SSM ten years since. Where are we (1)

1. *A short introduction*. — If we take a helicopter view of the SSM now, and of its evolution in the last 10 years it is fair to acknowledge that it has proved an exercise in supranational governance on a scale never attempted before in this Continent. Both the ECB and the NCAs have taken up the challenge and have lived up on the expectations. Today the SSM clearly represents the most advanced, and most successful, experiment of shared administration in the context of the European Union. It is a blueprint for the future of the Union. As Andrea Enria noted in a recent speech (2) the SSM has delivered "very rigorous, demanding supervision", a result that comes from bold institutional design and a deeply rooted, strong internal culture.

Getting where we are now has not been an easy journey, though. And not only from an organizational angle (as exemplified by the intricacies of the SSM governance and of Governing Council's delegation of powers), yet also from an institutional point of view. Suffice to mention here how ambiguities in Article 4 and 6 of the SSMR, resulting from a change in scope of the supervisory remit over LSI which was adopted by the Council at a later stage of the legislative process, morphed into a constitutional drama on the validity of the legal basis in Article 127(6) TFEU. There the CJEU and the German Constitutional Court acrobatically tiptoed on a tight rope (3), managing in the end to avoid the fall, yet without coming to the same conclusion on the meaning of the "exclusive competence" granted by Article 4 to the ECB. Another example is how important it has been, on account of the fundamental principle of effective judicial protection, the clarification of the CJEU on its judicial review of ECB composite proceedings (including their national preparatory acts) in *Berlusconi I* (4), and yet the thorny implications of that judgment in *Berlusconi II* (5) for the consti-

(1) Speaking note at the International Conference 'SSM Regulation, ten years since', Bank of Italy, Rome, 20 October 2023.

(2) Enria, 'A new stage for European banking supervision', 22 Handelsblatt Annual Conference on Banking Supervision, Frankfurt am Main, 28 March 2023, available at *https://www.bankingsupervision.europa.eu*

(3) Compare D'Ambrosio, Messineo (eds.), *The German Federal Constitutional Court and the Banking Union*, Quaderni di ricerca giuridica della Consulenza Legale, No 91, Banca d'Italia, 2021.

(4) Case C-219/17, ECLI:EU:C:2018:502.

(5) Case T-913/16, ECLI:EU:T:2022:279, on appeal in Case C-512/22 P.

tutionality check of national law when the ECB applies national law under Article 4(3) SSMR and the validity of the law is contested before European courts. This led to unprecedented discussions on a possible reverse referral from European Courts to national Constitutional Courts. Indeed, dialogues between Supreme courts are essential in the law of finance. It comes to little surprise, thus, that a few weeks ago the Franco-German experts' report on the Reform and Enlargement of the Union proposed the establishment of a mixed chamber (echoing an idea voiced in 2020 in the wake of the Weiss case by Joseph Weiler and Daniel Sarmiento). The CJEU has certainly been an important factor in the process of empowerment of the SSM, as also recently shown by the landmark opinion and judgment in *Credit Lyonnais* (6), which has confirmed the latitude of the ECB margin of technical appreciation in supervisory matters. However, legal challenges are still many in this ecosystem and have their toll of instability. Suffice to mention here the surprising General Court judgment in *Corneli* (7), currently on appeal, and the opinion of Advocate General Kokott in *Pilatus* (8), a case still waiting for the final judgment.

I would like to organize my introductory speech today on where we are with the SSM and what remains to be accomplished in the next future looking at four dimensions: *a*) legislative; *b*) supervisory; *c*) judicial and quasi-judicial and *d*) political.

2. *Where are we with the SSM now: legislative perspective.* — From a legislative perspective, much has been done and the forthcoming implementation of Basel IV by CRR3 and CRD6, whose legislative train came to the final compromise in July 2023, promises to straighten much of what was still missing. In particular, the inclusion in the Single Rule Book of several tasks and powers which have a prudential scope and yet were so far enshrined in national prudential rules without a clear backing in the Single Rule Book. Starting from the letters to the CEOs of March 2017 the ECB had informed that it considered those tasks and powers as falling into its remit. This was uncertain terrain, though, and their inclusion in the Single Rule Book is the right move forward. The same holds true for fit and proper (which numerically represents the majority of the SSM decisions), where diverging substantive and procedural national requirements contradicted so far the very essence of the SSM, yet could not find a solution in the supervisory practice.

