15. European banking union

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1. INTRODUCTION

The European Banking Union (EBU) is one of the greatest achievements of the European Union (EU). It aims at the centralization of supervisory and resolution practices vis-à-vis euro area credit institutions. Before the establishment of the EBU, responsibility for the supervision and resolution of credit institutions rested with national supervisory authorities (decentralized enforcement). However, the global financial crisis of 2008 revealed that enforcement at the Member State level was not always effective, especially in light of the fact that various credit institutions engage in significant cross-border activities (De Larosière 2009). As a result, supervision and resolution of euro area credit institutions was largely 'Europeanized'. The creation of the EBU, whose main rationale consists in breaking the vicious circle between banks and sovereigns (Euro Summit 2012), is premised on three pillars: single supervision carried out within the Single Supervisory Mechanism (SSM), single resolution carried out within the Single Resolution Mechanism (SRM) and a single deposit guarantee scheme.

The EBU has aptly been described as a two-layered construction (Lastra 2013). The first layer comprises regulatory tools, namely a set of common substantive rules – also known as the 'Single Rulebook' – with which credit institutions operating in the EU must comply. The second layer comprises (micro) supervision, enforcement and crisis management tools and is the focus of this chapter; we will be referring to issues pertaining to the Single Rulebook only to the extent that they are relevant from the enforcement perspective.

We aim to provide an overview of the enforcement design, mechanisms and practices that are evident in the SSM and SRM (section 2), as well as achievements, challenges and points for future research for the EBU (section 3). Overall, we argue that while supervision and resolution of credit institutions has been largely centralized, the European Central Bank (ECB) and the Single Resolution Board (SRB) still rely to a significant extent on their national counterparts. The enforcement approach, which is *inter alia* based on bringing together national supervisory expertise, experience and culture, notably through the creation of Joint Supervisory Teams (JSTs), and on utilizing a broad enforcement toolkit, generally succeeds in rebuilding trust in the banking system. Notwithstanding the EBU's overall success, we believe that there are still ongoing challenges and open questions that are worthy of further research. The chapter will be completed by a brief conclusion in section 4.

2. THE LEGAL FRAMEWORK APPLICABLE TO THE EBU

2.1 Key Legal Instruments

The EBU's first pillar, namely the SSM, is an integrated system of banking supervision and enforcement consisting of the ECB and 19 national competent authorities (NCAs) of Member

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States whose currency is the euro. As of 2020 the ECB has established close cooperation with the Bulgarian and the Croatian national banks, which is further discussed in section 4. According to Teixeira, the genesis of the SSM can be tracked back to the Euro Area Summit of June 2012 (Teixeira 2017). The founding Regulation (Regulation (EU) No 1024/2013 SSMR), which came into force in November 2013, mentions that the pivotal aim underpinning the creation of the SSM is the preservation of financial stability. The SSMR is based on Article 126(7) of the Treaty on the Functioning of the EU (TFEU) which reads that 'the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously […] confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions'.

The adequacy of this Treaty provision has been questioned, the main concern being that this provision mentions only specific tasks and not banking supervision in its entirety. In that sense, it has been argued that the prudential tasks which have been excluded from the ECB's competence are rather marginal and hence it is questionable whether the SSMR *de facto* contravenes the spirit of Article 127(6) of the TFEU (Wolfers and Woland 2014). Nevertheless, according to the prevailing view, the provision forms a sufficient legal basis (Wymeersch 2014) which could in fact be used to provide for further centralization, even beyond the scope of the SSM (Lo Schiavo 2014). We are of the opinion that Article 127(6) of the TFEU provides for at least two significant legitimacy-enhancing safeguards: it mandates the Council to clearly designate the ECB's 'specific tasks' in secondary EU law (SSMR), and mandates that that law must be adopted unanimously pursuant to a special legislative procedure.

