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23 Banking Union: Why Opting Out Is a Viable Alternative

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23.1 Introduction

Due to the self-reinforcing European financial and sovereign debt crisis that occurred in 2011, decision makers of the European Union decided to take steps to avoid a further possible turmoil and created a mechanism to break the bank-sovereign vicious cycle by elevating the supervision and resolution of large cross-border banking groups to the supranational level. The decisive response to the bank-sovereign feedback-loop was the creation of a common European cross-border supervisory and resolution power, since the idea that only a European-level framework could effectively play its role due to highly interconnected European financial and banking markets. This new framework of supervision and resolution focusing first and foremost on the Eurozone is called the Banking Union. In a broad sense – considering also the accompanying instruments – the milestones of the union are the following.

First, a single rulebook for the prudential requirements of credit institutions was adopted, since a well-functioning banking union requires common rules that apply to all banks. The revised Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR) contain a comprehensive set of prudential rules and also pave the way

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for macro-prudential authorities to set special macro-prudential requirements for banks to mitigate system-wide risks. (i.)

Approaching from a different direction, the European Stability Mechanism (ESM) is an important component of the Banking Union designed to safeguard financial stability within the euro area. Like its predecessor – the European Financial Stability Facility (EFSF) – the ESM provides financial assistance to euro area Member States experiencing financial difficulties. To fulfil its objective, the ESM raises funds by issuing money market instruments as well as medium and long-term debt.[1] The establishment of the ESM should not be regarded as a stand-alone response to the sovereign debt crisis, but rather as complementary to the realization of the Banking Union. The efforts taken by EU Member States with respect to fiscal consolidation and structural reforms, along with EU initiatives such as the strengthened Stability and Growth Pact, the Treaty on Stability, Coordination and Governance in the EMU (fiscal compact), European Semester, Euro Plus Pact and the Single Supervisory Mechanism (SSM) are all crucial for addressing the reasons of the crisis and creating conditions useful to economic growth, prudential operation of the financial sector and improved competitiveness.[2] In relation to the Banking Union a special vehicle, the Direct Recapitalization Instrument (DRI), was set on track in 2014, by means of which should a euro area Member State require additional financial resources following a bail-in of eligible creditors and the depletion of national or EU-level resolution funds, the DRI as a final resort would be available for recapitalization during a resolution procedure. (ii.)

The next component is the Single Resolution Mechanism (SRM) which ensures that if, despite stronger supervision, a bank subject to the Single Supervisory Mechanism was to face serious difficulties, its resolution could be managed efficiently with minimal costs to taxpayers and the economy. Hence, while the ESM concerned above offers to minimize the escalation of negative consequences at a macro-level, the SRM does the same at the micro-level. The SRM is operated by the Single Resolution Board who is also responsible for the careful management of the Single Resolution Fund. The Board carries out specific tasks to prepare for and carry out the resolution of a bank that is failing or likely to fail. The Single Resolution Fund will be set up to ensure that funding support is available while a credit institution is being restructured.[3] The SRM will function in strong conjunction with the SSM. In practice it means that the SRM will automatically apply to all SSM members, but Member States not participating in the SSM cannot expect 'SRM-treatment.' (iii.)

Lastly, before discussing the Single Supervisory Mechanism, several idiosyncratic cases have demonstrated even within the EU[4] that a well-functioning and well-funded deposit

1 http://esm.europa.eu/about/index.htm.
2 Ibid.
3 http://ec.europa.eu/finance/general-policy/banking-union/single-resolution-mechanism/index_en.htm.
4 E.g. *Cyprus* case in 2013.

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guarantee scheme is an important cornerstone of the financial stability architecture. Hence in the first conceptual document laying down the foundations of the Banking Union, the President of the European Council himself proposed an EU-wide cross-border banking deposit guarantee scheme as a building block for a stable and prosperous EMU.[5] Member States have therefore encouraged further harmonization on deposit insurance to enhance investor confidence in systemic stability through the enhanced security of the account holders. As a result, the Directive on deposit guarantee schemes provides a comprehensive set of rules on how Member State legislation on a national deposit guarantee mechanism should look like. In detail it was adopted in 2014 and it prescribes several substantive features, such as harmonized amount of deposits covered by the scheme and a maximum deadline for disbursement. However as part of the safety net for the depositors of members of the Banking Union, no common Deposit Guarantee Mechanism has been created or is planned to become operational in the foreseeable future. (iv.)

