

9. The ECB's macroprudential tasks and home–host supervision in the SSM: tasks, powers and supervisory gaps

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I. INTRODUCTION

The Single Supervisory Mechanism (SSM) was designed to enhance supervision of the European banking sector and to promote European banking stability following the financial crisis of 2007–2009 and the euro area sovereign debt crisis of 2010–2012. The SSM provides the supervisory pillar of the European Banking Union (EBU) and empowers the European Central Bank (ECB) to carry out prudential supervision of credit institutions, financial holding companies and mixed financial holding companies that are established in participating Member States and to allocate supervisory responsibilities to the national competent authorities (NCAs) of participating Member States to supervise less significant institutions.²

The SSM raises important legal and institutional issues regarding the extent and scope of the ECB's competence to supervise credit institutions and banking groups, especially on a cross-border basis, and whether or not its powers and capabilities are adequate to achieve prudential regulatory objectives. This chapter first analyses the ECB's legal competences to exercise macroprudential supervisory tasks involving the supervision of credit institutions on a home–host country basis within the EBU. Second, the chapter will analyse the applicable provisions of the Single Supervisory Mechanism Regulation³ (SSM

¹ I would like to thank Vivienne Madders for her research assistance. All errors are mine.

² See Kern Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) 40 *European Law Review* 154–187, 167–168, discussing the doctrine of conferred powers and Art. 13(2) TFEU.

³ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287.

Regulation) and the Single Supervisory Mechanism Framework Regulation⁴ (SSM Framework Regulation) as it relates to the allocation of home and host country supervisory tasks for credit institutions that operate on a cross-border basis. This will involve a discussion of some of the main issues arising for the ECB to supervise credit institutions on a cross-border consolidated basis and how it interacts with NCAs in participating Member States and in other EU Member States.

II. INSTITUTIONAL AND LEGAL CONTEXT OF THE SSM

At the outset, it is important to emphasise the constitutional basis of the ECB's authority to act as a bank supervisor.⁵ Article 13(2) of the Treaty on the Functioning of the European Union (TFEU) provides that EU institutions operate under the doctrine of conferred powers, which states that public institutions are constrained by law, in this case by the Treaty, because they are creatures of law.⁶ EU institutions only have powers granted to them by the EU Treaties.⁷ The rationale behind this is that the exercise of state power in a liberal society or market economy should be exceptional and require justification and constraint.⁸ In other words, European institutions have legal competence to exercise powers that are specifically conferred.

Under the Treaty of Maastricht, the ECB expressly did not have conferred powers to exercise supervision over credit and other financial institutions unless it was authorised by unanimous consent of all Member States voting in Council. The so-called enabling clause of Article 127(6) TFEU requires the Council of Members to approve unanimously the triggering of the ECB's

⁴ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) [2014] OJ L 141.

⁵ See discussion in Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (Cambridge University Press 2010) 60.

⁶ Case C-133/06 *European Parliament v Council of the European Union* (Safe Countries of Origin) ECLI:EU:C:2008:257, paragraphs 44 and 54, holding, inter alia, 'each institution is to act within the powers conferred upon it by the Treaty', and 'it has already been held that the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the Institutions themselves'.

⁷ *Ibid*, paragraph 55. Art. 13(2) TFEU provides that '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions, and objectives set out in them'.

⁸ See discussion in Chalmers, Davies and Monti, *supra* note 4, 60.

competence to act as a supervisor for credit and other financial institutions.⁹ According to the language of Article 127(6) TFEU, however, the ECB can only have supervisory powers conferred on it ‘concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings’. This means it can only have supervisory powers conferred on it for individual credit and financial institutions, not wider powers involving bank resolution, nor oversight of financial non-banking conglomerates or investment firms not defined under EU law as ‘credit institutions’. In other words, Article 127(6) TFEU essentially applies to the prudential supervision of individual ‘credit institutions and other financial institutions’ and not to the supervision of other financial firms or areas of the financial markets, such as clearing and settlement and the so-called shadow banking market.¹⁰ The restrictive language of Article 127(6) TFEU is presumably why the SSM Regulation was designed to apply only to individual ‘credit institutions’ as defined under EU law and to the larger banking groups in which they are owned or controlled.

The ECB acts through the Supervisory Board (SB),¹¹ which is responsible for supervising the euro area’s largest cross-border banks and the top three banks by size in each participating Member State. The SB is responsible for supervising large cross-border euro area banks and overseeing the supervisory actions of NCAs responsible for supervising small and medium-sized credit institutions in participating Member States. The ECB has ultimate discretionary authority to decide whether to intervene and to take supervisory decisions that could supersede the decisions of NCAs with respect to less significant credit institutions, which the ECB does not directly supervise.

In addition, the SSM Regulation provides specifically in Article 4(1)¹² that the ECB shall have competence and the powers to supervise credit institutions and banking groups by applying and enforcing the relevant provisions of EU banking law, such as the Capital Requirements Directive IV (CRDIV) and the

⁹ Art. 127(6) TFEU provides the Council may confer specific tasks upon the ECB concerning policies relating to the prudential supervision of credit institutions (banks) and other financial institutions with the exception of insurance undertakings.

¹⁰ The Financial Stability Board has defined shadow banking as ‘a system of credit intermediation that involves entities and activities outside the regular banking system’. See Financial Stability Board, ‘Shadow Banking: Strengthening Oversight and Regulation – Recommendations of the Financial Stability Board’ (2011) 2.

¹¹ SSM Regulation, Art. 26 (‘planning and execution of the tasks conferred on the ECB shall be fully undertaken by an internal body composed of its Chair and Vice Chair’).

¹² Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63 (29 Oct 2013) Art. 4(1).

Capital Requirements Regulation (CRR)¹³ as well as national law implementing EU banking law.¹⁴ The subject matter or area of competence for the ECB is enumerated in Article 4 of the SSM Regulation, which empowers the ECB with competence to monitor capital adequacy, liquidity buffers and leverage limits¹⁵ and approving bank recovery plans and asset transfers between affiliates within banking groups or mixed financial conglomerates.¹⁶

The SSM Regulation, however, does not authorise the ECB to engage in broader supervision of the financial system, including, among other things, the shadow banking industry, the wholesale structured securities markets and the over-the-counter (OTC) derivatives markets and derivatives clearing houses, probably because of the rather limited constitutional basis for such authority in Article 127(6) TFEU. This legal basis does not authorise the ECB to carry out broader macroprudential supervisory powers over the financial system. These gaps in supervisory competence will be discussed below in Section IV.