This is not to say that the legal framework of the Banking Union is complete. The third pillar of the Banking Union is still missing after the ill-fated EDIS (European Deposit Insurance Scheme) proposal despite the goodwill shown by the December 2021 Euro Summit. This shows a persistent fear in influential Member States that a common deposit insurance may translate into an instrument of loss mutualization. In a similar vein, political disagreements have more

(6) Case C-389/21 P, ECLI:EU:C:2023:368.
(7) Case T-502/19 ECLI:EU:C:2022:627, currently on appeal in Case C-777/22 P.
(8) Cases C-750/21 P and C-256/P ECLI:EU:2023:431.

recently delayed the establishment of the ESM (European Stability Mechanism) credit line and have made uncertain the fate of at least some proposals within the CMDI (Crisis Management Deposit Insurance proposal). Sometimes, when frustration has its toll, one feels a sense of futility in our European polity. Yet, despite the hurdles, the direction of travel is clear. CMDI, EDIS and the credit line of the ESM are necessary components of the Banking Union which need to come. The sooner the better. And on top of that the Unidroit works for a global Legislative Guide on liquidation of non-systemically relevant banks (wisely promoted by the Bank of Italy and currently approaching final stage) may further shape the harmonization of banks insolvency laws beyond CMDI. Quoting the famous 1933 inaugural address of President Roosvelt, "the only thing we have to fear is fear itself" to complete the Banking Union.

There are however two other potential legislative initiatives that the next European Commission should rank high in its 2024 agenda to complete the Banking Union (BU).

The first is the removal of the legislative barriers that stand in the way of a much deeper interstate consolidation of EU banking groups and EU financial conglomerates. This is in line with past statements of the European Commission (9) and with the ECB 2020 Guide on the supervisory approach to consolidation in the banking sector and would make good use of some insightful preparatory works made at the EBA (10). Few, well thought amendments to the CRR and the SRMR would nicely do the job, and could comprehensively solve obstacles at all three stages of life of financial conglomerates: *birth and growth*, by simplifying, through a US-like share exchange, the corporate tools for cross-border consolidation and by ensuring an unfettered market for corporate control for EU financial corporates; *adult life*, by putting forward few uniform and directly applicable provisions which would in the end give legal certainty to cross-border group-wide capital and liquidity management in good times, acknowledging the value-enhancing organizational gains embedded in interstate group structures, as already recognized by the CJEU in connection with the objectives of the internal market (11); *death*, by solving the intricacies of group-wide upstreaming of losses and down-streaming of funds in the resolution context. Once the policy goals are clear, all can be done with simplicity, building on the existing legal framework, with selective, well-thought adjustments.

The second, not less important, initiative should be *straightforward, bold legislative simplification*, through the codification of a European banking con-

(9) Report from the Commission to the European Parliamnet and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013, Strasbourg, 18.4.2023, COM(2023) 212 final, p. 18-19.

(10) Gardella, Rimarchi, Stroppa, *Potential Regulatory Obstacles to Cross-border Mergers and Acquisitions in the EU Banking Sector*, EBA Staff Paper Series No. 7, February 2020.

(11) C-528/12, Mömax, ECLI:EU:C:2014:51, para 21; C-292/16, A Oy, ECLI:EU:C:2017:888; C-386/14, Groupe Steria, ECLI:EU:C:2015:524; C-524/04, Test Claimants in the Thin Cap Group Litigation, ECLI:EU:C:2007:161; C-311/08, Société de Gestion Industrielle, ECLI:EU:C:2010:26; C-382/16, Hornbach Baumarkt, ECLI:EU:C:2018:366. For an insightful discussion, Schön, *Organisationsfreiheit und Gruppeninteresse in Europäischen Konzernrecht*, *Zeitschrift für Unternehmens- und Gesellschaftrecht*, vol. 48, no. 3, 2019, pp. 343-378.

