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The Transparency of the European Central Bank in the Single Supervisory Mechanism

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Abstract

Not least due to the relatively short period of existence of the Single Supervisory Mechanism (SSM), the transparency of the European Central Bank (ECB) in the SSM has not attracted significant attention from legal scholarship. This contribution seeks to close this gap to some extent by mapping out the ECB's transparency regime within the SSM and illustrating, where relevant, the notable differences not only with the transparency regime applicable in the area of monetary policy, but also the general transparency regime of the EU.

Die Transparenz der Europäischen Zentralbank im Einheitlichen Bankenaufsichtsmechanismus

Zusammenfassung

Rechtswissenschaftliche Abhandlungen haben den Transparenzbestimmungen des einheitlichen Aufsichtsmechanismus (Single Supervisory Mechanism – SSM) noch keine allzu große Aufmerksamkeit geschenkt. Dieser kurze Beitrag zielt darauf ab diese Lücke ein Stück weit zu schließen. Dazu werden die im Rahmen des SSM auf die EZB anzuwendenen Transparenzbestimmungen einer ersten Analyse unterzogen, sowie Ähnlichkeiten und Unterschiede zu den auf die europäische Währungspolitik anwendbaren Regelungen

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und darüber hinaus auch zu den allgemeinen primär- und sekundärrechtlichen Bestimmungen der EU aufgezeigt.

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JEL Classification: K2, K4, G28

I. Introduction

The establishment of the Single Supervisory Mechanism (SSM) by Regulation 1024/2013 (SSM Regulation) as a main pillar of the European Banking Union has seen the expansion of the tasks of the European Central Bank (ECB) beyond the sphere of monetary policy to also include banking supervision. In a nutshell, under the new EU system of banking supervision, the ECB is entrusted with direct supervisory powers over significant credit institutions, primarily in the euro area, whereas the National Supervisory Authorities (NSAs) are in principle in charge of the supervision of all other credit institutions.

While the principle of transparency in the EU in general, as well as more specifically the ECB's transparency in its monetary function, have attracted significant attention in legal and political-economy scholarship, less attention has been placed until now on the ECB's transparency as a banking supervisor. This contribution aims at addressing this gap within the confines of the available space by critically reviewing the ECB's transparency regime within the SSM.

To this end, the difficulties with defining transparency in the context of Union law are identified first, followed by a brief tour d'horizon of the EU general transparency regime. Thereafter, the article examines the transparency requirements applicable to the ECB in the context of monetary policy as the lex generalis regarding ECB's transparency regime, and then it focusses on the specific features that characterise the transparency of the ECB within the SSM.

Overall, the aim of the evaluation is not only to map the ECB's transparency regime within the SSM, but also to illustrate – where relevant – its specific features vis-à-vis the transparency regime applying to the ECB in monetary policy and the general EU transparency regime. In doing so, this contribution seeks to provide a starting point for further discussion and research on the topic of transparency in EU banking supervision.

II. Transparency as a Legal Concept in Union Law: In Search of a Definition

While the principle of transparency is undeniably part of the EU acquis, its precise meaning, content, and scope are difficult to determine with precision. To be sure, some core elements of transparency in EU law, such as access to doc-

uments, transparency of proceedings of EU institutions and bodies, or the duty to state reasons, can be easily identified. Yet, the overall content and application of this principle remain elusive, context-based, and subject to variations (*Alemanno* 2014). Some authors have claimed that transparency gains concrete expression by the principle of openness (*Lenaerts* 2013; *Alemanno* 2014), while others have characterised transparency as "the biggest component and precondition of openness" (*Alemanno* 2014), "a general objective of the European Union" (*Craig* 2012), an essential element "for the exercise of the rule of law", and even more broadly as a "precondition for establishing an accountable legal and political system" (*Hofmann* 2014). Transparency obligations for EU institutions are also connected with citizens' individual rights in so far as these obligations determine "who has the right to know who decides, how, about what, and with what outcome" (*Héritier* 2003).