III. MACROPRUDENTIAL TASKS IN THE SSM REGULATION AND THE SSM FRAMEWORK REGULATION

Although the definition of macroprudential regulation and supervision is intensely debated and there is ‘no widely agreed upon and comprehensive theoretical framework’,¹⁷ it is suggested that it consists of four main areas: (1) adjusting the application of regulatory rules to institutions according to developments in the broader economy (i.e., countercyclical capital

¹³ Directive 2013/36/EU, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176 (‘CRDIV’) (which repealed Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions, 14 June 2006); Regulation (EU) No. 575/2013, on prudential requirements for credit institutions and investment firms [2013] OJ L 176 (‘CRR’).

¹⁴ SSM Regulation, Art. 4(3).

¹⁵ *Ibid.*, Art. 4(1)–(3), especially Art. 4(1)(d) and (e).

¹⁶ *Ibid.*, Art. 4(1)(g) and (h) mention ‘mixed financial holding companies’ and ‘financial conglomerate’ respectively, over which the ECB has certain supervisory powers.

¹⁷ See Financial Stability Board (FSB), *Macro Prudential Tools and Frameworks: Progress Report to G20* (27 October 2011) 9, www.financialstabilityboard.org/publications/r_111027b.htm, accessed 18 June 2018. See also Financial Stability Board, *Strengthening Oversight and Regulation of Shadow Banking Entities* (2013) 12, recommending five ‘overarching principles’ for regulating shadow banking, but the FSB leaves it up to individual countries to ‘select the appropriate tool(s) from the policy toolkit’. www.financialstabilityboard.org/publications/r_121118.html accessed 18 June 2018.

requirements);¹⁸ (2) imposing regulatory controls on contractual relationships between market participants (i.e., OTC derivatives counter-parties, loan-to-value or loan-to-income ratios); (3) monetary policy controls, such as interest rates, exchange rate controls, regulating money supply, and capital controls; and (4) prudential requirements for financial infrastructure or firms providing infrastructure services (i.e., capital requirements for derivative clearing houses).¹⁹

At the institutional level, some macroprudential supervisory authorities exercise specific macroprudential supervisory levers or tools (i.e., countercyclical capital requirements and loan-to-income ratios).²⁰ For example, the use of countercyclical capital requirements can be varied depending on the riskiness of assets at points in the economic cycle. Denmark and Switzerland have used countercyclical capital buffers to dampen credit booms in their respective housing markets by imposing higher capital requirements on home mortgage loans as opposed to other types of loans. Denmark has also used loan-to-income ratio caps for bank mortgage lending. Other macroprudential measures include liquidity tools that require financial institutions to hold a certain ratio of liquid assets, i.e., assets that can be easily turned into cash, relative to total assets.²¹

As discussed above, the SSM Regulation allocates broad competences and powers to the ECB in the field of prudential supervision for individual credit institutions and financial holding companies but the scope of those competences is limited by the Treaty and the enumerated tasks set forth in Article

¹⁸ Experts have observed that countercyclical buffers could be difficult to implement. See Markus Brunnermeier, Andrew Crockett, Charles Goodhart, Avinash Persaud and Hyun Song Shin, *The Fundamental Principles of Financial Regulation* (Geneva Reports on the World Economy, Centre for Economic Policy Research 2009) chapter 4, which discusses the design of countercyclical regulation.

¹⁹ See Financial Stability Board, IMF and BIS, 'Macroprudential Policy Tools and Frameworks; Progress Report to G20' (2011) 6–11.

²⁰ See Bank of England, Financial Policy Committee, 'Financial Stability Report' (2012).

²¹ *Ibid.* Also, leverage ratios could be used to limit the amount of leverage relative to the value of the bank's assets. Forward-looking loss provisions: financial institutions can be required to set aside provisions against potential future losses on their lending. Collateral requirements: lending could be limited by imposing higher collateral restrictions, for example if growth in lending appears to be unsustainable. An example is a loan-to-value requirement, which would limit the size of a loan relative to the value of the asset. Similarly, 'haircuts' on repurchase agreements would limit the amount of cash that can be lent as a proportion of the market value of a set of securities. Information disclosure: greater transparency could help markets work better. For example, in times of crisis, more information about different institutions' risk exposure could increase the flow of credit as uncertainty is reduced.

4 of the SSM Regulation. However, Article 5 of the SSM Regulation confers on the ECB a limited number of macroprudential tasks and tools. Under the heading in Article 5, entitled 'Macroprudential tasks and tools', the ECB is allocated powers to impose stricter prudential requirements, including higher capital buffers, on individual banks based on macroprudential factors in the country where the bank is based.²² Although the exercise of these macroprudential tools rests primarily with the NCAs,²³ the ECB may intervene and utilise these tools 'if deemed necessary' to apply higher requirements than those set out by the national authorities.²⁴ In particular, it can adopt specific measures if required to take the specific circumstances of the Member State's financial and economic situation into account²⁵ as well as 'duly consider' any objection of an NCA that seeks to address a macroprudential risk on its own.²⁶ Moreover, the CRR permits the ECB as the competent supervisory authority to take macroprudential tools, other than increased capital buffers, only in limited circumstances for banks based in a participating SSM Member State where the ECB has identified macroprudential or systemic risks.²⁷

Although the ECB has specific powers to impose stricter prudential requirements and additional capital buffers have been carved out in Article 5 of the SSM Regulation,²⁸ the use of these tools now rests primarily with the NDAs. Under the SSM Regulation, the term used for national macroprudential authorities is 'national designated authorities'. The NDA can, but does not have to, be identical with the NCA. Article 4 CRDIV provides that the NCA or NDA (if the NDA is the same as the NCA) should have the expertise, resources, operational capacity, and the powers and independence to monitor effectively credit institutions' activities, assess compliance and investigate breaches. However, if the NDA is not the same body as the NCA, the NDAs (not the NCAs) will be responsible for macroprudential tasks and tools, such as imposing 'counter-

²² SSM Regulation, Art. 5.

