

Independence and accountability of the ECB as a supervisor

Analysis of the SSM Regulation and of the Interinstitutional agreement
between the European Parliament and the ECB

Jean-Victor Louis

Athens, 9 October 2013

Introduction

- The necessary independence of supervisory authorities
- Independence and accountability as the two faces of the same coin
- The modulation of the balance between the two concepts in consideration of the function of the authority concerned
- The strong independence of the ECB as a monetary authority and the consecration in primary (constitutional) law of this principle (articles 130 TFEU and 7 ESCB Statute) and its limited accountability.
- The nuances in the affirmation of the independence of the ECB as a supervisor and the high degree of accountability.

Structure of the speech

- First, we will look at the specific provisions shaping the independence of the ECB as a supervisor
- Second, we will dedicate more comments to the accountability of the ECB as a supervisor
- Before we have to quickly review some elements of the basic features of the SSM

The concept of SSM

- The SSM includes both the ECB and the national competent authorities (NCAs) of the participating Member States.
- The SSM is dominated by two basic obligations: to cooperate in good faith and to exchange informations. Two elementary obligations which introduce a new qualitative element in the relations of NCAs, traditionally reluctant to cooperate and exchange informations about their national credit institutions.
- All 6000 credit institutions of participating Member States are submitted to the SSM. « Significant » banks, i.e. systemic ones are submitted to the direct control of the ECB.

Direct supervision of significant credit institutions financial holding companies and mixed financial holding companies

- « Significant credit institutions » have to answer to one of the following criterias:
 - a. the value of an institution's assets exceeds 30 billions euros
 - b. the value of the institution's assets exceeds 5 billions euros and 20% of the GDP of the country where there are located
 - c. an institution considered of significant relevance with regard to domestic economy by the NCA which has made a notification to the ECB
 - d. an institution with important cross-border activities (subsidiaries and cross-border assets) upon a decision taken on its own initiative by the ECB
 - e. the institution is among the three most significant credit institutions, in the country.
- The number of credit institutions under the direct supervision of the ECB is estimated to be from 130 to 150 (80% of the bank assets in the EU).

Direct supervision by the ECB (cont.)

- A bank that has requested or received direct assistance by the ESM « shall not be considered less significant »;
- The ECB may, at any moment, if needed, take in its hands the supervision of non significant entities.
- Conferring a bank license and withdrawing it will be the task of the ECB for all SSM banks.
- The European and national levels of supervision will be integrated. Joint supervisory teams (JST) will include staff from the ECB and from NCAs. There will be one team for each significant bank directly supervised by the ECB, operating under the management of a coordinator working for the ECB. A great progress on the colleges of supervisors.

Building a common culture

- Common supervisory culture is not only built by new regulations. It is also a question of joint management.
- Most interesting is, in this regard, article 31 of the SSM regulation on staff and staff exchange. This article provides for appropriate arrangements between the ECB and NCAs on « appropriate exchange and secondment of staff with and among NCAs », and also the participation of staff from other participating countries to national supervisory teams. This latter possibility may be required by the ECB.
- If supervisory teams would have permanent staff from other Member States, this would constitute a significant step in the extension of free movement of workers in the EU, including those of the public administration which are in principle excluded by article 45 TFEU.

The principle of separation between monetary policy and supervision

- The separation of monetary policy and banking supervision is a central principle of the SSM (article 25 SSM Regulation).
- The aim of separation is avoiding conflicts of interest and reputational risk. It is conceived in the Regulation as an absolute principle. It is necessarily a relative one due, in particular, to the powers of the same organ: the Council of Governors competent for monetary policy and supervision.
- Various provisions aim at realising the separation but its rationale is contested by a part of the literature.

The complex structure for supervision: why?

- Participating Member States whose currency is not the euro may participate to the SSM through a « close cooperation » regime. Under the ESCB statute they could not have nationals participating in the EB or the Governing Council. Hence the necessity to create a new body: the Supervisory Board
- The SB is composed by elected Chair and vice-chair (this latter from the EB), four representatives of the ECB, not directly in charge of monetary policy and *representatives* of NCAs, which will be in most cases, the NCBs . The SB, which has also a smaller scrutiny committee, adopts draft decisions which are deemed to be adopted unless the GC objects within a (short) period of ten days

The structure (cont.)

