. The unevenness of access to justice and of ‘bite’ of economic policy stances across Europe is a source of concern. As Commission President Juncker stated in his 2017 State of the Union address: “Europe must be a Union of equality”.¹⁴⁵

Reliance on national law poses different dilemmas: this unique situation calls for legislative remedying in the longer term, and for immediate decisions by the ECB, for which this author suggests bold approaches in acute cases, relying on a composite of the directive in question and the SSM Regulation (Table 2).

The adjacent competences of national and European supervisors¹⁴⁶ have led to ‘clarifications’ by the ECB of the supervisory powers granted under national law which it considers its own, even if they are not explicitly mentioned in Union law. The reasoning that such powers either fall within the scope of the ECB’s tasks under the SSM Regulation or underpin a supervisory function under Union law is considered a valid ground for this extension of powers originally assumed. It is expected that the inventory of these powers leads to alignment of national standards and even to their adoption as specific provisions of Union law by the EU legislator¹⁴⁷.

On three of the explicit exceptions to ECB supervisory powers that the SSM Regulation mentions (in recital 28), the paper argues that their importance to core prudential issues, such as good governance and appropriate risk management, implies the need for particularly close collaboration with national authorities¹⁴⁸, and an extension of the ECB’s interest and competence into these areas (conduct of business, payments systems, AML/CFT).

¹⁴⁵ President Jean-Claude Juncker's State of the Union Address 2017, Brussels, 13 September 2017, at: http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

¹⁴⁶ For further development of European supervisory powers, see: *Reinforcing integrated supervision to strengthen Capital Markets Union and financial integration in a changing environment*, COM(2017) 542 final, Brussels, 20 September 2017, at: http://ec.europa.eu/finance/docs/law/170920-communication-esas_en.pdf.

¹⁴⁷ An approach I would favour.

¹⁴⁸ Also, in the case of sanctioning, to avoid *ne bis in idem* complications. See: Baptist Vleeshouwers and Thomas Verstraeten, *The postman always rings twice... on the application of the ne bis in idem principle in competition law*, E.C.L.R. 2017, 38(7), 305-315.

Turning back to the ‘monetary policy’ side, namely the holdings of gold and foreign reserves, the observance of their legal status seems qualified by practical considerations and national sensitivities. Whereas Treaty and Statute make unequivocally clear that both are held and managed by the Eurosystem as part of one of its “basic” tasks, the practice surrounding these balance sheet items is different. Both national central bank utterances and the ANFA seem to imply that we are *not* in the area of ‘monetary policy’. Similarly, the provision of LOLR assistance has been deemed an Article 14.4 task, i.e. one that NCBs can fulfil within an ECB framework to ensure compatibility with the price stability objective. It is argued that the time is more than ripe for the ECB to exercise itself an inherent element of central banking, namely the provision of ELA, under clear conditions which continue to allow discretion as to the actual granting of such emergency assistance.

Finally, with litigation against the ECB increasing in the context of banking union, the discrepancy in supervisory liability among the SSM actors is striking. As an incomplete inventory of State statutory provisions excluding supervisory liability (Table 4 [p37]) shows, the ECB itself is under quite a different regime, even acknowledging the strict standards for non-contractual liability under the case law of the CJEU in respect of Article 340 TFEU. There is scope for alignment, here, as well.

There is further work to undertake to research issues that this paper has only sketchily been able to discuss. Such research should ideally be undertaken in an interdisciplinary manner. Taking wider perspectives leads to more insights. The ADEMU Project provides for such an interdisciplinary approach; the extent of unresolved issues and their complexity call for a renewal of the research assignment by the Commission after 2018.

Also, in devising solutions for a dynamic and durable EMU, wider perspectives are called for. The European Union is faced with great challenges in a window of opportunity. In September 2017, both President Juncker and President Macron¹⁴⁹ referred to this and made concrete proposals¹⁵⁰. In Emanuel Macron’s speech, the reference to culture was a relief. I strongly believe that the cultural aspect of European integration has been neglected. Going beyond ‘high culture’ and exposure to the Other – which are both important – the cultural dimension includes awareness of the different prisms through which we think, speak and act, based on concepts of our language. Instruction in a common language from a very early age is, therefore, of the essence for better understanding, as is the development of Europe-wide media. In the meantime, consciousness of the context and linguistics of fellow citizens with a different mother tongue, is what we can contribute now.