²³ *Ibid.*, Art. 5(1).

²⁴ *Ibid.*, Art. 5(2).

²⁵ *Ibid.*, Art. 5(5).

²⁶ *Ibid.*, Art. 5(4).

²⁷ CRR, Art. 458. This article is entitled 'Macroprudential or systemic risk identified at the level of a Member State' and states in relevant part: '2. Where the authority determined in accordance with paragraph 1 identifies changes in the intensity of macroprudential or systemic risk in the financial system with the potential to have serious negative consequences to the financial system and the real economy in a specific Member State and which that authority considers would better be addressed by means of stricter national measures, it shall notify the European Parliament, the Council, the Commission, the ESRB and EBA of that fact and submit relevant quantitative or qualitative evidence'.

²⁸ SSM Regulation, Art. 5(2).

cyclical buffer rates'.²⁹ Furthermore, NDAs are empowered to propose draft national legislation if they identify changes in the intensity of systemic or macroprudential risks in the financial system.³⁰ The draft national legislation can be rejected within a one-month period by the Council but only upon a proposal by the Commission.³¹ As discussed above, the ECB may decide (instead of the NDA) to exercise a macroprudential task regarding a credit institution based in a participating Member State 'if deemed necessary'³² but is then required to take the specific circumstances of the Member State's financial and economic situation into account³³ as well as 'duly consider' any objection of an NDA or NCA proposing to address the local situation on its own.³⁴

The ECB must apply the macroprudential tools referred to in Article 101 of the SSM Framework Regulation in accordance with this Regulation and with Articles 5(2) and 9(2) of the SSM Regulation, and where the macroprudential tools are provided for in a directive (i.e., CRD), subject to implementation of that directive into national law. If an NDA does not adopt a macroprudential tool (i.e., a countercyclical buffer), this does not prevent the ECB on its own initiative from setting a capital buffer requirement in accordance with the SSM Framework Regulation and Article 5(2) of the SSM Regulation.

Furthermore, the SSM Framework Regulation contains procedural provisions for the use of macroprudential tools by the ECB and participating Member State authorities with competence under national law to exercise macroprudential tools (the so-called 'NDAs').³⁵ Article 103 SSM Framework Regulation provides that the ECB shall compile a list of the NDAs and NCAs of participating Member States that have authority under Member State law to utilise macroprudential tools. As macroprudential tools are a limited and a shared task for the ECB under the SSM Regulation and the CRR, Member State NDAs and NCAs have retained a wider competence to exercise an array of macroprudential tools. Macroprudential tools include, but are not limited to, countercyclical capital buffers, loan-to-income limits, measures for domestically authorised credit institutions, and any other measures to be adopted by

²⁹ CRDIV, Art. 136(1).

³⁰ CRR, Art. 458(1) and 458(2).

³¹ *Ibid.*, Art. 458(4).

³² *Ibid.*

³³ *Ibid.*, Art. 5(5).

³⁴ *Ibid.*, Art. 5(4).

³⁵ SSM Framework Regulation, Title 2: Procedural Provisions for the Use of Macro-Prudential Tools, Arts 103–105.

NDAs or NCAs aimed at addressing systemic or macroprudential risks set forth under EU law.³⁶

As part of the procedure on macroprudential tasks of the ECB, under the SSM Framework Regulation, the NDAs and NCAs are required to inform the ECB of their intention to use macroprudential tools, the systemic risks they are designed to address, and the actual decision to use such measures.³⁷ The decision to use macroprudential tools must be notified to the ECB in advance not less than ten days before the decision is actually taken, and the identification of systemic risks by NDAs or NCAs must be notified to the ECB as soon as possible after the risks are identified. The ECB can object to the use of macroprudential tools but must put its objections in writing and convey them to the relevant NDA/NCA. Before deciding to use (or not) the macroprudential tools, the relevant NDA must duly consider the ECB's objections before proceeding with the decision.³⁸

Where the ECB has competence to apply macroprudential tools that impose stricter requirements on banking institutions, it shall cooperate closely with the competent NDAs/NCAs and inform them of the intended decision. If the ECB decides to apply more stringent macroprudential tools to credit institutions that are subject to the CRR and the CRDIV, the ECB is required to inform the relevant NDAs/NCAs as early as possible of identification of systemic or macroprudential risks and the details of its use of specific macroprudential tools.³⁹ NDAs and NCAs may object to the ECB's decision to use macroprudential tools by stating their reasons in writing, which shall be duly considered by the ECB.⁴⁰ The ECB must notify its intention to cooperate closely with the concerned NCA or NDA ten days before taking the decision and respond to their objection by stating its reasons for action within five working days.⁴¹ It is questionable whether this five-day response period for the ECB is adequate for it to formulate an appropriate response to an NCA or NDA and therefore the ECB may be reluctant to take a decision to adopt a macroprudential tool (i.e., increased countercyclical buffers) when an NDA does not think that such a measure is necessary because of the relatively short period of time the ECB

³⁶ Ibid, Art. 101(1). But note also Art. 101(2): 'The macro-prudential procedures referred to in Articles 5(1) and (2) of the SSM Regulation shall not constitute ECB or NCA supervisory procedures within the meaning of this Regulation, without prejudice to Article 22 of the SSM Regulation in relation to decisions addressed to individual supervised entities.'

³⁷ Ibid, Art. 104(1).

³⁸ Ibid, Art. 104(3).

³⁹ SSM Framework Regulation, Art. 105(1).

⁴⁰ Ibid, Art. 105(2).

⁴¹ Ibid, Art. 5(4). Art. 5(4) SSM Regulation states that the ECB 'shall state its reasons [to object] in writing within five working days'.

would have to respond to an NDA's objection. Regarding the role of host state authorities where the local operations (i.e., branch) of a credit institution is based in a participating Member State, the principle of cooperation applies as to the decision of whether to take macroprudential tools. Host country authorities are also subject to the notification obligation regarding their decision to impose macroprudential tools on the local operations of a credit institution based in a participating Member State.