As regards the Single Supervisory Mechanism, it is one of the crucial parts of the Banking Union, since it has the task to overcome home-country bias in the field of financial supervision. The executer of this task is the European Central Bank (ECB), so for the time being the ECB is responsible for both the monetary policy of the Eurozone and the financial supervision of its most significant credit institutions. Nevertheless, in fulfilling its tasks, the ECB relies heavily on cooperation with the national competent authorities (NCAs). Acting as a golden mean, the SSM embraces only essential tasks in relation to credit institutions determined as significant within the euro area, whereas NCAs are expected to either fulfil the remaining tasks completely or to put forward proposals for the SSM for decision-making. As regards less significant financial institutions, the ECB has a constant oversight function, which can be turned into direct supervision in two cases, first when the institution is perceived to be in financial distress, and second when the institution has been subject to any state support measures.[6] The SSM is mandatory for the Eurozone Member States and voluntary for the rest of the EU. In essence, the ECB's supervisory power is confined by four factors, otherwise unlimited within the possibilities of the relevant legal framework.

First, the rules of the SSM are mandatory only for credit institutions under the financial supervision of Member States from the Eurozone. Since the SSM confers determinant supervisory powers to the ECB, the decisions of the highest decision-making body, the

5 'An integrated financial framework to ensure financial stability in particular in the euro area and minimise the cost of bank failures to European citizens. Such a framework elevates responsibility for supervision to the European level, and provides for common mechanisms to resolve banks and guarantee customer deposits.' Towards a Genuine Economic and Monetary Union Report by President of the European Council Herman Van Rompuy, Brussels, 26 June 2012.

6 Art. 5 (b) of Council Reg. (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 (hereinafter: the SSM Regulation).

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Governing Council of the ECB, are legally applicable only to Member Countries having representation in this body. For this reason, Member States outside the Eurozone cannot take part in the Mechanism on an equal footing, but they are able to decide voluntarily whether they want to join the SSM in a special liaison, called 'close cooperation.'

Second, the SSM Regulation refers only to credit institutions, and does not encompass other players of the financial world, such as financial enterprises, insurers, investment firms, other market infrastructure providers or entities engaged in 'shadow banking' activities. The scope of the system is as wide as it is, with admittance to the fact that not only credit institutions can pose a threat to the stability of the financial system. Without underestimating other sectors, there is a firm assumption that with consolidated Euro-area level bank supervision, as well as a well-functioning banking sector, Europe's financial and sovereign debt crisis could not have realized the way it did.

Third, the SSM Regulation comprises provisions only on essential tasks of credit institutions. The emphasis on these highlighted tasks[7] is crucial, since it prevents the SSM from being overwhelmed and fragmented and helps to focus on context that is manageable from a central location.

Fourth, the direct supervisory competence of the SSM concerns only the credit institutions which are evaluated by the ECB as significant. This process is a crucial part of the mechanism, since it designates the ECB's direct scope of competence. In legal terms the number of credit institutions where the ECB has supervisory responsibility amounts to around 6,000, whereas only approximately 120 are directly supervised by the ECB on a daily basis. Nevertheless, these banks represent around 85% of the banking assets in the euro area. As regards the classification procedure itself, both the SSM Regulation and the ECB Framework Regulation[8] contain specific detailed provisions. In summary, this legal background provides five essential criteria which make it possible to decide whether a credit institution can be described as significant or not. These are the following: the size of the institution, the national/EU economic importance threshold, the level of cross-border activity, the requisitioning of public financial assistance from the European Stability Mechanism and finally, the criteria by which the three most significant banks in a participating Member State are deemed to be significant irrespective of all the others. (v.)

