Juggling Preferences and Policy Aims: The SSM and the Quest for Supervisory Consistency

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After decades of political and technical efforts aiming to supranationalise prudential regulation at the EU level, a key step to bridge the gap between rule-making centralisation and its decentralised implementation has been the setup of the Single Supervisory Mechanism (SSM) within the context of the European Banking Union project. In spite of its major accomplishments, the SSM still faces some fundamental challenges. Legal scholarship has claimed that in the SSM case the institutional building process has outpaced regulatory harmonisation, whereas generally speaking, the EU has been characterised by the opposite situation, in which rule harmonisation comes first and is followed by a lengthy institution building path. This is a valid argument in light of the obstacles to a smooth building-up of the "Single Rulebook", and the obligation of the SSM to apply local rules transposing EU directives, potentially undermining the equal treatment of credit institution across SSM countries.

The present work, however, argues that the SSM institutional building process is far from being settled. The legal and structural diversity that characterises the euroarea banking system poses a key challenge to the SSM: the achievement of supervisory consistency. In order to explore how the SSM balances the inherent diversity of the banking sector with the need for consistency, the paper focuses on the regulatory powers of the SSM. In this sense, the Non-performing loans (NPLs) and the Institutional Protection Schemes (IPSs) cases are examined, in order to understand the relationship between both the SSM and relevant stakeholders, and the SSM and the national authorities. The cases also provide a starting point for a better understanding of the relationship between EU integration and the feedback between the national and supranational spheres.

1. Introduction

The global financial crisis and the sovereign debt crisis that spread among eurozone and non-eurozone countries have caused a major overhaul of the institutional architecture of both supervision and regulation of the financial sector lato sensu. The setup of the Single Supervisory Mechanism (SSM), the supervisory arm of the Banking Union, represented a significant institutional effort to bridge the gap between rule-making centralisation and its decentralised implementation. In spite of the progress that the SSM, in collaboration with the National Competent Authorities (NCAs), has made so far, there are still challenges ahead. These challenges can be clustered into two broad categories. First, the legal ones: when conducting its supervisory tasks, the SSM has to comply with nineteen different legal frameworks.[1] The second set of challenges are of a structural nature: the SSM has to apply the so-called Single Rulebook in inherently different contexts characterised by diversity in the banking sector.

What emerges from these two wide issues is the need to strike a balance between single market/level playing fields concerns and the existent legal and institutional diversity. In this sense, the task of the SSM is not to *harmonise* ex ante the applicable legal framework,[2] but to achieve *consistent* results. Supervisory consistency, therefore, constitutes a major issue for the SSM. In order to strengthen supervisory consistency, the SSM has been actively exercising the regulatory powers conferred by the SSM regulation, according to which it can adopt guidelines, recommendations, decisions, and also regulations but, in this last case, "only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred".[3]

The present paper focuses on the consistency challenges stemming from the structural diversity of the banking sector, by zooming in on the German and Italian cases. These challenges are examined in light of the aforementioned regulatory powers held by the SSM in two cases: The Non-performing Loans (NPLs) and Institutional Protection Schemes (IPSs) ones. Although these cases are different from a technical perspective, they nevertheless shed light on some of the mechanisms used by the SSM to bolster consistency in their supervisory practices.

The paper is organised as follows. The second section examines the NPL saga considering the two instruments adopted by the SSM (a Guidance and its Addendum), and the regulation of IPSs. The third section offers an additional perspective on these topics: that of the Less Significant Institutions (LSIs). LSIs, in fact, are still directly supervised by their respective NCAs, and indirectly by the SSM, given its residual responsibility for the overall functioning of the system. However, regarding the SSM's regulatory powers, the applicability of these instruments – some of which are non-binding instruments – is not always clear when it comes to the LSIs. In addition,

[1] Article 4 (3), first paragraph of the SSM Regulation: "the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, *the national legislation transposing those Directives*. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also *the national legislation exercising those options*" (emphasis added).

[2] The European Banking Authority is responsible for this.

[3] Article 4 (3), second paragraph of the SSM Regulation.

these smaller credit institutions pose difficulties to the supranational supervisor, who has to find an equilibrium between its consistency concerns and the much debated principle of proportionality. The last section concludes.