The common denominator in the above definitions is that transparency is perceived – or at least is promoted – as a way to increase the visibility and accessibility of EU institutions to the public, allowing citizens to scrutinise policy-making, thereby contributing to the EU institutions' accountability to the public and enhancing the legitimacy of the EU (*Curtin*/*Meijer* 2006).

Turning to primary Union law, Article 15 TFEU refers to two dimensions of transparency (*Alemanno* 2014; *Curtin*/*Meijer* 2006). The first paragraph refers to the so-called 'active transparency': a generic obligation on the EU institutions, bodies, offices, and agencies to "conduct their work as openly as possible". The second, passive dimension of transparency is articulated in the third paragraph of Article 15 TFEU and stands out in the discourse on EU institutions' transparency. It concerns the right of access to documents, reinforced by Article 42 of the EU Charter of Fundamental Rights, which is bestowed not only upon EU citizens but also on any natural or legal person living or having their registered office in a Member State. The details and limitations of the right of access to documents are governed by Regulation 1049/2001 (General 'Access to Documents' Regulation). This secondary Union law act, which emphasises "deliberativeness, legitimacy building and accountability" (*Adamski* 2014) as the objectives of openness, has become the point of reference for the transparency of EU institutions. Further details about the transparency framework applying to each institution, body, office or agency are provided in separate Rules of Procedure of the respective bodies, for example Decision ECB/2004/3 or EBA DC 036 27 of 2011, which build on Regulation 1049/2001.

Yet, despite the importance placed by primary Union law on the principle of transparency, the diversity stemming from the application of separate Rules of Procedure to each institution, as well as the largely contextual nature of the rules governing transparency, signal the absence of a single transparency regime across EU institutions, bodies, and agencies (*Alemanno* 2014).

What is more, transparency cannot be perceived as an absolute principle, as in some circumstances it can be restricted or even put aside in order to prioritise conflicting norms or to protect fundamental rights. This rationale is reflected in Article 15 TFEU, which stipulates that the right of access to documents is not without limits, as well as in the limitations imposed by Regulation 1049/2001 and in the case law of the Court of Justice of the European Union (CJEU). *Labayle* (2013) gives an overview of these cases. One of the most notable limits concerns the confidentiality mandated by data protection. According to Article 4(1)(b) of Regulation 1049/2001, "[t]he privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data" is a ground to refuse access without even balancing these interests against a potentially overriding public interest in disclosure; the general EU personal data protection regime is laid down by Regulation (EU) 2016/679 (the General Data Protection Regulation), whilst Regulation (EC) 45/2001 ensures the protection of individuals regarding the processing of personal data by EU institutions and bodies.

The specific features of the various EU policy areas and activities of EU institutions and bodies, as well as the different objectives of transparency lead to further complexity in mapping out transparency. For instance, transparency requirements are likely to be applied and assessed differently depending on whether they pertain to processes belonging to the 'public sphere', or to highly sensitive policy areas such as attainment of monetary policy objectives, preserving the stability of the EU financial system, combatting serious crime, or engaging in international diplomacy. For example, in Sophie in't Veld v European Commission regarding access to documents about international agreements, the General Court dismissed the case by referring to the fact that the disclosure of documents would have a negative effect on the negotiating position of the EU.

Similarly, as illustrated by Article 15(3) TFEU and Regulation 1049/2001, transparency requirements may fully apply to daily aspects of EU institutions' activities and only marginally to core aspects entailing highly technical assessments or wide discretion by (certain) institutions. This distinction has been confirmed by the General Court specifically with regard to the ECB in Thesing and Bloomberg Finance v ECB (the Bloomberg case). As will be subsequently highlighted, transparency is lacking a precise definition also in the context of (EU) central banking (*Crowe*/*Meade* 2008).