7 Art. 4 of the SSM Regulation.

8 Reg. (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.

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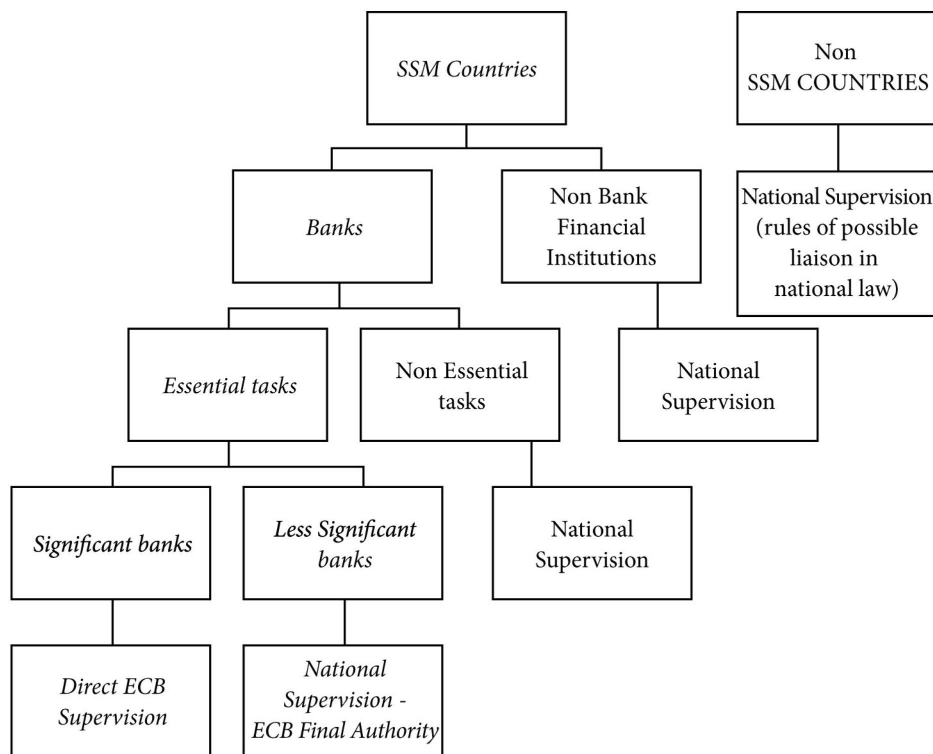
Figure 23.1 The Place of the SSM in the EU's Financial Supervisory Landscape



From the beginning of official negotiations on the structure of the Mechanism the issue of whether close cooperation is a real option has been in the forefront. Although up until April 2015 none of the non-Eurozone Member States gained acceptance to opt in, several countries have made full or partial official declarations regarding the intention to join.[9] As regards the domestic approach, Hungary shares the view of general concern among non-Eurozone Member States in relation to how their early joining would pass the cost and benefit test in sum. On one hand, the mere existence of a Single Supervisory Mechanism is about enhancing financial stability in the Eurozone, which has positive repercussions for all of Europe and as such, for Hungary as well. On the other hand, just from a regulatory perspective countries cannot conclude undeniably that the mechanism is suitable and operational also for countries where ECB direct supervision would involve more residual responsibilities at the local level. However, the possibility to join is on the

9 Bulgaria and Romania are reported to be determined to join whereas according to official statements Denmark also considers early opt in.

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agenda and investigated regularly incorporating the latest developments either at the EU or at local level.

Confirming the above mentioned, Hungary has been preeminent in implementing the provisions of the single rulebook in time. Following this line, it has to be considered that the Hungarian legal system is also fully in compliance with the Directive on deposit guarantee schemes[10] since it was successfully implemented by Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises. In regards to setting up a workable bank resolution framework, Hungary has been one of the first Member States to implement the provisions of the Bank Recovery and Resolution Directive in July 2014, half a year before the official deadline. Finally, Hungary has also accepted the Inter-Governmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund paving the way for a smooth adaption to the system at some point in the future. In sum, it can be declared that Hungary has duly implemented all of the available elements of the Banking Union which are requisite for a non-Eurozone Member State without opting into the SSM.