2. The SSM's Regulatory Powers in Action: The Case of Non-performing Loans and Institutional Protection Schemes

This section deals with some of the mechanisms that the SSM deploys with a view to achieving supervisory consistency and, thereby contributing to the integration of the banking system in light of the Banking Union's overarching aims. The following subsections examine the cases of non-performing loans (NPLs), and the recognition of institutional protection schemes (IPS) for prudential purposes, from the perspective of the supervisory endeavours that were carried out to regulate them.

2.1 Market integration through Guidance and Supervisory Expectations: The case of the Non-performing Loans and the Strength of Soft Law

In the exercise of the ECB's regulatory powers, an episode that did not go unnoticed is the NPLs one. The NPL issue has been a concern for the SSM since its very conception. Indeed, before taking up the supervisory responsibilities, the ECB conducted together with the corresponding national authorities a *comprehensive assessment* between November 2013 and October 2014. This "financial health check"[4] consisted of two pillars: the Asset Quality Review (AQR), and the stress tests, which have revealed some fundamental weaknesses in the banking sector, chiefly related to credit risk management and its impact on the sluggish growth in the euroarea.[5] The large amount of non-performing exposures (NPE), a term that is interchangeably used with NPLs for the purposes of the instruments issued by the ECB, was identified as a supervisory priority. NPL

[4] This is the expression used in the ECB website explaining the proceedings and methods applied in the first comprehensive assessment: https://www.bankingsupervision.europa.eu/banking/tasks/comprehensive_assessment/2014/html/index.en.html

[5] Albeit this is outside the direct scope of the analysis, it should be mentioned that some criticism has been raised in relation to how these stress tests were conducted. First, it has been critically pointed out that the initial comprehensive assessment has extensively focused on banks' credit risk, while disregarding important aspects concerning market risk (which is by its nature much more difficult to measure or quantify). This choice by the supervisor has negatively impacted on the assessment of a considerable part of the Italian banking sector, which tends to focus on lending activities (Centro Europa Ricerca 2017), and thus is more exposed to credit risk issues. Second, an aspect that has received additional criticism concerns the role played by not only consultancy firms, but also the largest asset management worldwide, BlackRock, in the conduct of the stress tests for the 2016 and 2018 period. The repercussions of this case have impelled Daniele Nouy, former chair or the Supervisory Board, to write two letters in response to some fundamental enquiries by MEPs concerning the selection of external service providers, and the existence of potential conflict of interests, taking into account that BlackRock provides its services to some of the banks that are part of the stress test, and a substantial amount of sensitive information is obtained as a result of the test. See for instance the last letter from the former chair of the Supervisory Board from October 1st, 2018 https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter181001_Schauble.en.pdf

reduction from banks' balance sheet was deemed necessary not just in light of the SSM's duties, but also considering the "risk reduction" condition upon which the completion of the Banking Union rested upon (and still rests upon).

A longitudinal analysis of the events that have taken place after this seminal financial check was carried out illustrates the technical and political difficulties to deal with the NPL situation. The details of the case reveal the policy entrepreneur stance adopted by the ECB and the institutional frictions awoken by the need to define the scope of the supervisor's regulatory competences. At the same time, as anticipated, the NPL saga mirrors the challenges to the achievement of supervisory consistency, which might be different from those related to the need to harmonise the regulatory framework. In this sense, this section zooms in on the fundamental steps that have been taken in order to examine the mechanisms that foster supervisory consistency.