- A *Mediation panel* is in charge of resolving differences of views expressed by the NCAs of participating Member States concerned regarding an objection of the GC to a draft decision adopted by the SB. The MP will include one member per participating Member States, chosen by the MS among the members of the GC and the SB, and deciding by simple majority, each member having a vote. The rationale of the setting up of the MP is the separation of monetary policy and supervision.
- The GC has the last word on draft decisions of the SB and on the conclusions of an *Administrative board of review* .

The administrative board of review (ABR) and the due process of law

- The ABR is composed by five individuals of high repute and competence and will carry out an internal administrative review of the decisions taken by the ECB, at the request of an addressee or of somebody having a direct and individual concern in a decision. The ABR will issue an opinion that the SB will take into account in order to present a new draft decision, which will follow or not the opinion of the ABR. Its intervention is without prejudice of an appeal to the Court of justice
- The acts accomplished under the Regulation are submitted to the Charter of fundamental rights of the EU. Article 22 of the Regulation reproduces the content of article 41 of the Charter, on good administration.

Part I The independence of the ECB as a supervisor

- *Institutional independence* is provided under article 19 SSM Regulation, which is globally similar to article 130 TFEU (7 ESCB Statute). *Grosso modo*, both provisions aim at the prohibition of receiving or seeking instructions, and the reciprocal obligations of other institutions or bodies.
- *Functional or operational independence* implies the conferral of objectives (which are stated in article 1 and point 65 of the Preamble) and of the powers (articles 9 and foll.) necessary to accomplish the (specific: see art.127.6 TFEU) tasks (articles 4 and foll.) assigned to it in order to achieve these objectives. The tasks not conferred to the ECB remain under the responsibility of NCAs (see a list in point 28 of the Preamble).

Independence of the ECB as a supervisor (cont.)

- *Personal independence* or security of tenure. Article 26.4 provides that if the Chair of the SB no longer fulfills the conditions required for the performance of his duties or has been guilty of serious misconduct, the Council may, following a proposal of the ECB, which has been approved by the EP, adopt an implementing decision to remove the Chair from office. Under the ESCB statute, only the Court may remove a member of the EB. Special rules apply to the vice-chair, in his quality of member of the EB of the ECB.
- *Financial independence* of the ECB (cf. article 282.3 TFEU on the independence of the ECB in the management of its finances) as a supervisor is respected but article 29 SSM regulation provides for a closer scrutiny.

Title II. The accountability of the ECB as a supervisor

- The delicate balance between independence and accountability
- Ex-ante accountability: the veto right of the EP on the appointment of the Chair and Vice-chair of the SB
- The sources of the accountability of the SB: articles 20 and 21 SSM Regulation and the *Interinstitutional Agreement (IA) on the cooperation on procedures related to the SSM*, of 12 September 2013, as an instrument of sincere cooperation among the ECB, in the exercise of its supervisory tasks, and the EP. No contagion on the exercise of monetary policy. No legal basis in the Treaty mentioned for the IA, but the Regulation provides for the conclusion of « detailed » arrangements on confidentiality (art. 20.8) and of « appropriate » arrangements concerning mainly reporting (art.20.9) between the ECB and the EP.

Accountability (cont.)

- Is the IA of a binding nature? We submit the view that a serious infringement, a non cooperative attitude, could be considered as a breach of the sincere cooperation required of the institutions by article 13 TEU. Of course such a conclusion presumes that the IA is compatible with EU law (the treaties and the SSM regulation, in particular)
- Article 20 of the Regulation provides for the accountability of the ECB as a supervisor to the EP and the Council. These institutions plus the Commission and the Euro Group will also be the addressees of the annual report that will be presented before the EP and the Euro Group by the Chair of the SB.

Accountability (cont.)