III. Transparency in (EU) Central Banking

In central bank literature, transparency has been described as being instrumental for communicating monetary policy decisions to market participants (*Issing* 1999) and as being necessary to explain the decision-making process and

its outcomes to the public (*Buiter* 1999). Policy-oriented literature refers to transparency in more specific terms, as a concept concerning either the provision of information from the central bank or the way in which the public understands monetary policy *(De Haan/Amtenbrink* 2003). A transparent central bank is seen as one that "provides at all times sufficient information for the public to understand the policy regime, to check whether the bank's actions match the regime and to pass judgment on its performance" (ICMB 2001). The ECB itself describes transparency as entailing that "the central bank provides the general public and the markets with all relevant information on its strategy, assessments and policy decisions as well as its procedures in an open, clear and timely manner" (ECB website:Transparency).

Various transparency elements, aspects and indicators have been advanced for the purpose of constructing an analytical framework or yardstick in order to measure the actual degree of central banking transparency both for individual central bank systems, but also in a comparative perspective. Thus, according to one view (*Angeloni* 2015) the essential elements of central banking transparency pertain to clarity (communication should be expressed in accessible language), substantive content (pertinent information should be given), and openness to public scrutiny (the reasoning behind policy actions should be communicated, including disclosure of models, methodologies, and data used by the central bank). Others identify various aspects of transparency depending on the need to provide information on the different elements of the policy-making process linked to monetary policy.

According to a widely embraced view (*Geraats* 2001 and 2002; *Dincer/Eichengreen* 2014), a distinction can be drawn between political transparency (openness about policy objectives), economic transparency (openness about data models and forecasts), procedural transparency (openness about the way decisions are made), policy transparency (openness about policy implications), and operational transparency (openness about implementation of decisions of central banks). Some restrict the analysis of transparency only to few of the transparency aspects mentioned above (*Braun* 2017). Finally, *De Haan/Amtenbrink/Waller* (2014) have suggested that transparency of central banks should be assessed by focussing on disclosure of the policymaking process, and by identifying specific indicators regarding the objectives, strategy and communication of central banks.

One notable characteristic of central bank transparency scholarship as compared to generic analyses of transparency is that its comprehensive and analytical approach encompasses multifarious aspects of central banking activities, and attempts to define concrete criteria and indicators with a view to quantify transparency. Another specific feature consists of highlighting the limits and negative side-effects of transparency in central banking (*Angeloni* 2015; *Lefort* 2006). In

this context, arguments pointing to the need to protect central banks from external interferences, the risk to provoke adverse market reactions or to endanger financial stability or other policy aims, the duty to protect sensitive and confidential information or to keep professional secrecy are routinely raised in order to justify limitations on access to information and on transparency duties in general.

Against this background, the risk for central banks to unduly restrict the scope of their transparency obligations by excessively relying on conflicting interests and possible adverse consequences should not be discarded altogether. In this regard, a general commandment of the principle of transparency would require that, while acknowledging that there might be sound reasons for a central bank not to reveal certain information, "non-disclosure should be the exception rather than the rule" (*Lefort* 2006). It is presently submitted that such a requirement should be enshrined and reflected accordingly in the legal framework governing central bank's transparency and access to information.

IV. The 'General Regime' of the ECB's Transparency

Prior to the establishment of the SSM, the debate on the transparency of the ECB was naturally linked to the ECB's primary function as laid down in Article 127(1) TFEU, that is the conduct of the single monetary policy for the euro area. Interestingly, compared to other Union institutions, the transparency regime applicable to the ECB is already limited by specific provisions in primary EU law. Article 15(3) TFEU, for example, includes a derogation from the general EU transparency regime in the case of the ECB. This provision limits the application of openness and transparency requirements to the exercise of the ECB's administrative tasks, thus excluding the conduct of monetary policy as such (*Curtin* 2016). Nonetheless, the exact scope and meaning of ECB's 'administrative tasks' in the context of transparency obligations is rather unclear. Unfortunately, in the Bloomberg case concerning the access to ECB's documents, the General Court missed the opportunity to provide further clarifications on this point.