The Guidance to Banks on non-performing Loans ("the Guidance"), whose formation process is explained afterwards, provides some background context in order to understand the supervisory concerns on the topic. In its first pages, the ECB explains that joint supervisory teams (JSTs) have observed varying approaches to the identification, measurement, management, and write-off of NPLs. It has to be recalled that, in parallel, the EBA was working on the harmonised definition of forbearance and non-performing exposures. The EBA Final Draft Implementing Technical Standards (ITS) on supervisory reporting on forbearance and nonperforming exposures under Article 99(5) of Regulation (EU) No 575/2013 was issued on July 24,2014, upon which the Commission's Implementing Regulation (EU) 2015/227 of 9 January 2015 was based.[6]

Once the problem has been identified, a High-level group on NPLs chaired by Sharon Donnery, Deputy Governor of the Central Bank of Ireland, was set up in July 2015. This task force comprised representatives of the ECB and the NCAs (ECB 2019), and it finished its mandate by late 2018. Among the activities carried out by the NPL Task Force, there had been two stocktakes on national supervisory practices. The first one was published by the ECB in September 2016 (ECB 2017b),[7] and the second one was released in June 2017. The aim of these activities was that of mapping the different supervisory guidance and practices throughout eurozone countries and identifying those labelled as "best" practices thanks to the "judgement-based exercise largely completed by the NCAs on behalf of the ECB" (ECB 2017b, 5). This second stocktake, indeed, provides a rich detail of the different phases of the management of NPL across the euroarea countries, and it classifies the jurisdictions into high and low NPL levels, classification that will be relevant to the scope of application of both the Guidance and the Addendum. For a detailed example of the different tools and legal frameworks mapped in the German and Italian cases, see Table 2 below. Some key differences emerge from this comparison. One is given by the margin of

[6] Commission Implementing Regulation (EU) 2015/227 of 9 January 2015 amending Implementing Regulation (EU) No 680/2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council (OJ L 48, 20.2.2015, p. 1).

[7] In spite of being mentioned in the June 2017 document, this first Stocktake is no longer publicly available.

leeway that German banks are given when dealing with NPL governance/workout, whereas BdI circulars tend to provide a more detailed framework. In fact, the Minimum Requirements for Risk Management (MaRisk) is a principles-based instrument issued by BaFin that contains minimum requirements, as opposed to more granular prescriptive rules. Another difference that stands from this exercise is the use of external auditors in the case of Germany, whereas the Italian case shows no traces of that (there is no such annual report requirement, and off-site inspections are carried by BdI staff – by the head office inspectors for the largest banks, and by BdI branch staff for LSIs, according to the information detailed in Annex X of the Stocktake).

The outcomes of the stocktake are fundamental and materialised in the Guidance given that those "practices are intended to constitute ECB banking supervision's supervisory expectation from now on" (ECB 2017a, 5). An additional characteristic of this instrument is that its content is meant to be dynamic, in the sense that its scope can be extended based upon the on-going monitoring of the NPL situation.[8] This characteristic is in line with experimentalists' rule-making expectations (Zeitlin 2015, 2016), since its reviewable nature and the need to update the instrument is openly acknowledged. Another element that stands out from the implementation process is the fact that "the JSTs will engage with banks regarding the implementation of this guidance" (ECB 2017a, 5). What at first sight could be seen as a paternalistic approach to supervision, in the sense that banks' are expected to need the JSTs' help in implementing the guidance, is immediately followed by a statement that implies a generous leeway when it comes to implementation: "It is expected that banks will apply the guidance *proportionately* and with *appropriate urgency*, in line with the scale and severity of the NPL challenges they face" (ECB 2017a, 5, emphasis added). Both the proportionality and the urgency requirements seem to have been left to the banks' own judgement.

In order to better understand the content and the characteristics of the Guidance which was published in March 2017, it is important to make a step back in time and examine the public consultation phase, which run from September 12 to November 15, 2016, and the public hearing that took place at the ECB premises on November 7, 2016, in parallel with the stocktake exercise. The draft document included detailed mechanisms on how banks should manage their stock of NPLs, by following the "NPL life cycle". This first public consultation already exposed stakeholders' concerns in relation to the ECB's competence on the matter.

For instance, the Federation of European Accountants expressed that "the Federation has the clear expectation that the ECB understands that it does not have the authority to establish requirements for financial statements"[9], or the German Banking Industry Committee (GBIC), who considered that "this guidance goes largely beyond pure interpretation and application of existing rules"[10]. Additionally, the GBIC pointed out to the importance of keeping a principle-based

[8] Which was what actually happened with the issuance of the Addendum in 2018, which expanded the scope of the original Guidance.
[9] See https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/npl_comment_10.pdf
[10] See https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/npl_comment_18.pdf

approach on the Guidance, typical of German Supervisors and in the spirit of MaRisk, as opposed to the current approach undertaken by the ECB. Given the importance of the LSI sector in Germany, the Committee insisted on the importance of clarifying the application of the Guidance to this sector, in order to comply with the proportionality principle.