From the perspective of enforcement, the most important legal instruments for the SSM are the SSMR, the SSM Framework Regulation (Regulation (EU) No 468/2014 SSM-FR) and the Capital Requirements Directive (Directive 2013/36/EU CRD). The former sets out the ECB's competences, tasks and powers and the key cooperation principles between the ECB and the NCAs; establishes the Supervisory Board, an important (quasi) decision-making body; and spells out that the ECB is accountable vis-à-vis the European Parliament while NCAs remain accountable vis-à-vis their national parliaments. The SSM-FR, an ECB regulation, establishes the practical framework for cooperation between the ECB and NCAs. The CRD, and the national laws transposing it, is relevant for enforcement insofar as it lays down the supervisors' investigative, supervisory and sanctioning powers, and deals with the exchange of information between authorities.

The enforcement approach underpinning the SSM also becomes evident from a number of supervisory policy documents that are regularly published by the ECB, in which the ECB communicates its expectations, assumptions and methodologies with respect to banking supervision. For example, the SSM Supervisory Manual, which spells out the SSM supervisory approach, the ECB's guide to on-site inspections and internal model investigations, which clarifies how ECB investigations are being carried out, and the annual reports on the ECB's supervisory tasks. According to literature, these documents seem to provide banks with the necessary transparency concerning the ECB's supervision and enforcement approach (Moloney 2014).

The EBU's second pillar, the SRM, comprises a centralized mechanism for the resolution of credit institutions falling under the SSM supervision. Similar to bank supervision, prior to the establishment of the SRM, bank resolution in the EU was premised on network-type enforcement, that is, national authorities cooperating with each other without a centralized decision-making actor (see Directive 2014/59/EU BRRD). However, in light of the fact that

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the supervision of credit institutions was meanwhile entrusted to the ECB, it was perceived that leaving crisis management in the hands of the Member States would likely lead to fragmentation (Boccuzzi 2016). Hence nowadays, when the ECB or the SRB establish that a bank is failing or is likely to fail (FOLTF), single resolution will be triggered.

The SRM consists of the SRB – an EU agency – and the national resolution authorities in the euro zone Member States Bulgaria and Croatia (NRAs). In certain instances, the European Commission also plays an important role in centralized resolution, as it is responsible for endorsing or objecting a resolution scheme. The Council may also be involved in the resolution procedure. The mechanism is further complemented by a Single Resolution Fund, an emergency fund which consists of contributions levied on banks by the NRAs.

Contrary to the SSM, which was established on the basis of Article 127(6) of the TFEU, the chosen legal basis for the SRM was Article 114 of the TFEU (internal market competence). While the legal basis is not uncontested, according to the prevailing view, the establishment of the SRM under Article 114 of the TFEU is lawful because the centralization of the decision-making process for resolution leads to an approximation effect, as it likely prevents a conflicting application of the relevant substantive rules by Member States, something which could in turn jeopardize the realization of the internal market (Zavvos and Kaltsouni 2015).

From an enforcement perspective, the most significant legal text for the SRM's functioning is the founding Regulation (Regulation (EU) No 806/2014 SRMR). The SRMR lays down fundamental principles underpinning the SRM's operation and the resolution procedures, clarifies the distribution of tasks between the SRB and NRAs, entrusts the SRB with important investigative and sanctioning powers and establishes the SRB's governance bodies and decision-making process.

Furthermore, the BRRD, which contains substantive rules for recovery and resolution, is an important legal instrument for the SRM. Being an EU directive, the BRRD is implemented by a network of national authorities and national resolution authorities (Busch 2017). The Member States remain free to entrust their NRAs with additional tools and powers unless otherwise indicated, and as long as these do not compromise the effectiveness of EU law. The EU legislator decided to include in the SRMR some provisions that already existed in the BRRD, presumably to ensure that the SRM would not have to apply potentially divergent national laws implementing the BRRD (Zavvos and Kaltsouni 2015). Similar to the ECB, the SRB frequently publishes 'operational guidance' addressed to banks and other soft law instruments in which it communicates its expectations to the industry (eg Single Resolution Board 2020).