Other primary Union law provisions further reveal that important aspects of the ECB's transparency are ultimately left at the institution's own discretion. For instance, Article 132(2) TFEU provides that the ECB "may decide" to publish its decisions, recommendations and opinions. In the same vein, Article 10(4) of the ECB Statute clearly states that the proceedings of the meetings of the Governing Council are confidential, whilst allowing this body to make the outcome of its deliberations public on its own will (*Buiter* 1999; critically on the lack of publication of minutes by the ECB see *Amtenbrink* 1999). In fact, it is only since 2015 that the ECB publishes the so-called monetary policy accounts of the decision-making meetings of its Governing Council. It is questionable whether in the longer term it remains justified for the ECB to be excluded from the provi-

sions of the General 'Access to Documents' Regulation with regard to its policy-making and other tasks.

The ECB has a duty to publish quarterly activity reports, weekly financial statements, its annual accounts (Article 26.2 ECB Statute), and annual activity reports on its activities and monetary policy to be circulated to the European Parliament, the Council, the Commission and the European Council (Article 15 ECB Statute). Additionally, Article 284(3) TFEU requires the President of the ECB to present the annual report to the Council and the European Parliament, which may decide to hold a debate on that basis. According to the same provision, the President and other members of the ECB's Executive Board may be heard by the European Parliament's competent committees.

The ECB's transparency obligations are counterbalanced by professional secrecy duties imposed on its staff, as follows from Article 284(3) TFEU and Article 37 of the ECB Statute. The ECB's Rules of Procedure (RoP) provide further details regarding the way in which the ECB should pursue active transparency through general communications and announcements of its decisions, and about the applicable confidentiality and professional secrecy requirements (Articles 22 and 23 RoP). With regard to the latter, it is interesting to note that, as compared to Article 10.4 of the ECB Statute, the ECB RoP extend confidentiality of proceedings to all of the ECB's decision-making bodies, including any committee or group established by them. In all cases, the outcomes of deliberations can be made public by the President of the ECB upon prior authorization by the Governing Council (Article 23(1) RoP).

Additional limitations to ECB's transparency are stipulated in the ECB's Decision on access to documents (Decision ECB/2004/3). As such, a question arises concerning the relation between this Decision and the General 'Access to Documents' Regulation, in particular since the former includes an extended list of exceptions on the ground of protecting the public interest as compared to Regulation 1049/2001 (Article 4(1)(a) Decision ECB/2004/3; *Braun* 2017). This is all the more so given that the Preamble to the ECB's Decision on access to documents states that the principles and limits set out by Regulation 1049/2001 were established at the moment when the ECB was not yet a Union institution. Technically speaking, therefore, the ECB was initially not covered by that Regulation. It can be argued though that, post-Lisbon, the scope of Regulation 1049/2001 extends fully to the ECB as a Union institution. Consequently, in so far as the ECB's Decision on access to documents can be considered as lex specialis by reference to Regulation 1049/2001, it should still comply with the principles and provisions of the latter Union legislative act, at least with regard to ECB's administrative tasks pursuant to Article 15(3) TFEU (Bloomberg case, para.44).

In practice, the ECB has been praised for increasing its transparency and even going beyond what is required by its legal framework (*Braun* 2017). The ECB

ranks high in some transparency indexes, being included in the group with the most transparent central banks in the world, whilst others offer a more nuanced assessment of ECB's transparency practices (*De Haan*/*Amtenbrink*/*Waller* 2014). In line with its formal legal framework, the ECB publishes weekly financial statements, its annual accounts, as well as quarterly and annual activity reports. As mentioned previously, the ECB currently publishes 'monetary policy accounts' of the decision-making meetings of its Governing Council. Furthermore, the President and members of the ECB's Executive Board attend hearings before the European Parliament throughout the year. The practice of quarterly appearances of the ECB president before the European Parliament's economic and monetary affairs committee (monetary dialogue), which has been taking place since the coming into operation of the ECB, is also noteworthy (*Eijffinger*/*Mujagic* 2004; *Amtenbrink*/*Van Duin* 2009; *Collignon*/*Diessner* 2016). Other examples of transparency practices include, but are not limited to, the publication of the calendar of the Governing Council's monetary policy and non-monetary policy meetings, the publication of an Economic Bulletin, which presents economic and monetary information upon which the Governing Council's policy decisions are based, and the publication of the diaries of the members of the Executive Board (*Braun* 2017).