¹⁴⁹ *Discours du Président de la République, Emmanuel Macron, à la Pnyx, Athènes le jeudi 7 septembre 2017*, at: <http://www.elysee.fr/declarations/article/discours-du-president-de-la-republique-emmanuel-macron-a-la-pnyx-athenes-le-jeudi-7-septembre-2017/>.

¹⁵⁰ See Agnès Bénassy-Quéré, Markus K. Brunnermeier, Lars Feld, Marcel Fratzscher, Philippe Martin, Hélène Rey, Isabel Schnabel, Nicolas Véron, Beatrice Weder Di Mauro, Jeromin Zettelmeyer, Henrik Enderlein, Emmanuel Farhi, Clemens Fuest, Pierre-Olivier Gourinchas and Jean Pisani-Ferry, *A resilient Euro needs Franco-German compromise*, Bruegel Opinion, 28 September 2017, at: <http://bruegel.org/2017/09/a-resilient-euro-needs-franco-german-compromise/>.

When exploring the best options, wide consultations are, indeed, called for, as Emanuel Macron admonishes us¹⁵¹. Yet, mere consultations are not enough. Deep societal change that surrounds us and impacts all call for a deeper understanding, beyond mere reasoning and arguments. As Albert Einstein remarked, “We cannot solve our problems with the same thinking we used when we created them.” So, new thinking, and beyond, is needed. After all, discursive thinking alone – pitting the one against the other, weighing facts and opinions – may not be sufficient to grasp the opportunities ahead and realise an emerging future.

There are methods to foster imagination and reach layers of consciousness normally untouched by the thinking mind. These methods permit researchers to uncover potential and share ideas, always based on rigorous data and shared intelligence. One such approach, developed at Massachusetts Institute of Technology (MIT)¹⁵², is the *U Process*¹⁵³. It has been used among academics and policy makers and provided a powerful tool in major transitions, both in societies¹⁵⁴ and in business development¹⁵⁵. It may help get beyond current or prevalent thinking. The idea behind the *U Process* is that the source from which we operate determines the outcome of our efforts. Getting to know that ‘inner space’ allows options that are there but hitherto remained unseen, to present themselves. I invite researchers and policymakers to dare to make this journey. This requires taking a servant attitude: being present to bring up the best, and to contribute to society.¹⁵⁶

Hoofddorp (NL), 17 September 2017 (revised and updated 31 October 2017).

Table 1

Overview of NCBs (Eurosystem) and NCAs (SSM) (P36)

Table 2

ECB supervisory approach when confronted with deficient national law (P18)

Table 3

List of competences in the scope of the ECB’s tasks or underpinning the ECB’s supervisory function (P20)

Table 4

Selected limitation of liability regimes for prudential supervisors (P37)

¹⁵¹ “(...) in each of the Member States, we organize six months of consultations, democratic conventions that will be an opportunity for our peoples, throughout our countries, to discuss the Europe they want to see.”

¹⁵² See: <http://leadership.mit.edu/author/peter-senge/>.

¹⁵³ C. Otto Scharmer, *Theory U: Leading from the Future as it Emerges*, 2nd edition, 2016; Peter Senge, C. Otto Scharmer, Joe Jaworski, Betty Sue Flowers, *Presence: Human Purpose and the Field of the Future*, 2008.

¹⁵⁴ In Guatemala after the civil war and in South Africa in the transition from apartheid. See: Adam Kahane; *Solving Tough Problems – An Open Way of Talking, Listening and Creating New Realities*, 2007.

¹⁵⁵ Royal Dutch/Shell has used the *U process* and scenario planning for strategic business development.