Also, the case law of the Court of Justice of the European Union (CJEU) comprises an additional source of law. According to Chiti (2019, 105) that case law has given the EBU 'internal coherency and consistency within the institutional EU system'. Indeed, in a number of landmark decisions, the CJEU has crystallized important issues that are relevant from the enforcement perspective. For instance, the CJEU has dealt with questions as to the division of competences between the ECB and NCAs (Case C-450/17 P *Landeskreditbank Baden-Württemberg v ECB*), the exercise of the ECB's discretionary power (Case T-733/16 *Banque postale v ECB*), the application and interpretation of national law by the ECB (Joined Cases T-133/16 to 136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB*), the question of whether EU or national courts are competent to review the lawfulness of preparatory acts adopted by NCAs (Case C-219/17 *Berlusconi and Fininvest*) that served as input for the adoption of a final ECB decision and the extent to which the shareholders of a bank whose authorization has been withdrawn can establish *locus standi* in annulment proceedings

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(Joined Cases C-663/17 P *ECB v Trasta Komercbanka and Others*). The interested reader may follow consult the website of the European Banking Institute, which frequently adds new EBU-related judgments and proceedings.

The European deposit insurance scheme (EDIS) comprises the third – currently incomplete – pillar of the EBU. A proposal for a regulation to establish an EDIS was presented in 2015. It is expected that a common deposit insurance scheme will enhance depositors' trust to the banking system and strengthen financial stability. However, at the time of writing, an operational EDIS does not exist, as suggestions regarding its development have met strong political resistance. According to literature (Brescia Morra 2019; Gortsos 2019; Howarth and Quaglia 2018), the main reasons that render the realization of a truly European scheme unlikely are the significant differences between the banking systems in Europe and the fear that an EDIS could result in stronger banking sectors subsidizing the weaker ones. As the realization of the EBU's third pillar is pending, this chapter shall only focus on the enforcement experience within the SSM and SRM.

2.2 Enforcement Models in the SSM and the SRM

The enforcement design of both the SSM and SRM calls for intensive cooperation between the EU and national authorities (see also Chapter 3, section 3.4). We will now look at how supervision and resolution are organized in the SSM and SRM respectively and highlight the distinct ways in which the EU and national levels interact for enforcement purposes.

With respect to the SSM, the ECB is exclusively competent to carry out the specific tasks listed in Article 4 of the SSMR, in relation to *all* credit institutions established in the euro area. While the ECB is responsible for the effective and consistent functioning of the SSM, for the operationalization of its exclusive mandate, the ECB is assisted by the NCAs. The ECB and the NCAs are under a duty of sincere cooperation and an obligation to exchange information. The distribution of tasks between the ECB and NCAs works as follows. All banks that fall under the SSM supervision are on an annual basis classified as being either 'significant' (SI) or 'less significant' (LSI). The day-to-day supervision of SIs is carried out by the ECB, while the NCAs remain responsible for the day-to-day supervision of LSIs. In discharging its mandate, the ECB must apply *all* relevant Union law, including national laws transposing relevant directives, such as the CRD.

The enforcement design of the SSM has been termed as a composite (Wissink 2021), a shared (Duijkersloot, Karagianni and Kraaijeveld 2017), a Europeanized (Scholten and Ottow 2014), a centralized (Wissink 2017; Ferrarini 2015) and a supranational model (Gren, Howarth and Quaglia 2015). The various SSM administrative procedures are qualified as composite in nature, in that there is *decisional interdependence* between the ECB and the NCAs (Brito Bastos 2021). In its case law (Case C-450/17 P *Landeskreditbank Baden-Württemberg v ECB*), the CJEU has portrayed the SSM as a system in which exclusive competence and tasks has been vested in the ECB and in which – within that framework – the NCAs' role consists in assisting the ECB in the 'decentralised implementation' of its exclusive tasks. The main elements of the SSM's and SRM's enforcement design to which all of the aforementioned terms refer are distilled below.