Even though the steps taken by the ECB to multiply communication and reporting channels suggest overall increased transparency in the area of monetary policy, it has also been pointed out that the quality of the information disclosed by the ECB (e. g. the content and clarity of the information) might actually hamper transparency thereby affecting the predictability of ECB's policy decisions (*De Haan*/*Amtenbrink*/*Waller* 2014). What is more, as regards the ECB practice regarding access to documents, whilst no detailed statistics are publicly available on this issue, it appears that few requests actually lead to documents being disclosed (*Braun* 2017).

V. Unpacking ECB's Transparency in the SSM

Whilst the issue of transparency in banking supervision may not yet have attracted the same amount of attention as in the case of monetary policy, this is not to say that it has been neglected by standard setters or in the academic literature. In fact, half of the IMF's 'Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles' is dedicated to the 'Good Transparency Practices for Financial Policies by Financial Agencies'.

The code thus defines standards for the clarity of roles, tasks and objectives of financial agencies responsible for financial policies, the open process for formulating and reporting of financial policies, and the public availability of information on financial policies (IMF 1999). In the literature, the transparency of fi-

nancial supervisors has been mainly discussed as part of treatise on the independence and accountability of such agencies (*Masciandaro*/*Quintyn*/*Taylor* 2007; *Amtenbrink*/*Lastra* 2008). In one of the few comprehensive studies that specifically focuses on the transparency of financial supervisors, transparency is broadly defined as "the extent to which the supervisor discloses information that is related to the supervisory process" (*Liedorp* et al. 2013). Activities that have as an objective the enhancement of "the understanding of an agency's policies may also be referred to as disclosure" (*Amtenbrink*/*Lastra* 2008).

A bird's eye view of the ECB's legal framework reveals that the general rules regarding ECB's transparency are also applicable with regard to its supervisory function. Thus, in acting as a banking supervisor the ECB is subject to the abovementioned relevant provisions in the ECB Rules of Procedure (RoP) regarding communications, access to documents, confidentiality and professional secrecy. In this respect, Article 23 RoP explicitly extends the requirement for confidentiality to the proceedings of the Supervisory Board. Also, similarly to the monetary function, the ECB is under an obligation to draft an annual report on supervisory activities to be submitted to the European Parliament, the Council, the Commission, and additionally to the Eurogroup (Article 20 SSM Regulation). In the same vein, the Chair of the Supervisory Board must present the report in public to the European Parliament, and, slightly different from the more permissive phrasing of Article 284(3) TFEU, is under a duty to participate in hearings before the European Parliament's competent committees (Article 20 (3) and (5) SSM Regulation). The ECB's supervisory activities are also subject to the ECB's Decision regarding access to documents previously discussed.

1. Specific Elements of the ECB's Transparency as a Banking Supervisor

It could be argued that the ECB was in fact not obliged to extend the general transparency regime to its supervisory function so widely in its RoP. After all, Article 25 of the SSM Regulation provides for a strict distinction between the monetary policy role and the supervisory role of the ECB. Yet, notwithstanding the extension of the general transparency regime, the SSM legal framework also includes some specific provisions sketching a particular regime for ECB's transparency as a banking supervisor.

To begin with, the SSM Regulation lays down explicitly the duty of the ECB to answer questions asked by the European Parliament and the Eurogroup (Article 20(6) SSM Regulation). Moreover, it puts the ECB under specific obligations to hold confidential discussions with the competent European Parliament committee, and to cooperate sincerely with the European Parliament on issues pertaining to the exercise of democratic accountability over the exercise of the ECB's supervisory tasks (Article 20(8) and (9) SSM Regulation). As required by the

SSM Regulation, the above issues have been further elaborated in an interinstitutional agreement (IIA) between the European Parliament and the ECB (IIA 2013/694/EU). Inter alia, the IIA covers ECB's annual reports, hearings, confidential discussions and answering questions before the European Parliament (*Amtenbrink*/*Markakis* 2017), and provides for access to information and safeguards regarding ECB's confidential information.