¹⁵⁶ I refer to my presentation in Florence last year: *Sustainable Economic and Monetary Union in Europe in turbulent times*, ADEMU/PWC Lecture at the European University Institute, Fiesole (FI), 10 October 2016, at: <http://ademu-project.eu/sustainable-economic-and-monetary-union-in-europe-in-turbulent-times/>.

Table 1 Overview of NCBs (Eurosystem) and NCAs (SSM)

<u>Member State</u>	<u>National Central Bank</u>	<u>National Competent Authority (if not the NCB)</u>
1. Belgium	Nationale Bank van België/Banque Nationale de Belgique (NBB/BB)	
2. Cyprus	Central Bank of Cyprus	
3. Germany	Deutsche Bundesbank	Bundesanstalt für Finanzdienstleistungsaufsicht (BaFIN)
4. Greece	Bank of Greece	
5. Spain	Banco de España	
6. Estonia	Eesti Pank	Finantsinspektsioon
7. France	Banque de France	Autorité de contrôle prudentiel et de résolution (ACPR)
8. Ireland	Central Bank of Ireland	
9. Italy	Banca d'Italia	
10. Latvia	Latvijas Banka	Finanšu un kapitāla tirgus komisija
11. Lithuania	Lietuvos bankas	
12. Luxembourg	Banque Centrale de Luxembourg	Commission de Surveillance du Secteur Financier
13. Malta	Central Bank of Malta	Malta Financial Services Authority (MFSA)
14. Austria	Oesterreichische Nationalbank (OeNB)	Finanzmarktaufsicht
15. Netherlands	De Nederlandsche Bank (DNB)	
16. Portugal	Banco de Portugal	
17. Slovakia	Národná banka Slovenska	
18. Slovenia	Banka Slovenije	
19. Finland	Suomen Pankki/Finlands Bank	Finanssivalvonta

Competences and alignment in an emerging future *After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*

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Table 4 - Selected limitation of liability regimes for prudential supervisors

State	Source	Original text	English translation
Belgium	Section 68 <i>Loi relative à la surveillance du secteur financier et aux services financiers // Wet betreffende het toezicht op de financiële sector en de financiële diensten</i>	<i>La FSMA exécute ses missions exclusivement dans l'intérêt général. La FSMA, les membres de ses organes et les membres de son personnel n'encourent aucune responsabilité civile en raison de leurs décisions, actes ou comportements dans l'exercice des missions légales de la FSMA sauf en cas de dol ou de faute lourde. // De FSMA voert haar opdrachten uitsluitend in het algemeen belang uit. De FSMA, de leden van haar organen en haar personeelsleden zijn niet burgerlijk aansprakelijk voor hun beslissingen, handelingen of gedragingen in de uitoefening van de wettelijke opdrachten van de FSMA behalve in geval van bedrog of zware fout.</i>	The FSMA carries out its missions exclusively in the public interest. The FSMA, the members of its bodies and the members of its staff are not liable for any civil liability for their decisions, acts or conduct in the exercise of the FSMA's statutory duties, except in the case of fraud or gross negligence. NB The FSMA is the Financial Services and Markets Authority. Belgian law refers to the FSMA by its English acronym, avoiding language issues between Dutch and French.
	Section 12 bis (3) <i>Wet tot vaststelling van het organiek statuut van de Nationale Bank van België // Loi fixant le statut organique de la Banque Nationale de Belgique.</i>	<i>De Bank oefent haar toezichtopdracht uitsluitend in het algemeen belang uit. De Bank, de leden van haar organen en haar personeelsleden zijn niet burgerlijk aansprakelijk voor hun beslissingen, niet-optreden, handelingen of gedragingen in het kader van de uitoefening van de wettelijke toezichtopdracht van de Bank, behalve in geval van bedrog of zware fout. // La Banque exerce sa mission de contrôle exclusivement dans l'intérêt général. La Banque, les membres de ses organes et les membres de son personnel n'encourent.</i>	The Bank exercises its supervisory function solely in the public interest. The Bank, the members of its bodies and the members of its staff are not liable for any civil liability arising from their decisions, non-interventions, acts or conduct in the exercise of the Bank's statutory supervisory mission, except in case of fraud or gross negligence. NB In the context of the SSM, the National Bank of Belgium, not the FSMA, is NCA.