Macroprudential regulatory measures are wider in scope of coverage and application and necessarily involve a broader array of prudential supervisory tools that include both *ex ante* supervisory powers, such as licensing, authorisation and compliance with regulatory standards, and *ex post* crisis management measures, such as liquidity and resolution tools, deposit insurance and lender of last resort.⁴² Indeed, the objectives of macroprudential regulation – to monitor and control systemic risks and related risks across the financial system – will require greater regulatory and supervisory intensity that will necessitate increased intervention in the operations of cross-border banking and financial groups and a wider assessment of the risks they pose. Under the SSM, the main question that remains open is whether the ECB has the necessary scope of authority to be an effective macroprudential supervisor. The European Commission has consulted on this issue but decided in 2017 to adopt only cosmetic changes to the current EU institutional framework of financial supervision, such as the composition of the European Systemic Risk General Board (ESRB) and making the president of the ECB automatically the Chair of the ESRB.⁴³ Despite these incremental reforms, the ESRB remains a soft law body with no binding competence and with the authority only to issue recommendations and warnings, not technical standards like the European

⁴² See European Commission, 'Report of the High-level Expert Group on financial supervision in the EU', chaired by Jacques de Larosière (25 February 2009), https://ec.europa.eu/info/files/report-high-level-group-financial-supervision-eu-chaired-jacques-de-larosiere_en, accessed 4 December 2018. See also Financial Services Authority, 'The Turner Review – a regulatory response to the global banking crisis' (March 2009), www.fsa.gov.uk/pubs/other/turner_review.pdf accessed 21 February 2018.

⁴³ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board' COM(2017) 538 final 2017/0232 (COD) (20 September 2017), https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-538_en, accessed 15 June 2018. Also note the ECB's comment: 'However, the Commission concluded that an overhaul of the macroprudential toolbox was not needed at the current juncture.' See European Central Bank, 'Targeted review of the macroprudential framework' (27 April 2018), http://www.ecb.europa.eu/pub/macprudential-bulletin/html/ecb.mpbu201804_03.en.html, accessed 15 June 2018.

Supervisory Authorities (ESAs). Thus, the proposed changes do not address the issue that the ECB has limited authority and tasks in respect of macroprudential oversight despite the fact that with the European Banking Union, the ECB has become a Euro-wide microprudential bank supervisor. Hence, there remains a gap in banking supervision at the EU level because there is no body with the legal competence and powers to perform fully macroprudential supervision and regulation.

IV. OVERVIEW OF THE HOME–HOST FRAMEWORK IN THE SSM

The SSM system consists of both the ECB and the NCAs. Its overall purpose is banking supervision in EU participating Member States and EU non-participating Member States that have opted in. Its overriding objectives are to ensure safety and soundness of the European banking system and to ensure the unity and integrity of the EU internal market.⁴⁴ The ECB is responsible for the effective and consistent functioning of the SSM.⁴⁵ The rules apply to existing home–host supervisory arrangements but where the ECB has taken over prudential supervisory tasks under Article 4 of the SSM Regulation it carries out the functions of both the home and host authorities of participating Member States.⁴⁶ Moreover, the ECB acts as a host supervisor in relation to significant branches operating in participating Member States which have home offices in non-euro area countries and for other branches considered as significant institutions.⁴⁷

All euro area Member States are automatically members, while non-euro area members can decide to participate in the SSM through a procedure involving the NCA entering into a ‘close cooperation’ with the ECB.⁴⁸ For the other non-participating Member States, the ECB is authorised to adopt a Memorandum of Understanding with the relevant national competent authority that explains how the ECB will cooperate with the competent authority in

⁴⁴ SSM Regulation, Art. 1.

⁴⁵ *Ibid.*, Art. 6(1).

⁴⁶ *Ibid.*, Art. 4.

⁴⁷ See European Commission, ‘Commission Staff Working Document accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013 {Com(2017) 591 final}’ SWD(2017) 336 final, 24.

⁴⁸ SSM Regulation, Art. 7(1) and (2)(a)–(c), providing the legal requirements for ECB cooperation with national competent authorities that enter into ‘close cooperation’ with the SSM, including rules that apply directly to banks established in participating countries.

performing their respective supervisory tasks.⁴⁹ Article 6(7)(b) SSM requires that the ECB and NCAs establish a public framework for making practical arrangements between the ECB and the NCAs to coordinate oversight of ‘credit institutions’ not considered as less significant.⁵⁰

The ECB is responsible for direct supervision of ‘significant’ credit institutions, which represent over 80 per cent of banking assets in the euro area.⁵¹ The ECB is also indirectly responsible for the supervision by NCAs of smaller, less systemically important institutions.⁵² The EU General Court in the *L-Bank* judgment case⁵³ held that the determination of the legitimacy of the ECB’s classification of an institution as a ‘significant entity’ must be assessed in the context of the ECB’s exclusive competence under the SSM Regulation to supervise credit institutions, and that any challenge by a bank on proportionality grounds against such a classification should be assessed, among other things, in light of the exclusive competence transferred to the ECB against the subordinate role attributed to the NCAs under the Regulation.⁵⁴ Moreover, it should be emphasised that the ECB only has competence to apply its powers to enforce EU prudential banking law and regulatory requirements against ‘credit institutions’, financial holding or mixed financial holdings defined as such under EU law.⁵⁵ For instance, financial institutions that do not accept whole-

⁴⁹ Ibid, Recital 14, Art. 3(6). The SSM Regulation reserves the term ‘NCA’ for authorities participating in the SSM. Non-SSM authorities are ‘competent authorities’ on equal footing with the ECB.

⁵⁰ Ibid, Art. 6(7)(b).

⁵¹ The criteria used to define a bank as significant are: total value of assets exceeding €30 billion, whether it is one of the top three largest banks in its home Member State; its importance to the economy of its home state or the EU as a whole; the extent of its cross-border activities; and whether it has requested or received direct public financial assistance from the European Stability Mechanism (ESM) or the European Financial Stability Facility (ESFS). SSM Regulation, Art. 6(4)(i)–(iii).

⁵² SSM Regulation, Art. 4(1): ‘in relation to all credit institutions established in the participating Member States’.