solidated act. Restructuring, at level I, the current overflowed single rule book into a principles-based, sober Consolidated Act is certainly not an easy task; yet it is necessary, not only to reconsider and fix the very many inconsistencies and collisions dispersed in a legislative framework that is made of more than one thousand Level I rules (which, in turn, delegate to the European Commission the adoption of more than one hundred implementing or regulatory acts), but also to replace as much as possible rules currently enshrined in the directives with principle-based directly applicable and uniform provisions, leveraging more (within the limits allowed by the Treaties) on the legal basis of Article 114 TFEU and taking back the legal basis of Article 53(1) solely to provisions which are *strictu sensu* measures to achieve mutual recognition and right of establishment. It is crystal clear that many prudential requirements, including those on governance and buffers, which are currently in the CRD, would deserve a uniform treatment, to ensure the needed level playing field in the Banking Union.

3. *Where are we with the SSM now: supervisory perspective.* — In the supervisory domain, it is fair to acknowledge that the SSM has been successful in ensuring, through an extraordinary effort in codifying supervisory practices into very detailed internal policies and handbooks, equal treatment in oversight. Sure, supervision implies judgment and thus a margin of technical appreciation in individual cases of complex economic or technical factors which may occasionally lend to frictions with the supervised entities. However, judging from the case-law so far, fundamental disagreements have been episodical and the CJEU seems to have granted more leeway to the ECB than to the European Commission in antitrust cases, where prudential assessments are based on forecasts and hypothetical, future scenarios. In banking the Court has been content with a plausibility test, whereas in antitrust it has sometimes gone further, to require a balance of probability to identify the "most likely" (or "more likely than not") scenario, such as in *Bertelsmann* (12) and more recently in *CK Telecoms* (13). As a counterbalance, though, the Court, in parallel also with the ABoR practice, has been progressively more exacting as to the requisite standard of the sufficient statement of reasons (14).

In its ten years of practice the ECB has also shown the necessary flexibility to adapt its supervisory approach to new risks, to help banks weathering the

(12) ECJ 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P ECLI:EU:C:2008:392, points 207-208.

(13) AG Kokott, 20 October 2022,, *European Commission v CK Telecoms UK Investments Ltd.*, C-376/2, ECLI:EU:C:2022:817, points 56-58. Consider in the literature, Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement - The EU Approach* (Hart Publishing, 2019), 78 and Joana Mendes (ed), *EU Executive Discretion and the Limits of Law* (OUP 2019).

(14) EGC 23 September 2020, *Landesbank Baden Württenberg v SRB*, T-411/17, ECLI:EU:T:2020:435 and on appeal ECJ 15 July 2021, *European Commission v Landesbank Baden Württenberg*, C-584/20 and 621/20, ECLI:EU:C:2021:601; EGC 6 October 2021, *Ukrselhosprom Versobank v European Central Bank*, T-351/18 and T-584/18, ECLI:EU:T:2021:669, paras 385-387. As noted in the text, this is also consistent with the ABoR practice, which recently published a statement that disclosed that a recurring element in ABoR opinions has been the need for the ECB to provide adequate reasoning of its decisions.

storm. Good examples, as recently noted by Andrea Enria, are the so called "pragmatic SREP" during the pandemic, the supervisory focus on reputational risks associated with exposure to Russian counterparties and sanctions during the ongoing Russian/Ukrainian conflict and the current special attention to interest rate risk and funding and liquidity risk in the ongoing fast-paced normalisation of the monetary policy environment ([15]). But also the supervisory approach to NPLs' normalisation was, in the end, quite flexible, because the ECB insisted for a long time on dialogue and moral suasion and postponed the escalation of supervisory measures (P2R, requiring specific provisioning, and sanctions) thereby granting to the banks the grace period they needed to take action, something that invited harsh criticism from the European Court of Auditors, with its 2023 Special Report ([16]) and may now invite a reflection on the potential use of periodic penalties. This risk-focused approach ([17]) is now called to address cyber risk and climate change and their prudential impacts. Two big known economic unknowns, especially at this stage of transition.

4. *Where are we with the SSM now: judicial, quasi-judicial and accountability perspectives.* — To conclude, I will briefly touch on the SSM accountability in these ten years with a couple of telegraphic remarks.