23.2 The Option of Close-Cooperation within the SSM Framework

Since the SSM Regulation delegates all supreme powers of decision-making to the Governing Council of the ECB consisting of governors of the central banks of Member States within the Eurozone, the current legal framework does not offer the possibility that decisions of the ECB Governing Council are directly applicable and binding in non-Eurozone Member States. This situation is perfectly articulated by Verhelst[11] as follows: 'In a nutshell, the Treaty stipulates that non-Eurozone countries are not allowed to vote in the final decision-making body of the ECB, nor are non-Eurozone countries bound by decisions made by the ECB.'

On the other hand, there is an explicit need for supervisory harmonization, for instance because of an internationally over-connected structure (often referred to simply as 'interconnectedness') of credit institutions within the union. To avoid fragmentation and the further splitting of the union into core Member States and peripheral Member States, decision-makers had to come up with a solution, which grants – at least the possibility – for Member States outside the Eurozone to opt-in the system. However, it cannot be more than a dispositive rule, a voluntary feasibility, as regards the composition of the supreme decision-making body of the SSM. Hence, on the decision of the Member State concerned to opt into the system within the framework of a close-cooperation agreement it must

10 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

11 Verhelst, S. (2013). Assessing the Single Supervisory Mechanism: Passing the point of no return for Europe's banking union. Egmont Paper 58; p. 25.

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execute specific modifications in its relevant national legislation whereby it binds itself to the ECB's guidelines and requests and it is ready to provide all relevant information the ECB may require.[12]

As regards the comparison of the rights and obligations between NCAs within the Eurozone, and NCAs outside signing a close cooperation agreement, two main differences can be observed. First, for the NCAs outside the Eurozone their operational independence is constrained by the fact that they are expected to follow all the instructions of the ECB, where on the other hand the NCA itself remains legally liable for these decisions. For the Eurozone no such discrepancy exists. Second, the difference in the possibility of affecting supervisory decisions between SSM Member States within the Eurozone and Member States outside the Eurozone signing a close cooperation agreement has to be emphasized. In addition to this, the differences in the possibilities for conflict resolution between supervisors of cross-border investments between SSM and non-SSM Member States is worth deeper elaboration.

Regarding the first issue, in the system of close cooperation the NCAs are expected to take the measures required by the ECB. An ECB decision can manifest only in the form of an instruction. These instructions do not have a direct binding effect on national legislation, so they have to be reformulated as decisions of the NCAs. If the ECB had to address a decision to a supervised entity or supervised group, the ECB would, instead of addressing a decision to a supervised entity or supervised group, issue instructions to the NCA in close cooperation and that NCA would address a decision to a supervised entity or supervised group in accordance with such instructions.[13] In respect of a less significant supervised entity or less significant supervised group, specific instruction cannot be addressed.[14] If an NCA does not transpose any particular instruction of the ECB into a formal decision, the ECB does not have any tool to enforce the request, except to force the Member State concerned to leave the close-cooperation status and the SSM as well. On the other hand, the NCA should be cautious, since in the system of close cooperation, it shall be liable for any damage resulting from its failure to apply any ECB measure, instruction, request or guideline in a timely manner.[15] The same liability of the NCA applies if any damage results from the proper execution of the ECB request. So principally, the main difference lies with the liability of the ECB to issue direct decisions towards the supervised credit institutions. Within the Eurozone the ECB has direct supervisory power accompanied by legal liability, and outside indirect power via national supervisory authorities resulting in that the liability is transferred to the NCA.

12 Art. 7 (2) of the SSM Regulation.
13 Art. 111 (3) of the ECB Framework Regulation, 2014.
14 Art. 108 (2), ibid.
15 Art. 108 (6), ibid.

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Second, non-euro area Member States in close cooperation who disagree with a draft decision of the Supervisory Board only have the right to send their reasoned disagreement in order not to be bound by the pertinent decision if the Governing Council does not confirm the non-euro area Member State's objection. If the Governing Council does not change its contested decision, the only remaining recourse lies in the immediate termination of the close cooperation at the affected Member State's request.[16] As can be seen from the above mentioned, there are no comprehensive means in the hands of the NCAs in the case of disagreement, the last resort, namely abandoning the system – at first glance – looks inadequate in many cases. In sum ergo – when disagreeing – the Member State in close cooperation can decide to temporarily or permanently leave the SSM by suspending or terminating its membership. Nevertheless this option is absolutely closed for Member States inside the Eurozone.