On the one hand, the IIA provides a detailed list of aspects that need to be covered in the ECB's annual reports, and lays down clear obligations for the ECB to publish its annual reports on its website, to extend its 'information e-mail hotline' to SSM issues, and to introduce a FAQ section on SSM-related aspects. What is more, the ECB commits to publishing on its website a guide to its supervisory practices, its supervisory fees and an explanation of how these are calculated, and a section on MEPs' questions addressed to the ECB and the respective answers. Quite significantly, the ECB is under a duty to provide the European Parliament's competent committee at least "with a comprehensive and meaningful record of the proceedings of the Supervisory Board that enables an understanding of the discussions, including an annotated list of decisions" (IIA 2013/694/EU, section I.4).

On the other hand, the IIA puts utmost care to precluding any information regarding confidential meetings between the ECB and the European Parliament from being disclosed to the public. It is noteworthy that the ECB has also concluded a similar cooperation agreement with the Council (Memorandum of Understanding of 11.12.2013), which, however, seems to feature a more restrictive approach as regards disclosure of information concerning hearings and answers to questions.

Another specific element of the ECB's transparency as a banking supervisor concerns the establishment of a direct link between the ECB and national parliaments of the SSM Member States via an ECB's duty to send them annual reports, and through the possibility for members of the Supervisory Board to participate in exchanges of views upon invitation by a national parliament (Article 21 SSM Regulation). In this context it is noteworthy that, according to the wording of Article 21(3) of the SSM Regulation, the exchange of views is limited to matters relating to the supervision of credit institutions in that Member State, rather than pertaining more generally to the function of the ECB as banking supervisor.

Regarding disclosure of information, there are several specific features that are worth mentioning. Firstly, in the exercise of its supervisory tasks the ECB is subject to specific disclosure and confidentiality duties referred to in Articles 53–62 and 143–144 of the Capital Requirements Directive (CRD IV). Secondly, the ECB's Decision on access to documents has been extended in order to include some SSM-specific 'public interest' exceptions. For instance, according to Article 4(1)(a) of the Decision, the ECB shall refuse access to documents per-

taining to the EU and Member States' policies relating to prudential supervision of credit institutions or to the purpose behind supervisory inspections. Thirdly, in relation to the supervised entities and in the context of enabling legal review, the general EU duty to state reasons is given specific expression with regard to the ECB's supervisory decisions (Article 22(2) SSM Regulation). In this respect, more details are provided in Article 33 of ECB Regulation 468/2014 (SSM Framework Regulation), which requires that the statement of reasons accompanying ECB's supervisory decisions contains the material facts and the legal reasons on which those decisions are based.

With regard to the ECB's transparency practices as a banking supervisor, it seems that the ECB has taken some steps towards ensuring transparency in line with its legal framework. An early assessment of the new framework concluded that "the website of ECB banking supervision, the handling of enquiries from the general public and dedicated public conferences provide comprehensive information on its tasks and governance structure, including a section dedicated to nontechnical explanations on different aspects of banking supervision" (*Braun* 2017).

As to the ECB's public annual reports on banking supervision, these include information covering overall the relevant aspects of the supervisory function, including sections on accountability requirements, as well as on data reporting, information management and transparency. According to the 2016 ECB's SSM Report, the ECB has been increasingly engaged in communication with the general public through press conferences explaining how the ECB carried out its supervisory activities, by publishing a SREP methodology booklet disclosing its supervisory approach, by conveying policy messages through speeches and interviews given by the Chair, Vice-Chair and ECB Representatives of the Supervisory Board and published on the ECB's banking supervision website, and by disclosing the Chair's and Vice-Chair's meeting calendars. It also reported improved communication with supervised banks by means of publications, press releases, workshops and calls explaining the SREP and stress test methodologies.