⁵³ Case T-122-15 *Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank* [2017] OJ C 213/26. As of June 2018, an appeal case of this decision is in progress: Case C-450/17 P *Landeskreditbank Baden-Württemberg*.

⁵⁴ Ibid, paras 50–64.

⁵⁵ ‘Credit institution’ is defined as an ‘undertaking whose business is to receive deposits or other repayable funds from the public and to grant credit for its own account’. However, it is pointed out that the concept of ‘repayable funds from the public’ and the concepts of ‘credit’ and ‘deposits’ can be interpreted in different ways, meaning that financial institutions performing similar activities in different Member States may be classified as a ‘credit institution’ in one Member State, but not in another. See Communication from the Commission to the Council and the European Parliament, ‘Shadow Banking – Addressing New Sources of Risk in the Financial Sector’ COM/2013/0614 final.

sale or retail deposits are not defined as ‘credit institutions’ under EU law and therefore are not subject to SSM jurisdiction. These could though be defined as credit institutions under national law. Similarly, a ‘credit institution’ subject to SSM jurisdiction for carrying on activities governed by EU prudential banking law is not subject to SSM jurisdiction for activities not subject to EU prudential banking law, such as brokering and dealing securities or the marketing and sale of retail financial products.⁵⁶ For such non-prudential activities, the bank would be subject to other EU banking and financial law requirements, such as conduct of business rules, which are the sole responsibility of NCAs to monitor and enforce.⁵⁷

The ECB Supervisory Board is also responsible for overseeing the supervisory actions of participating NCAs that supervise directly less significant institutions in the SSM regime.⁵⁸ The ECB has ultimate discretion to decide whether to intervene – either on its own initiative or if it is requested to intervene by the NCA – and take direct oversight of less significant institutions that are ordinarily subject to direct supervisory control by NCAs if the ECB determines that it is necessary to meet its objectives under the SSM Regulation or to ensure that the relevant NCA is fulfilling its supervisory responsibilities.⁵⁹

V. HOME–HOST RESPONSIBILITIES AND PASSPORTING IN THE SSM

A. Home–host Rules

The SSM Framework Regulation provides more details about the procedural allocation of powers between the home and host countries where credit institutions or banking groups operate within the EBU and also provides rules for allocation of powers between the ECB as a home and host authority and other competent authorities in other EU/EEA states which are outside the EBU. As

⁵⁶ See SSM Regulation, Recital 28.

⁵⁷ The SSM does not apply to most conduct of business rules that govern a credit institution’s capital market activity – such as prospectus requirements, insider dealing and market abuse rules, or mis-selling of retail financial products. These are subject to other areas of EU and national law and are regulated by that country’s NCAs (not the ECB).

⁵⁸ *Ibid.*, Art. 6(7)(a)–(c). See also Art. 26(8) (SSB shall adopt ‘draft decisions’ ‘to be transmitted ... to the national competent authorities of the Member States concerned’).

⁵⁹ *Ibid.*, Art. 6(5)(b): ‘when necessary to ensure consistent application of high supervisory standards, the ECB may at any time on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions’.

a general matter, where credit institutions exercise their right of establishment or provide services in another Member State, ‘Union law provides for specific procedures and for attribution of competences between the Member States concerned’.⁶⁰ Under the single passport rules of EU financial services law, the home state authority where the credit institution is established has competence to ensure the institution’s compliance with prudential regulatory requirements of EU law, including the institution’s branch operations in other EU/EEA Member States.⁶¹

However, the host country would have competence to supervise the branch operations of the non-host state credit institution for compliance with host country central bank liquidity requirements.⁶² Also, the host state authority has competence to ensure the branch’s compliance with EU and domestic conduct of business laws and regulation (including consumer protection), and compliance with domestic anti-money laundering and counter-terrorist financing requirements (AML/CFT Directive⁶³). This means, for example, that the host state authority will need to establish policies and procedures on client acceptance, suspicious transaction etc.⁶⁴ It should be noted that the ECB is nonetheless competent to act as a supervisor for the tasks that are set forth in Articles 4 and 5 of the SSM Regulation, but not for tasks not specified in the Regulation.

Furthermore, Article 11 SSM Framework Regulation provides the important principle of communication and exchange of information between the ECB, home state authorities and host state authorities regarding the procedures for the right of cross-border establishment. Significant supervised entities seeking to establish a branch in another Member State are required to notify this to their home state authority, which will in turn immediately notify the ECB. A less significant supervised entity that is not directly supervised by the ECB only has to notify its home state authority, which does not have to notify the

⁶⁰ Ibid, Recital 51.

⁶¹ George Walker, *European Banking Law: Policy and Programme Construction* (British Institute of International and Comparative Law 2006) 291–327. See also, Mads Andenas and Wolf-Henning Roth, *Services and Free Movement in the EU* (Oxford University Press 2002) chapter 1.

⁶² Ibid.

⁶³ Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141.

⁶⁴ Byrne Wallace, ‘Regulation of Banking in Ireland: Subsidiary or Branch’, *Lexology* (10 April 2017), <https://www.lexology.com/library/detail.aspx?g=b0ceecf6-12dc-429b-8341-39b39756f829>, accessed 20 November 2018.

ECB about the institution's wish to expand to another Member State.⁶⁵ If the ECB does not object within two months of the notification, the establishment is deemed to be approved and the ECB is required to notify the host Member State that the institution will establish a branch in that host state. Similarly, for a less significant entity that is not directly supervised by the ECB, the home state authority must inform the ECB and the host Member State where the institution is seeking to establish a branch.⁶⁶

Regarding the procedures for the free provision of services by credit institutions on a cross-border basis within SSM participating states, Article 12 requires significant institutions providing services in another Member State for the first time to inform the home Member State authority, which will in turn inform both the ECB and the host state where the institution is seeking to provide services.⁶⁷ Regarding less significant institutions, they are required to notify their NCAs, which will in turn notify the ECB and the host state where the institution is seeking to provide services.⁶⁸

Where credit institutions are established in non-participating Member States, their home competent authorities are required to notify the host participating Member State authority, and then the host state authority is required to notify the ECB on the receipt of this communication.⁶⁹ For significant institutions, the ECB has two months to make arrangements to supervise the significant branch and indicate the conditions under national law and in the interests of the general good under which the branch can conduct its activities in the host Member State.⁷⁰ Similarly, for a less significant branch, the host Member State authority has two months to prepare to supervise the branch and to indicate the conditions under national law and in the general good for the branch to conduct its activities in the host state.⁷¹ The host state NCA then must notify the ECB of the conditions under national law under which it is prepared to supervise the branch.⁷²

The exercise of supervisory powers by the competent authority of the host Member State is governed by Article 14 of the SSM Framework Regulation. The ECB has supervisory competence over the host Member State where the branch is significant and will supervise the branch directly. Where the

⁶⁵ SSM Framework Regulation, Art. 11(1) and (2). The expansion is to be carried out in accordance with the CRDIV.