- *Ordinary hearings* with the EP's competent committee shall be organised following an agreed calendar
- The Chair may be invited to *additional ad hoc exchange of views* with the EP's competent committees.
- The Chair may be invited to *Special confidential meetings* with the Chair of the committee (cf. the precedents in Foreign and Security policy and for the ESRB).
- The Chair shall present the annual report in public to the enlarged Euro Group.
- The Chair may be heard, at the request of the EG, by the enlarged Euro group on the execution of its supervisory tasks
- The ECB shall reply orally or by writing to questions put by the EP of the EG.
- The EP may conduct *investigations* which should take the form of temporary committees of enquiry under article 226 TFEU or follow rules presenting the same guarantees for the ECB as such committees.

Accountability of the ECB as a supervisor (cont.)

- Both the Regulation and the IA include provisions on professional secrecy: article 27 Regulation referring to article 37 of the ESCB statute and Points L to N of the Preamble of the IA refer to EU legislation on professional secrecy. Article 20.8 of the SSM Regulation mentions the « confidentiality imposed on the ECB as a competent authority under relevant Union law ». Part I.5 of the IA includes provisions on *safeguarding ECB classified information and documents*. More rules seem to be needed. Point N of the IA Preamble provides that the EP should provide for « an adequate framework to follow-up each case of breach of confidentiality by its members or staff ».
- Under *access of the EP to information*, under Point 4 of Part I, the IA commits the ECB to provide the EP's competent committee with « a comprehensive and meaningful record of the proceedings of the SB that enables an understanding of the discussions, including an annotated list of decisions ». This has to be put in relation with the recent and parallel move of the ECB to communicate more informations in a way still to be determined on the deliberations of the GC.

Accountability of the ECB as a supervisor (cont.)

- The EP's competent committee will also be informed on the reasons of the objections of the GC against a draft decision of the SB, « in line with the confidentiality requirements referred to in [the]Agreement. » In the same vein, one should mention the *ex-post disclosure of non-confidential information* in the event of a winding up of a credit institution, « once any restrictions on the provision of relevant information resulting from confidentiality requirements have ceased to apply ».
- Three important « varia » should also be mentioned: the very detailed provisions of the IA (Part II) on the selection procedure of the SB Chair, ensuring the transparency of the process; the provisions (on content and application) about the *code of conduct* that the ECB may adopt under the Regulation and the most remarkable early information procedure (IA, Part V) on draft ECB Regulations which are submitted to public consultation.

Accountability of the ECB as a supervisor (cont.)

- Article 21 SSM regulation provides also for relations between the ECB as a supervisor and national parliaments (NP). The annual reports shall be forwarded to them simultaneously to the transmission to the EU institutions. NP may submit observations to the ECB, ask written questions to it, invite the Chair or a member of the SB to participate to an exchange of views in relation with the supervision of a credit institution in that Member State together with a representative of the NCA concerned. This would be without prejudice to the accountability of the NCAs to their parliament. The ECB is not obliged to accept the dialogue but has a political interest to do it which is more about public relations than accountability.

An appreciation

- Thanks to its pugnacity the EP has obtained both in the Regulation and in the IA, important results on the field of accountability. It is very clear that what has been achieved in the field of democratic accountability is limited to the carrying out of the tasks of the ECB under the Regulation. The Preamble of the IA records in point J that proceedings of the meetings of the GC shall be confidential (article 10.4 ESCB Statute) and it specifies in point P that the IA does not cover the exchange of confidential information regarding monetary policy or other ECB tasks which are not part of the tasks conferred upon the ECB under the [SSM] Regulation.

An appreciation (cont.)

- One can discuss the necessity or the opportunity of some elements provided in the IA, like the structure of annual reports, the pre-consultation on draft regulation, the place given to committees of enquiry and similar investigations procedures (the Regulation provided only a simple reference to it). We are perhaps at the borderline of what could be achieved under EU law both primary and secondary but we should observe that in the consultation and dialogue processes, the ECB has always the last word. There is no veto right for the EP, except, as provided by the Regulation, for the appointment of the Chair and Vice-chair of the SB. Presidents Schulz and Draghi observed in a joint declaration that the IA « provides a high degree of accountability of the ECB in its tasks under the SSM vis-à-vis the EP as well as adequate safeguards for the protection of confidentiality. »