Yet, in spite of the ECB's transparency efforts, a recent evaluation of its supervisory activities reported a low level of transparency as regards in particular public disclosure of supervisory methodologies and of micro-prudential supervisory data (*Braun* 2017). Among the factors causing this, the report mentioned the ECB's decision to publish a shortened version of its SSM manual, which did not enable a sufficient understanding of its supervisory methodology, as well as the legal restrictions on disclosure of supervisory information on individual banks according to CRD IV (*Braun* 2017).

The above criticism illustrates yet another potentially salient matter concerning the ECB's transparency, namely the relevance of the addressees of the information in defining the ECB's expected transparency standards. It bears the more

general question of whether these standards should be fine-tuned depending on the recipient of the information. Should there be different requirements of transparency when it comes to information to be used (and understood) by supervised institutions, other Union institutions, as well as the public at large? Such differences could be motivated by the ways in which the addressees should benefit from ECB's transparency initiatives, as well as by the underlying purpose and objectives of transparency. This would entail then a detailed and differentiated assessement whereby the ECB may live up to its transparency expectations with regard to the general public, for instance, but fail on the side of transparency towards the banking sector, or the other way around. In this respect, it might be pertinent to note that EU primary law does not explicitly differentiate between expected levels and degrees of transparency depending on the receivers of the information.

2. Intra-SSM Transparency: A New Dimension to the ECB's Transparency?

An important aspect of the SSM framework marking arguably a distinction from the monetary policy domain is the focus on disclosure and exchanges of information between the ECB and the national supervisory authorities (NSAs). Contrary to the situation in which transparency requirements exist towards supervised institutions, other Union institutions, and the public at large, this refers to what may be termed 'internal transparency' (i. e. between the ECB and NSAs which cooperate under the SSM). A peculiar feature of internal transparency in the SSM context is that it is geared mostly towards enhancing cooperation between supervisory authorities with a view to supporting the fulfillment of their tasks and ensure the good functioning of the whole SSM system. Moreover, since disclosure takes place between peers who normally trust each other, and is needed to ensure the overall effectiveness of the EU supervisory system, less restrictions may be expected to apply as compared to the relationship between the ECB and the 'outside world'. Transparency in this context normally translates into wide disclosure obligations between the ECB and the NSAs on the basis of the principle of sincere and loyal cooperation, with limitations imposed on the basis of specialisation, transmitting information only to the extent necessary to exercise one's supervisory tasks, and preventing unauthorized disclosure towards third parties.

The above-mentioned considerations are reflected in the SSM legal framework. Article 6 of the SSM Regulation subjects both the ECB and the NSAs to a duty of sincere cooperation and an obligation to exchange information. In this regard, the ECB and the NSAs have specific duties to provide each other with information for the purpose of carrying out their supervisory tasks (Articles 6, 9 and 10 SSM Regulation). Further details regarding the mutual disclosure obliga-

tions between the ECB and the NSAs are found in the ECB's SSM Framework Regulation. Recital (11) of the preamble of the SSM Framework Regulation makes clear that full cooperation between the ECB and NSAs, including exchanging "all the information that may have an impact on their respective tasks" is seen as essential for the smooth functioning of the SSM. Following this statement, Article 21 of the SSM Framework Regulation introduces a general obligation on the ECB and the NSAs to provide each other with access to information necessary to carry out their tasks in a timely and accurate manner.

Other provisions of the SSM Framework Regulation regulate the ECB's and the NSA's specific duties to exchange information pertaining to various supervisory tasks and activities (e. g. Articles 38, 92 and 105). Moreover, CRD IV ensures that confidential documents and information covered by professional secrecy obligations may be exchanged between supervisory authorities (Article 56). Further research focussing on empirical data is desirable to provide a clearer and more comprehensive picture on how intra-SSM transparency works in practice. For now, it appears that the ECB is rather the main beneficiary of intra-SSM transparency as it relies to a great extent on the information received from NSAs in the exercise of its supervisory tasks, whilst the use of Joint Supervisory Teams (JSTs) arguably ensures a good information flow between the ECB and the NSAs.