As regards inward investment by a significant group, the ECB will be in full charge of the parent company and of the branches, services and subsidiaries wherever located in the SSM area, within all participating states. A comparable national regime will be applicable to the less significant groups, where supervision will be exercised by the national supervisors of the home state for the parent company and its branches and service provision, and of the host state for subsidiaries.[17] In other terms, according to Article 116 (1) of the ECB Framework Regulation, an NCA in close cooperation shall adopt decisions in respect of significant supervised entities and significant supervised groups in its Member State only on the ECB's instructions. The NCA in close cooperation may also request instructions from the ECB. In case of outward investment by a significant group in the Eurozone – targeting institutions in a 'close co-operator' Member State – the scheme is the same with the exception that the ECB issues only a request addressing the NCA having a formal decision with a determined content.[18] According to the ECB's discretion the same can apply to non-significant institutions as well, otherwise there are only general guidelines and opinions issued.[19]

In case of outward investment by a significant group in the Eurozone targeting institutions registered in Member States chosen to opt out, given the fact that the jurisdictions of these Member States are independent and had not been subordinated by any relevant agreement, national law shall apply. As regards the Hungarian approach there is a suitable balance between cooperation and representing national interest as certain cross-border

16 Tröger, T.H., (2013) The Single Supervisory Mechanism – Panacea or Quack Banking Regulation? SAFE – Sustainable Architecture for Finance in Europe. Goethe University. SAFE Working Paper Series No. 27; p. 33.

17 Wymeersch, E. (2012) The European Banking Union, a First Analysis. Ghent University. Financial Law Institute. Working paper 2012/07; p. 34.

18 Art. 115 (5) of the ECB Framework Regulation, 2014.

19 Art. 117 (2), ibid.

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relevant issues[20] are supervised subject to joint supervision including implementation and even decision making[21] together with the competent authority of the parent company. In the case of disagreement the European Banking Authority is also involved.[22] This example shows that an optimum solution may be reachable even in the case of parallel existence of opposing interests.

23.3 Challenges of the Possible Supervisory Extension to Non-Eurozone Member States

As was mentioned above, although there is a possibility of opting into the SSM from outside the Eurozone as well, none of these countries has formally gained acceptance to subordinate themselves voluntarily to the powers of the ECB. For those non-Eurozone Member States who openly declared to stay outside[23] this decision stems from the ambiguous nature of the close cooperation agreement offered by the mechanism for Member States using their own currencies. In sum, the downside of this possibility results in two issues preventing the majority of non-Eurozone governments from giving a green light for the adherence to supervisory integration.

First, as was indicated above, non-euro area Member States in close cooperation who disagree with a certain draft decision of the Supervisory Board have the sole right to send their reasoned disagreement in order not to be bound by the pertinent decision if the Governing Council does not confirm the non-euro area Member State's objection. If the Governing Council does not change its contested decision, the only remaining recourse lies in the immediate termination of the close cooperation at the affected Member State's request.[24]

Second, the separation of the ECB's and the NCA's competencies is vague in a way that regulatory, legal, policy and finally fiscal responsibilities are not fully aligned, or at least not in a fully transparent manner for the general public.

20 According to Art. 173 (1) of CCXXXVII of 2013 on Credit Institutions and Financial Enterprises (hereinafter: Hpt.) the Authority and the competent supervisory authorities of EEA Member States where the EU parent credit institution, EU parent financial holding company or EU parent mixed financial holding company is established shall cooperate in monitoring: the internal capital adequacy assessment process, the liquidity risk, the supervisory review, the extra capital requirement and the compliance with institution-specific liquidity requirements.

21 Art. 173 (3) of Hpt.

22 Art. 173 (4), ibid.

23 The UK, Sweden, the Czech Republic and Hungary have communicated about having no immediate intention to join at the time of the drafting of the paper, May 2015.