On the contrary, the Italian Banking Association (ABI) has not specifically mentioned the need to clarify the application for the LSI case, although they made general considerations about proportionality.[11] Given that the proportion of LSIs in Italy was by that time relevant, it is worth asking who was representing the interest of the LSI sector, especially concerning the cooperative banks (BCC). Although ABI was not explicit on the issue, and the Association of Italian Co-operative Banks (*Federcasse*) did not submit individual observations to the Draft, the European Association of Co-operative Banks (EACB) expressly raised the LSIs concern.

An aspect that emerges from stakeholders' responses is the clash of the requirements done by the ECB with current bank's practices and material possibilities, which seems difficult to be put into practice. This is exemplified by the lack of flexibility, the granularity of the provisions, the NPL classification requirements, IT requirements, centralized information, and the need for specialized human resources and create additional division within the existing structures. Banks associations and banks themselves point out to the rigidness or the inconveniences stemming from automatic triggers that do not take individual debtor's considerations and also the importance of national legal frameworks together with both institutional and macroeconomic conditions.

Additional features that emerge from the comments submitted by different stakeholders, the public hearing, and the analysis of the track changes file that compares the Draft version to the Final Guidance,[12] concern Chapter 5 on NPL recognition. Leaving aside the specific technicalities of this highly detailed and exhaustive chapter, it is important to highlight the following. The overall aim of this chapter is to align the definition of "non-performing loans" used throughout the ECB Guidance with the existing definitions of "non-performing exposures" (NPE). This mirrors not only the existing institutional overlaps between the ECB and the EBA, being the latter in charge of providing the exact regulatory scope, but also the challenges to achieve a common and coherent set of regulations, given that these definitions are related to both prudential and accounting requirements. The search for coherence and consistency in the interpretation and the application of the rules is a fundamental responsibility of the SSM. It is true that the EBA is mandated to strengthen the Single Rulebook and has to monitor convergence of supervisory practices as such. However, as earlier mentioned, the task of the SSM goes beyond harmonisation of applicable rules: achieving consistency at the supervisory level is about rule application and its results. In this sense, the Guidance shows the need to align prudential and accounting definitions.[13]

[11] Given the sensitivity of the topic for the country, and the fact that the association represents the whole Italian banking sector, an official from the association confirmed that they preferred to maintain a balanced position.
[12] See https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl/comparison.en.pdf
[13] In fact, when analysing the track changes documents, it is possible to see that Chapter 5 was among the most amended sections of the Draft. Annex 1 Glossary of the NPL Guidance provide additional clarification: "However, it

Likewise, some participants of the public hearing have raised the concern of potential overlaps between SSM's requirements and the related accounting provisions. While the SSM acknowledged the sensibility of the issue and the blurred lines between the two realms, it is interesting to see Mr. Siani's (Deputy, Directorate General Microprudential Supervision IV) reply: albeit "the SSM is not formally entitled with accounting powers", this was meant to be a continuation of the ongoing measures that are part of Pillar one measures.[14] The explanation to this complex question was solved by naturalizing the scope of supervisory activities. Other differences that easily emerges from the track changes version of the Guidance is the replacement of the words: *requirements* for *expectations*, *are required* for *are expected*, banks *need to* for *should*, in an attempt to decrease the prescriptive tone and align it with its non-binding nature.

A key point that has been highlighted throughout the consultation process concerns the "horizontal" view that the SSM applies when trying to achieve consistency and comparability, which is exemplified in the present case by considering the "EU average NPL level" as the dividing line between high and low NPL banks. The kernel of this horizontal or average view is concisely explained by the European Banking Industry Committee (EBIC)'s representative, when mentioning that it is "important to ensure that the NPL strategy and methodology adopted are consistent with firms' business models, local market conditions and other external factors. The establishment of an 'EU average NPL' as a benchmark is inappropriate as credit institutions' business models differ substantially"[15]. In spite of this an many other concerns raised both in writing and orally during the public hearing process, the EU average notion was kept.