The creation of the SSM has resulted in *more* centralized banking supervision as competence, responsibilities and tasks have been largely concentrated in the hands of the ECB. Notwithstanding the fact that the ECB is responsible for the effective functioning of the mech-

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anism, the SSM is not a completely centralized system of supervision and enforcement. The NCAs continue to play a major role in all three stages of law enforcement.

During the monitoring stage, NCA staff members are embedded in the day-to-day supervision by participating in the ECB's JSTs. These teams are established for the supervision of each SI, and consist of staff members from both the ECB and NCAs. The ECB is in charge of the establishment and composition of JSTs, while the appointment of NCA staff members is made by the respective NCAs. The ECB and NCAs shall consult with each other and agree on the use of NCA resources for JSTs, and the ECB may require NCAs to modify their appointments if appropriate for the purpose of the JST's composition. Each JST is coordinated by a designated ECB staff member.

NCAs are also involved in the investigative stage of enforcement by means of the participation of their staff in ECB on-site inspection teams, and the possibility for them to transfer to the ECB's independent investigating unit information that they obtained by making use of their investigative powers under national law.

Concerning the sanctioning stage of enforcement, NCAs remain competent to run sanctioning proceedings in accordance with national law in all cases in which the ECB does not enjoy direct sanctioning powers (Felisatti 2018, 385). This concerns, in general, imposing sanctions on LSIs, natural persons and SIs in cases where the legal basis for the alleged violation is contained in national law.

Within the SRM, while the SRB is responsible for the effective functioning of the SRM, the NRAs also play a significant – if not the most significant – role in enforcement. Resolution – to be distinguished from resolution planning – may be divided into (a) the preparation of resolution schemes, and (b) their enforcement. In the preparation phase, when it has been deemed that a bank is FOLTF and there is no reasonable private sector alternative and resolution is in the public interest, the SRB is responsible for drawing up and adopting a resolution scheme with respect to, among others, banks that have been classified by the ECB as being significant. Subsequently, the resolution scheme must be transmitted to the Commission, which must – within 24 hours – either endorse the scheme or object it. Should there be an objection, the involvement of the Council is also foreseen. The NRAs prepare resolution plans and adopt relevant decisions vis-à-vis the remaining euro area banks. When it comes to the enforcement of resolution decisions, the SRB does not have any powers. All decisions must be enforced by the relevant NRA. However, the SRB may issue a warning to an NRA, or even decide to take over the NRA's tasks, if it considers that an NRA's draft decision does not comply with the SRMR.

The SRM's enforcement design has been perceived in literature as a system of centralized decision-making (Busch 2017). Indeed, the SMR does not lead to centralization regarding the enforcement of the adopted resolution schemes, but rather comprises a significant approach towards more centralized *decision-making*. In that respect, the national level still plays a pivotal role as the SRB's governing bodies (that is, the extended Executive Session and the Plenary Session) are composed of SRB board members *and* board Members representing all NRAs. It has been noted that even though NRAs' extensive involvement in decision-making may make resolution more democratic, 'it adds an additional, highly political, layer to an already complicated decision-making procedure in which time is of the essence' (Busch, van Rijn and Louisse 2019, 15).

Literature has furthermore pinpointed that the SRB's institutional set-up reflects a compromise between the need for efficient and centralized decision-making and constitutional constraints stemming from the non-delegation Meroni doctrine and Council interests (Busch,

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van Rijn and Louisse 2019; Moloney 2014). It has been posited that the SRM's complex decision-making process and the involvement of numerous actors may undermine effectiveness (Busch, van Rijn and Louisse 2019; Božina Beroš 2018; Busch 2017) and result in a lack of clarity concerning where responsibility lies (Timmermans and Chamon 2020).