24 Tröger, T.H., (2013) The Single Supervisory Mechanism – Panacea or Quack Banking Regulation? SAFE – Sustainable Architecture for Finance in Europe. Goethe University. SAFE Working Paper Series No. 27; p. 33.

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As regards the first issue, the problem stems from the decision making process of the ECB. As long as the ECB's Governing Council makes the final decision in specific supervisory cases even in relation to Member States outside of the Eurozone; close cooperation will not be attractive.

Considering policy responsibility, it definitely goes to the ECB, since the real decision making power is there. The issue of legal responsibility is more controversial because of the 'indirect-likeness' of the ECB decisions addressed to credit institutions registered in Member States of close cooperation. On the one hand, the substance of the decision is adopted by the ECB, but on the other hand the legal 'packing' – which through the decision wins its binding effect in that certain legislation – is the task of the NCA. This legal 'packing' means that the NCA should issue its own decision with exactly the same content as the ECB instruction. Although it seems as if there are two equal arguments standing in front of each other, but at the end of the day it shall be the NCA who bears the legal responsibility. It shall be the NCA whose decision may be contested before the courts and the NCA shall also be the one who pays the price for possible infringements of the decision concerned.

With policy responsibility on the ECB and legal responsibility on the NCA concerned there cannot be seen any real response mitigating this controversy, except for two weak attempts. First, there may be room for a sort of coordination at the professional level during the discussions of the Joint Supervisory Teams (JST), but this is without any constraining effect. Second, in case of dissention there is the reasoned disagreement procedure mentioned before, but its usage is just really limited again, since there is no possibility for fine-tuning, to provide a proportional, appropriate answer for a specific concern. In most of the imaginable cases, the opt-out possibility at the end of the reasoned disagreement procedure is exaggerated in a sense that opting-out would possibly cause more damage to the system in the end than accepting the opinion of the ECB in the individual decision concerned.

Moreover, this exaggerated opting out is not even a feasible option to Member States in the first times, since once the close cooperation between the ECB and NCA has been established, the Member State is bound for at least three years, termination is not possible. This restriction may result in considerable risks, since there is no profound experience of the operation of the Banking Union supervisory system in close cooperation so far. Furthermore, according to the SSM Regulation, the ECB can decide whether close cooperation should be maintained, suspended or terminated. With these decisions, the ECB shall take into account *inter alia* whether the absence of a suspension or termination could jeopardise the integrity of the SSM, have significant adverse consequences as regards the fiscal responsibilities of the Member States, could have significant adverse impact as regards the fiscal responsibilities in the Member State which has notified a reasoned disagreement in accordance with Article 26 (8) of the SSM Regulation, or the NCA adopted suitable measures according to the ECB's opinion. In the absence of established practices and clear

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rules of procedure, it is difficult to judge how these considerations will be applied. These unclarified issues further increase the legal and policy uncertainties associated with close cooperation with the SSM.

The real solution can be somewhere around the pivotal point of the decision making process. More precisely, the controversy stems from the context in which the legal responsibility of the NCA goes hand in hand with the ECB's decisive last word in relation to each decision. It would perfectly match the European legal heritage if there was a role in the decision making process for the one who bears the responsibility. It can be achieved by the involvement of the NCA when the Governing Council decides. If there were a place at the table for the NCA – limited to the decisions affecting the NCA concerned – signing a close cooperation agreement would definitely be a more tempting possibility for Member States outside the Eurozone.

Another attempt to mitigate the risk of close cooperation could be the extension of reasoned disagreement procedure with a phase in which the NCA concerned could have room for a further expression of its dissent. It would be an appropriate tool to ease the inter-institutional tension in cases where – according to the opinion of the NCA concerned – the legal 'packing' of the ECB instruction may have adverse effects. This is the case, when – following a reasoned disagreement procedure – the NCA has to transpose the ECB instruction through its formal decision, which the NCA professionally disagrees with, then the financial institution appeal the obligatory decision before the court. According to the present mechanism, if the court rules as damages should be paid to the financial institution due to illicit obligatory provision of the decision concerned, damages shall be paid by the NCA transposing the ECB instruction irrespective to its former reasoned disagreement. If a possible second round of reasoned disagreement procedure concerned above contained a certain kind of responsibility sharing determined by future possible court rulings, such a gesture would be another welcoming sign towards the reluctant non-Eurozone Member States.