In the period between the publication of the Guidance in March 2017 and the opening of the public consultation process for the NPL Addendum in October of that year, the Council's Action plan to tackle non-performing loans in Europe was issued in July 2017.[16] The Action Plan's importance stems from the fact that it sets an EU-wide NPL reduction strategy, as opposed to the ECB's efforts that were directed to the SSM's banks only. The Action Plan invites the EBA and the Commission to develop the necessary tools to advance regulatory measures in this regard, and it specifically entrusts the SSM with the task of implementing, together with the NCAs, a Guidance similar to the one issued in March 2017 to be applied to the LSIs, with the corresponding adaptations if appropriate.

In spite of the launching of this EU-level strategy, the SSM decided to move forward with the publication of the Draft Addendum to the ECB Guidance to banks on non-performing loans,

should be noted that this Guidance document generally refers to "NPLs" as this is an established term in daily interactions between banks and supervisors. In technical terms, the guidance addresses all Non-Performing Exposures (NPEs) following the EBA definition, as well as foreclosed assets. In parts it also touches on performing exposures with an elevated risk of turning non-performing, such as watch-list exposures and performing forborne exposures." (page 99).

[14] The video is publicly available on YouTube: https://www.youtube.com/watch?v=L32Nwwh25jo

[15] See page 2 of the letter to Mr. Siani: http://www.ebic.org/Position%20Papers/EBIC%20comments%20on%20the%20ECB%20draft%20guidance%20to%20banks%20on%20non-performing%20loans%20(NPLs).pdf

[16] See https://data.consilium.europa.eu/doc/document/ST-11173-2017-INIT/en/pdf

with a consultation period from October 4 to December 8, 2017, and a public hearing held on November 30, 2017. A very brief document if compared to its predecessor, but that has nevertheless caused wide institutional perplexity, as it reinforced those aspects that have been pointed out as at least dubious when the first public consultation took place. Nonetheless, this time the track changes document reveals that several amendments have been done to the draft version.[17]

One thing to note is the concept of "supervisory dialogue", which was addressed several times in the course of the first public hearing, but yet does not appear in the Guidance document. The Addendum, on the contrary, incorporates on various occasions such supervisory dialogue, being sometimes used as a means to ease the original prescriptive tone (v.gr. to reply words like *compliance* or *assessment*). As Figure 2 below shows, the supervisory dialogue acts as a transitional element between the supervisory expectations, and the Supervisory Review and Evaluation Process'(SREP) outcome.[18] What these steps mean is that supervisory expectations *do have* concrete consequences. Given that the aim of the SREP is to make sure individual banks have proper risk management processes in place, as well as adequate levels of capital and liquidity, the result of not meeting supervisory expectations and not being able to come to an agreement during the supervisory dialogue, is reflected on the additional Pillar 2 requirements that the SSM can impose.

Another important word that was present throughout the Draft Addendum but disappeared from the final version is "backstop".[19] The backstop language was replaced by the *expectations* one. However, these prudential backstops were specifically considered in the Council's 2017 Action Plan, and in fact have been recently approved by the Council in the Capital Requirements Regulation's last amendments concerning minimum loss coverage for non-performing exposures. The fact that these prudential backstops are *now* part of the EU regulatory framework might give the impression that the question regarding the legality of the Addendum and the requirements imposed by the ECB has been overcome. Yet, the episode is still important given the institutional dynamics it has triggered, while it also reveals an additional channel through which the ECB fosters the integration of the banking sector, albeit in an indirect fashion. It is illustrative in this regard one of the comments submitted by the Association for Financial Markets in Europe (AFME) in its position paper: "we are concerned that the present ECB proposal is frontrunning the ongoing, broader reflection at European level on NPLs, while at the same time potentially conveying the signal that the provision levels of the banks the ECB supervises are not adequate."[20]

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[17] See: https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl2/ssm.npl_addendum_compare.en.pdf

[18] For a brief overview of the SREP, see https://www.bankingsupervision.europa.eu/about/ssmexplained/html/srep.en.html.