⁶⁶ *Ibid.*, Art. 11(4).

⁶⁷ *Ibid.*, Art. 12(1).

⁶⁸ *Ibid.*, Art. 12(2).

⁶⁹ *Ibid.*, Art. 13(2).

⁷⁰ *Ibid.*, Art. 13(2).

⁷¹ *Ibid.*, Art. 13(3).

⁷² *Ibid.*, Art. 13(3).

institution is less significant, the ECB allocates supervisory powers to the host Member State. Article 14(2) provides that ‘the NCA of the participating Member State where the branch is established shall exercise the powers of the host MS’.⁷³ Where a credit institution from a non-participating Member State seeks to provide services in a participating Member State, the non-participating NCA is required to notify the host participating Member State, which must then notify the ECB.⁷⁴

The ECB competence to supervise credit institutions in host Member States for the free provision of services where the institution is established in a non-participating Member State raises important legal issues regarding the scope of host Member State authority to impose conditions on the provision of services (i.e., consumer financial services) for the general good or pursuant to other areas of EU or domestic law.⁷⁵ For instance, the ECB’s supervisory competence does not include the competence of participating host states to use their powers to require significant or less significant credit institutions to comply with the domestic law governing anti-money laundering and counter-terrorist financing that host states must adopt to implement EU directives.

A significant entity seeking to establish a branch or provide services in a non-participating Member State is required to notify its relevant NCA.⁷⁶ The home state authority then will be required to inform the ECB, which will exercise the powers of home country supervisor under EU law. A less significant entity is required to inform the relevant NCA where it is established. The NCA will then exercise the powers of the home state supervisor. The role of the host Member State therefore depends on the significance of the supervised entity. This influences the host state authority’s right to receive notifications from the ECB and home state authorities. It also influences the role of the host state in participating in the college of supervisors for that particular institution. However, all incoming branches of EU supervised entities are subject to the domestic law requirements that implement other EU legislation that impose conditions on the branches in the interests of the general good.

Where a branch is established in a host SSM country, the ECB will have competence to supervise the branch if it is a significant entity. If the branch is less significant, the host country NCA will have competence to supervise its compliance with EU bank prudential regulatory requirements.

Within the EBU, the ECB shall act as the ‘consolidated supervisor’ over credit institutions, financial holding companies and mixed holding companies

⁷³ Ibid, Art. 14(2).

⁷⁴ Ibid, Art. 15.

⁷⁵ Ibid, Art. 16(1).

⁷⁶ Ibid, Art. 17(1).

on a consolidated basis. This means the ECB has plenary competence to supervise all the operations of the credit institution and financial holding companies established in participating Member States or in a Member State that has opted into the SSM on a cross-border basis, regardless of whether the credit institution is operating through subsidiaries or branches in the participating host state. The ECB has decided to allocate powers of consolidated supervision by direct supervision of significant institutions that are determined as such on a consolidated basis ‘where the parent undertaking is either a parent institution in a participating Member State or an EU parent institution established in a participating Member State’.⁷⁷ The relevant NCA in the state where the credit or parent institution is established is responsible for supervising the same financial entities that are deemed by the ECB to be less significant.⁷⁸

B. Consolidated Supervision and Supervisory Colleges

Under EU banking law, the home country supervisor of a credit institution or financial conglomerate that has activities and operations in host Member States is required to form a supervisory college for that particular institution. The formation of supervisory colleges is facilitated by the European Banking Authority (EBA) but within the euro area, where the ECB takes the lead in supervising institutions in participating Member States, the ECB plays a more proactive role in forming supervisory colleges. The NCAs of participating Member States in which the parent companies of financial conglomerates, subsidiary credit institutions and significant branches are established will participate in the college as observers.⁷⁹ The ECB and host Member State competent authorities shall establish a college of supervisors where a significant entity has significant branches in a non-participating Member State for which no college has been created.⁸⁰

The rules governing the participation status of Member States as either a ‘member’ or an ‘observer’ in a college is set forth in Article 10 of the SSM Framework Regulation. Where the consolidating supervisor is not in a participating Member State, the following rules will apply. For a significant supervised entity, the consolidating supervisor chairs the college and the ECB is a member, while host NCAs are observers. For less significant entities, all NCAs where they operate are members of the college. If the supervised entities in a participating Member State are both less significant and signif-

⁷⁷ Ibid, Art. 8(1).

⁷⁸ Ibid, Art. 8(2).

⁷⁹ Ibid, Art. 9(1).

⁸⁰ SSM Framework Regulation, Art. 9(2).

icant entities, the ECB and NCAs are members. The country in which the significant supervised entity is established will be an observer in the college of supervisors.⁸¹

C. Host Authority Powers and Cooperation on Consolidated Supervision

Article 17 of the SSM Regulation provides the procedural aspects of how home and host Member State authorities coordinate and exchange information regarding a credit institution seeking a secondary establishment in a host Member State, or when the institution seeks to provide services in another participating Member State. The institution will remain in the competence of the home and host state authorities unless the supervisory tasks in question have been conferred on the ECB under Article 4 of the SSM.⁸² Similarly, cooperation between NCAs for supervision is not required if the ECB is the sole competent authority,⁸³ for instance for a significant supervised entity.