3. *Justifying the Peculiarities of the ECB's Transparency Regime under the SSM?*

It can be argued that the special features of banking supervision may entail the application of tailored transparency requirements and require particular safeguards protecting countervailing interests and obligations (*Angeloni* 2015). Banking supervision entails dealing with information concerning not only the supervisor and "its behaviour (proceedings, deliberations, internal thinking, strategy and methodologies, etc.)", but also the supervised entities (credit institutions). As such, "supervisors typically obtain, in the exercise of their function, sensitive information" about the situation of individual financial institutions, which cannot readily be disclosed (*Angeloni* 2015; on the sensitive nature of information see *Goodhart* 2001). What is more, the supervisory process may generate information on the soundness of individual banks which, if disclosed at the wrong moment, may entail risks for the bank concerned and may result in endangering financial stability (*Angeloni* 2015). Another relevant aspect to consider is that "more than in monetary policymaking, banking supervisors may have to communicate differently to various stakeholders" (*Liedorp* et al. 2013).

According to *Angeloni* (2015), a distinction should be made in the area of banking supervision between information on the activity of the supervisor and

information on the supervised institutions. On the one hand, the information on the authority should cover at least three elements: the strategy (communication about the "supervisory model"), the tactics (the priorities pursued by the supervisor and specific decisions on individual banks), and the internal organisation of the supervisor (structures, functions, internal governance, staffing, financial aspects, etc.). On the other hand, with regard to the supervised entities, Angeloni argues that the supervisor should "promote the dissemination of high-quality information" about banks, but without disclosing in principle "private market-sensitive information" (unless explicit consent is granted).

Additionally, as discussed before, in view of the close relationship between the ECB and the NSAs entailing extensive information exchange and disclosure obligations, it can be argued that there is a specific dimension of transparency in the context of the SSM.

Whilst the factors mentioned above are all valid reasons for justifying the special transparency regime of the ECB as a banking supervisor, one may question whether and to what extent the current regime should still be aligned with the general EU transparency regime. At least the general line according to which disclosure of information is the rule, whilst non-disclosure is the exception, seems relevant for assessing the design and application of the ECB's transparency regime within the SSM. Moreover, one may wonder whether broader considerations, such as the aims that transparency seeks to achieve may account for various transparency requirements and for different intensity of transparency obligations.

VI. Conclusion

This contribution offered an early mapping exercise of the transparency regime applicable to the ECB's new supervisory function. As such, it provided an analysis of the main elements and features of ECB's transparency legal framework under the SSM Regulation. It also placed the findings in perspective by linking them both to the ECB's general transparency regime originating in the ECB's monetary function, and to the broader concept of transparency within EU law.

The analysis has revealed commonalities between the transparency regimes applicable to the ECB's monetary and supervisory functions, such as the tendency to prioritise the active dimension of transparency, but also a number of specific SSM peculiarities, such as the disclosure of information between the ECB and the NSAs participating in the SSM, which could be characterised as 'internal transparency'.

This contribution also identified variations regarding the design, extent and intensity of transparency obligations with regard to the ECB's supervisory

function. Whereas factors specific to banking supervision may justify some of the peculiarities and variations in the ECB's transparency regime within the SSM, a more elaborated legal-analytical framework is needed in order to explain and assess the transparency of the ECB as a banking supervisor. Such a legal-analytical blueprint should enable a more thorough examination of the ECB's transparency regime within the SSM vis-à-vis the general EU transparency regime. At the same time, it should take into consideration the instrumental value of transparency, as well as the extent to which the objectives sought by transparency and the different recipients of the ECB's various transparency initiatives can determine the scope and the application of the relevant legal framework.

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