As to legal accountability, the balance of the last ten years is not black and white. SSM and SRM related disputes have gained momentum and prominence, in number and economic significance, in the case-law of the CJEU and European courts have delivered some landmark judgments in some pivotal cases. Yet, in more interstitial cases, queuing for long years to have final answers on matters of more minute detail is far from ideal in a highly dynamic environment such as supervision. For less pivotal cases also internal review would make the job.

In the SRM the administrative internal review (the Appeal Panel), despite the limitations in the scope of reviewable acts, has proved an efficient filter for the CJEU and a non-expensive and expeditious expert forum for first instance review, where all safeguards of due process (and fair trial) are granted. This is acknowledged by the incoming reform of Protocol 3 of the Statute of the Court which purports now to limit the review by the Court of Justice also in cases decided by the SRM Appeal Panel and the Joint Board of Appeal of the ESAs. Unlike those review bodies, in the SSM, however, the ABoR opinions are not binding ([18]). This is so although the CJEU in the *Landeskreditbank* case found that the ECB had complied with its duty to state reasons as a result of the arguments discussed by the Administrative Board of Review in its opinion ([19]). For this reason it is to be welcomed the recent publication by the ECB of a report

([15]) Enria, *A new stage for European banking supervision*, p. 3.
([16]) EU supervision of banks' credit risk. Special Report, Luxemburg, 2023.
([17]) Enria, *A new stage for European banking supervision*, p. 6.
([18]) Compare Concetta Brescia Morra, *'The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field*, 81 Quaderni di Ricerca Giuridica, Banca d'Italia, 109, 109-132.
([19]) Case T-122/15, *Landeskreditbank Baden-Württemberg* v *ECB* [2017] ECLI:EU:T:2017:337, para 121-132 and Case C-450/17 P, *Landeskreditbank Baden-Württemberg* v *ECB* [2019] ECLI:EU:C:2019:372, para 87-102.

casting some light on the ABoR practice. Yet, ABoR advisory rather than quasi-judiciary role does not incentivize its use, and banks often prefer to challenge directly the ECB decision before the CJEU. A solution for this is not easily available, not only due to the special independence of the ECB and of the Governing Council, but also because the fifth paragraph of Article 263 of the Treaty on the Functioning of the European Union ('TFEU') allows the establishment of pre-judicial control mechanisms for Union *agencies, bodies or offices*, but not for Union institutions such as the ECB ([20]).

b) Beyond judicial and quasi-judicial review, political and administrative accountability is also a component of SSM legitimacy. The European Commission has assessed SSM accountability as 'overall effective' ([21]). Looking at the interactions between the SSM and the EP ECON Committee (hearings and MEPs' letters), one gets, however, a mixed picture. MEPs are engaged, yet they lack SSM specific, granular information, which remains mostly in the confidential exchanges with the Chair and Vice Chair. The impact of the interplay with the EP looks modest, and only very episodical that with national parliaments (the most visible exception being the Banco Popular case). In turn, administrative accountability can hardly fill the gap, despite the efforts from the European Court of Auditors and the EBA, which could immensely contribute to improve EP gaps in information and expertise, yet is oddly perceived to fall outside the exercise of accountability.

5. *A conclusion*. — What is the lesson that we can draw from the ten years of the SSM? The lesson is that bold European ambition, and ingenuity in setting up the SSM at a time of unprecedented economic crisis morphed, using the words of President Roosvelt again, "retreat into advance". It is now about time for the next European Commission to complete the Banking Union.

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([20]) The fifth paragraph of Article 263 TFEU reads as follows: 'Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them'.

([21]) Commission Report on the SSM, SWD (2017) 336 final and Commission Staff Working Document accompanying the Report; this finding is supported by authors who highlight that the ECB has become more responsive yet, they also find a lack of 'performance benchmarks', 'expert review' or 'regulatory audit' (Ph. Nicolaides, *CERiM Online Paper Series* 10 (2018), p. 3, and 25-27; F. AMTENBRINK, M. MARKAKIS, *ADEMU Working Paper Series* 081 (2017).