2.3 Enforcement Approach in the SSM and the SRM

The ECB and NCAs have at their disposal a wide enforcement arsenal, ranging from requiring banks to hold additional own funds to imposing hefty punitive fines. The ECB's operational structures – most notably the JSTs – may also utilize informal communication channels with supervisees, based on dialogue (Angeloni 2015). The existing literature uses different terminology when referring to the ECB's enforcement powers (Wissink 2021; de Poli and de Gioia Carabellese 2019; Allegrezza and Voordeckers 2015). The decisive criterion is whether the enforcement tool has a punitive, a restorative, a formal or an informal character. The classification of a decision as one having a punitive character necessitates the affordance of criminal law safeguards in the course of sanctioning proceedings. The ECB may also address to banks operational acts which are informal, non-binding and non-enforceable (ECB Supervisory Manual 2018; Duijkersloot, Karagianni and Kraaijeveld 2017).

The SSM enforcement toolbox thus contains both compliance-based and deterrence-based tools. This raises the questions of which enforcement style is primarily employed, and of the extent to which the ECB and the NCAs manage to strike the right balance between cooperation and consultation on the one hand and deterrence on the other. According to the ECB itself, the SSM adopts a risk-based approach to supervision (ECB Guide to Banking Supervision 2014), meaning that if it is considered – on the basis of qualitative and quantitative approaches – that there is an increased risk to a specific bank, that bank will be monitored more closely until the perceived risk decreases to an acceptable level. Furthermore, when it comes to the imposition of pecuniary penalties in particular, in determining the base amount for the penalty, the ECB will first determine the severity of the breach. In doing so, the impact and the degree of the breach are first classified as low, medium or high and the breach is characterized as 'minor', 'moderately severe', 'severe', 'very severe' or 'extremely severe' (ECB Guide to the Method of Setting Administrative Pecuniary Penalties 2021). Thus, escalation to the more severe enforcement tools will occur only when lighter approaches have failed. And even when deploying deterrence-based approaches, the ECB will impose the highest penalties only when the severity of the breach so demands. The aforementioned ECB Guide was published after ECB penalties were partly annulled for concerns regarding inadequate reasoning (Case T-203/18 *VQ v ECB*; Case T-576/18 *Crédit agricole v ECB*; Case T-577/18 *Crédit agricole Corporate and Investment Bank v ECB*; Case T-578/18 *CA Consumer Finance v ECB*). The Guide is thus a welcome, and necessary, step towards more transparency.

The ECB is also integrating the use of artificial intelligence (AI) in its enforcement approach. It has established a SupTech Hub to explore the potential of AI and other new supervisory technologies. Through this hub, the ECB liaises with internal and external stakeholders (such as peer authorities and academic institutions) to exchange AI expertise and practices. Furthermore, the ECB provides support and training for supervisors to use AI and other new technologies, and has launched various AI-related projects (see ECB nd).

Another issue worth discussing is the question of which branches of law – administrative, criminal and/or private law – are relevant when it comes to the SSM's enforcement dimen-

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sion. The ECB and NCAs are authorities that operate under administrative law and therefore the enforcement powers available to them are administrative in nature. Therefore, all formal decisions adopted by the ECB and NCAs are appealable before the CJEU and national administrative courts respectively.

Concerning the SRM, given that up until the moment of writing only two resolution decisions have been adopted – one concerning Banco Popular Español in 2017 (Case T-481/17 *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB*) and one concerning Sberbank banka in 2022 – distilling the overall enforcement approach is no easy task, and further cases would be necessary in order to further determine the overall enforcement approach.