According to the second issue, the other significant challenge of the possible supervisory extension to non-Eurozone Member States is the vague separation of the ECB's and the NCAs' competencies and responsibilities. Although, the tasks and responsibilities of the authorities are clear in theory according to the regulation, there are many practical issues, which are ambiguous and need to be clarified as the text shows in the following.

National legislation: According to the SSM Regulation, national legislation should ensure that national supervisors will abide by the ECB's instructions and guidelines in close cooperation. Since these requests and guidelines are legally non-binding, the national legislation should provide that the ECB's decision will be effectively adopted.[25] Although

25 Wymeersch, E., (2014) The single supervisory mechanism or 'SSM', part one of the Banking Union; National Bank of Belgium – Working Papers No. 255; p. 63 (https://www.nbb.be/doc/oc/repec/reswpp/wp255en.pdf).

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direct effect of EU law is a common European principle since *Van Gend en Loos*,[26] in case of close cooperation it cannot be applicable, since – determined by the TFEU[27] – the Governing Council of the ECB adopts supervisory decisions with respect to the Eurozone. Hence, the source of commitment undertaken by a non-Eurozone Member State in relation to the SSM is not the directly applicable EU law, but an international agreement. As such, it should be ratified to gain its effectiveness in national jurisdictions. From a practical point of view, it is unclear how to control whether national legislation will appropriately ensure the identity of the original ECB decision at the national level. The evaluation of identity has no elaborated procedural stages, according to the SSM Regulation it is fully based on the mere opinion of the ECB.[28] In addition, in the case of disputes between the ECB and NCAs as regards how the ECB shall be able to monitor and oversee the progress of implementation of its decisions, the rules of procedure are also vague. The presence of the ambiguity created by the deficiencies of the above mentioned proceedings might have a leading role in non-Eurozone Member State reluctance as regards opting into the SSM.

Macro-prudential issues: According to the SSM regulation, the ECB may apply stricter macro-prudential requirements defined in CRR/CRD IV than NCAs in close cooperation, irrespective of whether the affected credit institutions are under direct supervision or not. Nevertheless, national macro-prudential authorities retain control over macro-prudential tools not specified in CRR/CRD IV (e.g. Loan to Value, Payment to Income ratios), but the policy objectives of these measures are often common to the instruments defined in CRR/CRD IV (e.g. mitigating excessive credit growth). For this reason, it is essential to ensure sound cooperation between the two separated macro-prudential authorities (ECB and national macro-prudential authorities), guaranteed by legislative frameworks and appropriate rules of procedure. Failing this, serious conflicts may arise between ECB and national macro-prudential authorities, with regard to which macro-prudential measure is the most suitable to treat a particular systemic risk.

23.4 Conclusions

Overall the decision on potential close cooperation has to factor in both the benefits and costs of becoming part of the SSM.

On the benefit side the most obvious is the harmonization of supervisory activities at the SSM level, most specifically conducting supervision along the principles and technical modalities of the common supervisory manual, along with planning and executing

26 Judgment of the Court of 5 February 1963. in case 26-62. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* (1963).

27 The Treaty on the Functioning of the European Union, OJC 326 (2012).

28 Art. 7 (5) of the SSM Regulation.

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supervisory actions under the centrally coordinated supervisory cycle. This from the supervisory authorities' point of view, can enhance resource efficiency either directly or via the lessening need for case-by-case coordination, whereas from the institutions' point of view it can decrease compliance costs via more harmonized supervisory behaviour and actions at the group-level.

With regard to the modalities of decision-making, i.e. the operation of the Supervisory Board where the actual discussion of prospective supervisory actions takes place, some benefits can also be foreseen. First of all the composition, i.e. the relatively large number of ECB-delegated members and the decision-making process, namely that there is a vote on each and every action proposed by the Governing Council are until now the best efforts towards guaranteeing that the Supervisory Board will pursue EU-level interests and specific country-level aspects cannot be put forward so easily. From the close cooperation countries' point of view this could entail that sensitive home-host issues, especially on the placement of liquidity and capital within the cross-border banking groups can be handled in a more balanced way and – as opposed to the supervisory college structure – host authorities can have a stronger voice in highlighting level playing field issues. Overall, in theory the system is capable of achieving final, SSM-level supervisory decisions that would embody less bias towards home countries.