Article 17 sets forth the principle of ‘fair balance’ between home and host supervisory authorities. Where the ECB has direct supervisory powers, it is expected to respect a fair balance between all participating Member States. For instance, when performing its enumerated tasks under Articles 4 and 5, the ECB is expected to respect a fair balance between all participating Member States.

VI. SUPERVISORY GAPS IN THE SSM: THE CURRENT PICTURE

The overarching rationale of the SSM was to sever the tie between banking and sovereign debt crises by providing the ECB with supervisory powers over individual banking institutions.⁸⁴ However, it does not provide the ECB with oversight responsibility for non-bank financial firms, third-country branches, shadow banks and off-balance-sheet entities operating in the financial system. Member State competent authorities retain supervisory responsibility for financial institutions and firms not defined as ‘credit institutions’ (that take deposits and make credit available to borrowers) under the CRDIV and for oversight of the broader financial system. Furthermore, the ECB does not have legal competence or institutional responsibility to monitor systemic and

⁸¹ Ibid, Art. 10(c).

⁸² Ibid, Art. 17(1).

⁸³ Ibid, Art. 17(2).

⁸⁴ European Council, President, ‘Towards a Genuine Economic and Monetary Union’ Report by the president of the European Council, Herman van Rompuy, EUCO 120/12, Brussels (26 June 2012) 1–2, <https://www.consilium.europa.eu/media/33785/131201.pdf>, accessed 15 June 2018. See also discussion in Alexander, *supra* note 1, 470.

macroprudential risks across the financial system as this is the responsibility of the European Systemic Risk Board – a body comprising all EU Member State central bank governors and a secretariat including technical experts with only hortatory powers.⁸⁵

As discussed above, the EU Treaties provide limited competence of the ECB to act as a bank supervisor under Article 127(6), which precludes it from engaging in any supervisory activities directed at the broader financial system, including, for instance, the wholesale debt securities markets, securities clearing and settlement systems, or bank resolution and restructuring.⁸⁶ This means that the ECB would not have the competence to oversee the shadow banking market, which was a source of systemic risk that caused the global banking crisis of 2007–2009. Moreover, although the ECB has the competence to review and approve a credit institution's recovery plan and to be consulted on resolution plans under consideration by the Single Resolution Board, it does not have the competence to put a credit institution (which it had the competence to supervise) into resolution, but only to declare it failing or likely to fail,⁸⁷ nor could it exercise resolution powers, such as transferring the assets of a distressed bank to a private purchaser, or transfer a distressed bank's assets to a bridge bank.

Certain important legal issues seem to arise from the current system. For instance, the supervisory structure builds heavily on strong information exchange and cooperation between the NCAs and the ECB. However, where information exchange and cooperation is weak, the ECB may be unable to act in a timely manner due to inadequate oversight where a failing bank has been classified as a less significant institution.⁸⁸ Moreover, as mentioned above, the ECB does not possess certain supervisory competences relating to the free provision of services⁸⁹ that a host country usually enjoys, creating the potential for a supervisory shortcoming.

Another prudential supervisory concern with the SSM is that it applies only to banking institutions that are defined under EU law as 'credit institutions' –

⁸⁵ See Eilis Ferran and Kern Alexander, 'Can Soft Law Bodies be Effective? The Special Case of the European Systemic Risk Board' (2011) 37 *European Law Review* 751–777. More recently the EU Commission has proposed some minor institutional changes to the ESRB that include, among other things, making the president a permanent chair. See ESRB amendment proposal, *supra* note 42.

⁸⁶ See also Frédéric Allemand, 'The ECB, the SSM and Differentiated Integration: The Legal Triangle of Incompatibility?' (2015) ECB Legal Conference, arguing that '[Article 127(6) TFEU] is a too narrow basis for the creation of an independent body'.

⁸⁷ See SSM Regulation, Art. 4(1)(i).

⁸⁸ Eilis Ferran, 'European Banking Union: Imperfect, But It Can Work' in Danny Busch and Guido Ferrarini (eds), *European Banking Union* (OUP 2015) 66.

⁸⁹ E.g. ensuring compliance of national anti-money laundering rules

that is, banks that perform traditional intermediary functions of taking deposits and providing credit through commercial and retail lending.⁹⁰ Indeed, the precise scope of the SSM regime's enumerated powers of prudential supervision under Article 4(1) of the SSM Regulation apply only to institutions defined as 'credit institutions' under Article 4(1)(1) of the CRDIV, which defines 'credit institution' as 'an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account'. Recent EU Commission proposals seek to expand the definition of the term 'credit institution' to include systemically relevant financial institutions that are not necessarily credit institutions⁹¹ but these proposals suffer from a lack of specificity regarding how to define a systemically important financial institution and therefore would potentially contravene EU legal principles such as the principle of legality.

The SSM's regulation of credit institutions, however, does not cover the growing number of non-bank financial intermediaries and structured entities that are not defined as 'credit institutions' under EU law. These non-bank financial intermediaries or 'shadow banks' are playing an increasingly important role in the maturity transformation process – borrowing short and lending long – outside the formal banking sector in the European economy, but which are not subject to prudential regulatory controls.⁹² It is this type of non-bank credit intermediation and related trading of credit instruments that, although important for the development of the European economy and its capital markets, must nevertheless be regulated carefully to address macroprudential financial risks. Presently, the ECB does not have the competence to address these risks.

Moreover, within the Single Resolution Mechanism (SRM), the ECB has only limited powers, merely allowing it to cooperate with the SRM's Single Resolution Board (SRB) in conducting an assessment of the extent to which banks and groups under its direct supervision are resolvable without

⁹⁰ See CRR, Art. 4(1)(1).

⁹¹ See European Commission, Financial Reform – list of actions, Sep 2017, 'Proposals to amend rules on financial supervision', https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/progress-financial-reforms_en, accessed 20 November 2018. Other Commission draft legislation to enhance supervision includes: Proposal for a regulation amending regulation (EU) No 1092/2010; Proposal for a regulation amending regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010, (EU) No 345/2013, (EU) No 346/2013, (EU) 600/2014, (EU) 2015/760, (EU) 2016/1011, (EU) 2017/1129. See Proposal for a directive amending directives 2014/65 and 2009/138/EC.