3. ACHIEVEMENTS AND CHALLENGES

Despite the many challenges resulting from the complex, close cooperation between the EU and national authorities within the EBU, a shared structure was considered to be necessary in order to achieve effective prudential banking supervision within the euro area (Wissink 2021; Zilioli and Wojcik 2021) accompanied by a second pillar for the resolution of banks. The overall picture portrayed in the literature supports the view that the SSM's enforcement design generally succeeds in rebuilding confidence in the financial system (Wissink 2017; Bovenschen, ter Kuile and Wissink 2015; Ferran 2014; Moloney 2014; Wymeersch 2014). More specifically, the JSTs are considered a good example of the close cooperation between the EU and national levels in order to ensure effective daily supervision of credit institutions (Wissink 2017). Chiti and Recine point out that '[t]he combination of supranationalism and transnationalism responds to a clear functional need, that of exploiting the capacities and expertise of national administrations while keeping centralized leadership' (Chiti and Recine 2018, 110). Having NCA staff members in JSTs also ensures close proximity to the supervised entity and supervisors who have mastered the language of the Member State at issue and who are familiar with the local supervisory culture, which may add to the effectiveness of supervision, while the multiplicity of nationalities contributes to the avoidance of regulatory capture (Petit 2022; Wissink 2017). Also, in other areas many achievements have been reached. The authorities increased transparency by publishing operational guidance, guides and manuals about their interpretations, priorities, approaches and practices, and use their regulatory powers to the extent possible to further harmonize the substantive rules. Furthermore, the ECB is exploring the use of AI in its supervision, which potential for enforcement may be enormous given the access that supervisory authorities have to large amounts of data.

At the same time, the EBU's enforcement design brings along challenges for the division of tasks, creates complex decision-making procedures, and may result in gaps with respect to the accountability of supervisors and the protection of fundamental rights. Moreover, the scope of the entities supervised as well as the geographical scope may create their own challenges for enforcement. Also, the lack of fully harmonized substantive rules, of a single EU administrative act and of a fully harmonized set of supervisory powers, as well as some complexities and unclarities regarding the sanctioning procedures, result in challenges for enforcement of the relevant Union laws within the EBU. These challenges are elaborated upon in this section, as well as the accompanying points for further research.

A first challenge relates to the novelty of the far-reaching composite administration. The division of labour between the ECB and the NCAs has been characterized as 'sub-optimal'

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as the – once powerful – NCAs have now become 'subordinate'. This may in turn lower their incentive to serve their principal's (that is, the ECB's) interests (Tröger 2014, section 3.3.1). Another concern relates to the fact that the ECB significantly depends on the NCAs' expertise and resources, which may in turn undermine its overall effectiveness (European Court of Auditors 2016; Moloney 2014, section 4.1). With respect to JSTs, scholars have pinpointed the possible complex bureaucratic environment and consequent complications and delays, the inherent tensions between the ECB and NCAs which may give rise to conflicts of interest for staff members and employment law questions and the scope of the JST members' tasks, and, more practically, issues such as language barriers and a certain level of cultural awareness required to create effective collaboration (Chiti and Recine 2018; Wissink 2017). Furthermore, it has been put forward that the fact the ECB is dependent on the NCAs for the allocation of their staff to a JST may be challenging, just as the observation that having JST members operating under 'two hats' may result in unclarity concerning to whom (ECB or NCA) those members report, under which liability regime they operate (EU or national) and whether they can still make use of national law powers (Karagianni 2022; Petit 2022; Wissink 2017). However, the fact that this also has been put in place for the SRM (for an elaborate discussion about their functioning, see Petit 2022) seems to indicate these teams are considered to be a valuable contribution to creating a true close cooperation between the EU and national levels (Moloney 2014).

The geographical scope of the EBU brings along other challenges. The EBU is put in place for the euro area instead of the EU in its entirety, which involves a risk of fragmentation between the two areas (Ferrarini and Chiarella 2013; Moloney 2014). The SSM's objectives explicitly refer to the stability of the financial system within the Union, for which the mere cooperation of banking supervisors turned out to be insufficient, especially in the context of the single currency. The openness towards non-euro area Member States and the importance of the unity and integrity of the internal market are explicitly laid down in the SSMR. The SSMR also provides the possibility for non-euro area Member States to enter into a close cooperation with the ECB (Chiarella 2016; Moloney 2014; Zagradišnik 2019). The close cooperation with the SSM requires participation in the SRM (Moloney 2014; cf SRMR). However, this structure seems to be even more complicated than the cooperation for euro zone Member States within the SSM; it brings along its own specific questions regarding, for instance, how equality can be ensured between the participating Member States and Member States who entered into a close cooperation and results in its own legal challenges (Chiarella 2016; Ferran and Babis 2013; Pizzolla 2021; Tröger 2014). So far, the ECB has established a close cooperation with Bulgaria's central bank and Croatia's central bank.