And finally, the mere fact that with an early opt-in countries' representatives can be present when the whole system of common supervision is taking shape can provide ample opportunities for deeper integration and more influence on all technical and organizational modalities.

On the cost side, in our opinion the most decisive factor is that the SSM framework does not actually take on any operational steps in the supervisory process on its own, meaning that the local supervisory authorities' time, efforts and resources are going to be used exactly as before. The NCAs are even expected to prepare the most decisive actions regarding authorization, withdrawal of authorizations, mergers and acquisitions, etc. The SSM's responsibility in these areas is only that it gives the 'seal of approval' on the already prepared supervisory action. The division of labour can be somewhat different in the JST pursuing actual supervisory activities with regard to operating banking groups, however local competent authorities have to be involved in each and every supervisory phase, especially in the most resource intensive on-sight supervision. Generally, we can expect that during the ongoing supervision NCAs will be those who have the knowledge and the vision of what supervisory action is warranted and will be the primary source of initiation of any specific decision. The SSM's role is to convey the proposal made at the local supervisors' level in front of the Supervisory Board and the Governing Council to become legally binding. In this regard the pan-European decision-making procedure can result in a more level playing field and provide more room for a balanced home-host discussion, but in everyday life it embodies an additional layer of bureaucracy where the benefits can be

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ambiguous, but the costs in terms of resources and timeliness of the decisions are certain. Especially in relation to unexpected events or when some crises occur this delay in supervisory decision and action can entail serious consequences.

When we examine the regulatory environment of these supervisory decisions we find additional pitfalls that may hinder how the potential benefits of a cross-border supervisory system could materialize. When following the adoption of the Basel III rules when EU-specific implementation took place, the EU decided to split the regulatory requirements into a directive and a directly applicable regulation form. Since the concept of a Banking Union was not on the table at that time all the rules of supervisory actions and responsibilities were implanted into the CRD IV recognizing the differences of the organizational and institutional background of supervision in the Member States. The Member States not only took the opportunity to implement CRD IV as it best fits into their legal system and supervisory culture, but were also allowed to fine-tune their country-level requirements while using the approximately 80 options and discretions embedded into the directive. As a whole under the SSM structure, these local requirements set the framework of supervision no matter who acts as the supervisory authority. This entails among others that the differences in legal requirements at the country level are about to seriously hinder the comparability and equal standards for credit institutions operating under the territory of the SSM, one of the major benefits the new structure is expected to be bring about.

Furthermore the proportionality principle advocated by the SSM in its Guide to banking supervision[29] can be a source of concern for potential opt-in countries who are expected to bear the consequences of supervisory misconduct until the build-up of the common Resolution Fund by 2024, and even after that costs beyond the 60 billion euros the Fund would be able to finance. When the Guide talks about proportionality it emphasizes that supervisory stringency must be commensurate with the systemic importance of the institution under supervision. However, from the logic of the SSM one would conclude that this systemic importance is measured on the EU or at least on the Eurozone scale. However, the potential close cooperation countries are dominated by credit institutions that are systemically important at the Member State level, but are almost unrecognizable on an EU scale. Would joining the Banking Union entail that regulatory attention would diminish with regard to these institutions? Or would it require extra efforts and resources from local authorities to pay due attention to these institutions – sometimes subsidiaries – while following the regulatory cycle set by the SSM? As of yet no comforting solution has been offered for this problem.

In sum, when the costs and benefits are weighted against each other we cannot conclude that the potential benefits would clearly outweigh the costs and the embedded risks described above. So until some advancement in operation, transparency and openness for

29 https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf.

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problem resolution from the SSM side – the 'wait and see' approach is warranted for the Member States with the option to initiate close cooperation with the ECB and become an – almost equal – partner within the SSM.