⁹² See European Systemic Risk Board (2017), 'EU Shadow Banking Monitor', No 2/May 5–8.

the assumption of extraordinary public financial support,⁹³ and to notify the SRB of a supervised entity failing or likely to fail.⁹⁴ Also, the ECB has the authority to review the trading activities of bank holding companies under its supervision, and to coordinate with the SRB in initiating the separation of a deposit-taking institution from the group's trading entities if it poses a barrier to the effective resolution of the group and a threat to financial stability.⁹⁵

From a macroprudential perspective, the SSM should help to mitigate systemic risk at the level of the individual credit institution. However, the ECB has only the competence to supervise individual banks or 'credit institutions' as defined under EU law.⁹⁶ As a result, the ECB has only limited authority to impose regulation aimed at reducing systemic risk, involving, for example, imposing higher capital and liquidity requirements on individual banks. It does not have competence to regulate non-bank financial intermediaries – such as shadow banks – nor does it have the competence to regulate the off-balance-sheet entities involved in the securitisation and structured finance markets, which are increasingly playing a greater role in channelling large volumes of credit and leverage to European businesses and consumers.⁹⁷ In other words, the ECB has very limited authority to address macroprudential systemic risks that can arise in the broader financial system where non-bank financial intermediation is growing along with increased trading and clearing of risky financial instruments such as credit default swaps. The Commission's 2017 proposals amending the Capital Requirements Regulation to extend prudential supervisory competence to include also systemically important financial institutions may lead to legal uncertainty and the risk of further regulatory arbitrage.⁹⁸

⁹³ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L 225, Art. 8(2).

⁹⁴ *Ibid.*, Art. 16(1).

⁹⁵ *Ibid.*, Art. 10(2). Once the separation is initiated, the ECB will review the separation plan submitted by the entity and can require its amendment (Art. 18).

⁹⁶ See CRR, Art. 4(1)(1).

⁹⁷ SSM Regulation, Art. 5.

⁹⁸ Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures COM/2016/0854 final – 2016/0364 (COD).

VII. CONCLUSION

This chapter addressed the ECB's macroprudential supervisory tasks and how these tasks can be coordinated with host country supervisors in the EBU. The chapter concludes that the EU Treaties provide limited competence for the ECB to act as a bank supervisor under Article 127(6) TFEU, which precludes it from engaging in any supervisory activities directed at the broader financial system. Also, the CRDIV provides authority for the ECB to supervise only 'credit institutions' and no other financial institutions that might pose financial stability risks. Second, the chapter analysed the applicable provisions of the SSM Regulation and the SSM Framework Regulation to the extent that they relate to the allocation of home and host country supervisory tasks for credit institutions that operate on a cross-border basis. Because the supervisory structure depends heavily for its effectiveness on information exchange and cooperation between the NCAs and the ECB, the chapter concludes that where the ECB is not the lead supervisor (for instance, with a less significant credit institution), information exchange and cooperation is likely to be weak. Therefore, the ECB may be unable to act in a timely manner due to inadequate oversight where a less significant institution is in distress.

Moreover, the SSM Regulation only authorises the ECB to engage in oversight and exchange of information with host state authorities for certain enumerated tasks (i.e., capital, liquidity and governance) and not for other regulatory tasks defined under EU legislation (i.e., anti-money laundering or misselling).

The chapter also considers some of the supervisory gaps in the SSM in relation to macroprudential supervisory competences, particularly in respect to non-credit financial institutions, shadow banks and derivatives clearing houses.⁹⁹ Nevertheless, the SSM is a vital pillar for the development of a robust EBU.

⁹⁹ Ignazio Angeloni, 'How real is Europe's banking union?' Presentation, Petersen Institute of International Economics, Washington DC (19 April 2018), <https://www.bankingsupervision.europa.eu/press/speeches/date/2018/html/ssm.sp180419.en.html>, accessed 20 November 2018.

ANNEX: OVERVIEW OF ALLOCATION OF SUPERVISORY POWERS AND TASKS

Table 9A.1 Significant supervised entities

Direct supervision by ECB through joint supervisory teams consisting of the ECB and NCAs (Arts 3–6 SSM Framework Regulation).
ECB performs both home and host authority functions for all participating Member States.
Other ECB powers: authorisation powers, investigatory powers, request for information, on-site inspections, special supervisory powers, imposition of sanctions and fines.
ECB and NCAs subject to a 'duty of cooperation in good faith' and obligation to exchange information (Art. 6(2) SSM Regulation, see also SSM Framework Regulation).
Sanctions: ECB administrative penalties for breaches of directly applicable law or for violation of EU regulation or decision (Art. 16(1) and (7) SSM Regulation). NCAs can open proceedings only at the request of the ECB if breach in relation to EU rules. NCA may also request the ECB to open proceedings (Art. 134(1) and (2) SSM Framework Regulation).

Table 9A.2 Less significant supervised entities

Direct supervision by NCAs (Art. 6 SSM Regulation, Art. 7 SSM Framework Regulation).
The ECB may choose to directly supervise such entities if it proves necessary to ensure consistent application of high supervisory standards (Art. 6(4) SSM Regulation).
The ECB has the power to instruct NCAs to make use of their powers (Art. 22 SSM Framework Regulation), may request reports from NCAs on their performance (Art. 6(5)(e) SSM Regulation) and shall issue regulations, guidelines or instructions to NCAs in this regard (Art. 6(5)(a) SSM Regulation).
If the financial situation of a less significant institution deteriorates rapidly and significantly, the NCA is to inform the ECB, and the NCA may apply supervisory procedures, including the removal of management members of these entities and other procedures (Art. 97 SSM Framework Regulation).
NCAs are to notify ECB of all administrative penalties imposed on less significant supervised entities connected with the exercise of its supervisory task (Art. 135 SSM Framework Regulation).

Table 9A.3 All supervised entities

ECB	NCAs
Sole right to grant or withdraw authorisation as a credit institution (Art. 4(1)(a) SSM Regulation).	In accordance with national law, NCAs may obtain information from entities regarding their consolidated financial situation and carry out on-site inspections.
Approval of qualifying holdings in credit institutions (Art. 4(1)(c) SSM Regulation).	
General policy guidance in the SSM.	