The EBU's geographical scope also results in a rather complex relationship between the ECB and the European Banking Authority (EBA). The latter is a European agency for the internal market in its entirety that contributes to the effectiveness of the Union's financial system by, among others, supporting the harmonization of prudential banking rules and promoting the convergence of supervisory practices. This resulted in discussion with respect to the split of supervisory and regulatory tasks, the relationship between the ECB and EBA and the way in which the EBA's effectiveness could be ensured given the participation of the ECB as a new and powerful supervisor, which issues have been tackled to the extent possible within the legal framework by amending the EBA's voting structures and the EBA's tasks and powers (Brescia Morra 2014; Chiarella 2016; Ferran and Babis 2013; Guarracino 2013; Moloney

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2014; Tröger 2016). These difficulties regarding the EBA may also apply to the SRB, although in a more limited way (Moloney 2014).

The lack of a fully harmonized set of EU banking rules also results in many challenges for the ECB to effectively carry out its tasks (Lautenschläger 2016; cf Enria 2015; Wissink 2017). Besides the fact that, in general, harmonized substantive rules for both the banking and insolvency laws would be beneficial for the EBU's enforcement, the particularity of the ECB applying national laws transposing directives makes this even more urgent. As pointed out by Coman-Kund and Amtenbrink, the difficulties for the ECB to interpret, apply and enforce national rules of different Member States may impact the coherence of the EU financial regulatory and supervisory system (Coman-Kund and Amtenbrink 2018). This novelty under EU law of having an EU institution apply national laws results in a broad discussion among scholars (Boucon and Jaros 2018; Coman-Kund and Amtenbrink 2018; Gagliardi and Wissink 2020; Hernández Fernández 2021; Kornezov 2016; Witte 2014, Witte 2016). This structure was, luckily, not necessary and not chosen in the context of the SRM (ter Kuile 2015). Although, also in the SRM context, the impact of non-harmonized national insolvency proceedings is significant (Petit 2022), as is the use of directives (BRRD) which must be implemented in national laws. An important step for further improving enforcement in the banking sector would be the further harmonization of substantive banking rules and bank insolvency laws (Binder 2022). Many scholars have pointed out the need to further harmonize the Single Rulebook, and possible ways in which this can be done (Arranz 2016; Babis 2014; Ferrarini and Chiarella 2013; Lefterov 2015; Lehmann 2017; Smits 2017; Zagradišnik 2019).

Related challenges concern the lack of a fully harmonized set of supervisory powers under EU law and the fact that a general administrative code at the EU level is missing. An important step to further harmonize supervisory powers has been taken by the EU legislator in its proposal for the 'Banking Package 2021', in which the CRR and CRD are revised. It includes among others a proposal for stronger and more enforcement tools (for a brief explanation of the proposed amendments, see European Commission 2021 regarding 'more enforcement tools'; cf Opinion of the ECB of 27 April 2022).

Due to the lack of a single set of harmonized banking rules and the division of tasks and responsibilities according to the significance of a credit institution, the risk exists that SIs and LSIs may be subject to different supervisory treatments. The ECB, together with the NCAs, is working hard to avoid any unjustified difference in treatment between SIs and LSIs by providing, where possible, guidance and the like (such as ECB documents in light of its oversight tasks regarding LSIs, which are generally based on the methods used for SIs but adapted to the specificities of LSIs). The challenging job will be to create a more harmonized set of rules in order to minimize the differences in the approach towards SIs and LSIs within and between Member States without creating an unjustifiable cumbersome regulatory framework for LSIs.