Original text

<u>State</u>	<u>Source</u>	<u>Original text</u>	<u>English translation</u>
Belgium (cont'd)		<i>aucune responsabilité civile en raison de leurs décisions, non-interventions, actes ou comportements dans l'exercice de la mission légale de contrôle de la Banque, sauf en cas de dol ou de faute lourde.</i>	
	See, also, section 36/44.		
Netherlands	Section 1:25d (1) <i>Wet op het financieel toezicht (Wft)</i>	<i>De Nederlandsche Bank, de leden van haar directie en raad van commissarissen en haar werknemers zijn niet aansprakelijk voor schade veroorzaakt door een handelen of nalaten in de uitoefening van een op grond van een wettelijk voorschrift opgedragen taak of verleende bevoegdheid, tenzij deze schade in belangrijke mate het gevolg is van een opzettelijk onbehoorlijke taakuitoefening of een opzettelijk onbehoorlijke uitoefening van bevoegdheden of in belangrijke mate te wijten is aan grove schuld."</i>	The Netherlands Central Bank, its executive and non-executive supervisory board) board members and its employees are not liable for damage caused by any act or omission in the exercise of a task conferred on, or a mandate assigned, by statute, unless this damage results, to a significant degree, from a deliberately improper exercise of duties or a deliberately improper exercise of mandate or is, to a large extent, due to gross negligence.

State	Source	Original text	English translation
Luxembourg	Section 20 <i>Loi du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier</i>	<i>(1) La surveillance exercée par la CSSF n'a pas pour objet de garantir les intérêts individuels des entreprises ou des professionnels surveillés ou de leurs clients ou de tiers, mais elle se fait exclusivement dans l'intérêt public. (2) Pour que la responsabilité civile de la CSSF pour des dommages individuels subis par des entreprises ou des professionnels surveillés, par leurs clients ou par des tiers puisse être engagée, il doit être prouvé que le dommage a été causé par une négligence grave dans le choix et l'application des moyens mis en œuvre pour l'accomplissement de la mission de service public de la CSSF.</i>	(1) Supervision by the CSSF is not intended to guarantee the individual interests of companies or supervised professionals or of their clients or third parties, but is carried out exclusively in the public interest. (2) In order for the civil liability of the CSSF to be incurred for individual damages suffered by companies or supervised professionals, by their customers or by third parties, it must be proven that the damage was caused by gross negligence in the choice and the application of the means used for the fulfilment of the public service mission of the CSSF.
Germany	Section of 4(4) <i>Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht (Finanzdienstleistungsaufsichtsgesetz – FinDAG)</i>	<i>Die Bundesanstalt nimmt ihre Aufgaben und Befugnisse nur im öffentlichen Interesse wahr.</i>	The Federal Authority exercises its functions and powers exclusively in the public interest. NB The Authority referred to is the Federal Financial Supervisory Authority, or BaFin.
Ireland	The Central Bank Act, 1997	(1) The Bank or any employee of the Bank or any member of its Board or any authorised person or authorised officer appointed by the Bank for the performance of its statutory functions shall not be liable for damages for anything done or omitted in the discharge or purported discharge of any of its statutory functions under this Act unless it is shown that the act or omission was in bad faith.	

<u>State</u>	<u>Source</u>	<u>Original text</u>	<u>English translation</u>
United Kingdom	Schedule I, Article 19 Financial Services and Markets Act 2000	<p><i>Exemption from liability in damages</i></p> <p>1) Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.</p> <p>(2) Neither the investigator appointed under paragraph 7 nor a person appointed to conduct an investigation on his behalf under paragraph 8(8) is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of his functions in relation to the investigation of a complaint.</p> <p>(3) Neither sub-paragraph (1) nor sub-paragraph (2) applies—</p> <p>(a) if the act or omission is shown to have been in bad faith; or</p> <p>(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998.</p>	NB The Authority referred to is the Prudential Regulatory Authority (PRA), a part of the Bank of England.