Another challenge for effective enforcement within the EBU is the complexity of the decision-making processes and, within the SSM context, the large number of decisions to be adopted. Given the required strict separation of the ECB's monetary and supervisory tasks, a supervisory board was established to adopt draft supervisory decisions with respect to the ECB's prudential supervisory tasks (for more about the tensions for national representatives within the Supervisory Board and their required independency, Chiti and Recine 2018). These draft decisions are formally adopted by the ECB's ultimate decision-making body, the Governing Council (TFEU, Article 129), but mainly prepared by the ECB's supervisory board. As such, a division is basically guaranteed within the limits of the treaties. However, it clearly

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implies a rather complex decision-making procedure. To ensure a smooth decision-making process and handle the high number of supervisory decisions, the ECB adopted a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (Decision (EU) 2017/933. This has for instance been put in place for fit and proper decisions (see Decision (EU) 2017/935)). The SRM also involves a complex decision-making procedure, but for different reasons. Since the SRM is an EU agency, it is subject to different requirements with respect to the delegation of discretionary powers than EU institutions such as the ECB (ter Kuile 2015; Ferran 2014; Moloney 2014; Zagradišnik 2019). This results in a complex decision-making process involving the SRB, ECB, Commission and Council (cf ter Kuile 2015). On top of that, the decision-making in cases of resolution requires decision-making in emergency situations, under time pressure and involving complex factual situations (Marcucci 2016).

The effectiveness of the sanctioning architecture has not been without criticism either. Literature has noted that the sharing of sanctioning tasks may leave the door open for 'enforcement arbitrage' and may increase the ECB's reliance on national approaches and concomitant resources (Singh 2015).

Also, even though administrative law enforcement is the dominant enforcement regime also at national level (Allegrezza 2020), Member States do retain the right to impose criminal law penalties for violations of substantive prudential legislation. As a result, the field of banking supervision reveals important synergies between administrative law enforcement carried out under the aegis of the ECB and criminal law enforcement carried out at the national level. Literature has studied the role of criminal law in the SSM context, and points to the fragmented picture which exists at the national level (Karagianni 2022; Allegrezza 2020; Lasagni 2019). In dealing with the criminal law dimension of prudential legislation, some jurisdictions have in place special criminal law enforcement regimes while others enforce prudential legislation by means of ordinary criminal law (Karagianni 2022). Such a fragmented picture may affect the effectuation of key procedural safeguards at the interface between EU administrative law enforcement and national criminal law enforcement, such as the privilege against self-incrimination and the *ne bis in idem* principle (Karagianni 2022; Allegrezza 2020). Further exploration is needed on the interaction between EU and national legal orders in light of sanctioning, the extent of judicial scrutiny on both the EU and the national levels in such cases and the cooperation between the ECB and national criminal judicial authorities (Karagianni 2022).

4. OUTLINING FUTURE QUESTIONS AND POINTS OF ATTENTION FOR RESEARCHERS AND PRACTITIONERS

The far-reaching close cooperation within the SSM and SRM between both the EU and national administrative authorities seems to have created a system that benefits from both the centralization of tasks and responsibilities at the EU level and the national expertise, experience and knowledge. However, as also elaborated upon, this mixed administration results in many challenges for ensuring effective enforcement of the relevant EU laws.

The scholarly discussions touch upon many of these challenges, helping to pinpoint the challenges we are facing, and step by step the CJEU's case law provides further guidance about the way in which this mixed administration should function. Obviously, the CJEU

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judgments in turn provide food for thought, and are themselves interesting matters to further research. Many topics – for example, the EBU's scope, the interaction between EU institutions and cooperation between EU and national authorities, the further harmonization of substantive rules, administrative procedures and supervisory powers, the bettering of decision-making procedures and the application of sanctions – require further research, which will hopefully result in many more interesting discussions among both practitioners and scholars.

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