[19] It appeared thirty seven times in the original document, and it was completely removed as shown by the track changes comparison. The only places from which it was not removed were the explanatory figures.

[20] See page 2 of the position paper https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl2/ssm.npl_addendum_comment_21.en.pdf

Figure 2: Overview of the prudential provisioning concept. Source: ECB Addendum page 6, partial figure from a broader scheme of the whole prudential provisioning concept.

In addition, other elements that clash with banks' reality were given by the overlap with the measures prescribed by the Guidance which were still in the process of being implemented by the time the consultation of the Addendum took place. Therefore, adding more requirements on top of the pre-existent ones does not seem to be the most efficient solution. The need to incorporate LSIs within the scope of the Addendum's application was raised by different stakeholders, in most cases for level playing field concerns, given the burden of the implementation of these provisions. The final document, however, does not refer to this applicability issue.[21]

As anticipated, the question of the Addendum's legality is still important in spite of the formal adoption of the backstop now incorporated in the prudential requirements, as it touches upon a key issue: the scope of the regulatory powers of the SSM, and whether their exercise can be subsumed under the "organizational" purposes explicitly referred to in Art. 4 (3), Paragraph 2 of the SSM Regulation. Indeed, while the public consultation period was still open, both the European Parliament's and the Council's Legal Services issued legal opinions, on November 8, and November 23, 2017 respectively. Both EU Institutions reached the conclusion that the ECB lack the competence to issue generally applicable rules, as opposed to the supervisory measures that are imposed on a case by case basis. In fact, according to the analysis provided by the Parliament, even if the Addendum was meant to be a non-binding instrument, given the language used, participants' expectations, and the circumstances surrounding its issuance, the documents should be deemed to have legal effects, no matter the label or the name that the supervisor has used to identify it. The Commission, on the other hand, displayed a more ambiguous position, which was mirrored by the opposed stances taken by, on the one hand, the Commission's Vice President Valdis Dombrovskis, who backed the Parliaments' view regarding the need for the ECB to act on a case-by case basis and, on the other, Commissioner Pierre Moscovici who supported

[21] Indeed, the adaptation of the SSM's NPL framework to the LSIs is part of the aforementioned Council's Action Plan.

the ECB's actions.[22] Nevertheless, in spite of the institutional tensions and the criticisms raised against the adoption of the Addendum, the document was finally issued.

It is also worth highlighting some general features that stem from the public hearing's format: keeping a balance between an open and transparent public hearing, on the one hand, and preserving a serious dialogue and exchange of opinions, on the other, is not simple. The publicity and transparency elements can reach a tipping point after which its benefits are less clear. Indeed, the "press conference setting", as described by one interviewee that participates in these meetings, is an accurate picture of the context in which these measures are publicly discussed. However, the aims of a press conference are different from those that a public hearing in which different stakeholders' expose their interest and concerns is meant to achieve. The recordings, indeed, reflect this approach, which seems to be more in line with a Q&A session typical of a press conference than that of an authentic discussion and debate of the measures.

The public hearing, indeed, reveals some aspects that are important to better understand the SSM's rationale and modus operandi. In contrast with the 1st public hearing, this one featured the presence of Daniel Nouy, former chair of the SSM's Supervisory Board. In her introductory remarks, she stressed that the draft clarifies their expectations, its main aim is to make their approach transparent: "our expectations are firm but there are not automatic actions attached to them, we will discuss provisions with affected banks".[23] Sharon Donnery, the main figure behind the NPL Task Force, highlighted in the same vein that the Addendum reinforces the qualitative Guidance, and stated in a clear and transparent way which their expectations were; expectations that have been calibrated based on international best practices. Leaving aside the transparency concerns, another element that emerges from the dialogue between supervisors and stakeholder is the ECB's need to act quickly, in an expeditive fashion since it was not possible to wait until the effects of the application of the new international accounting standards (IFRS 9) are materialised, or until European legislators implement a Pillar 1 measure of similar effects – which eventually happened, as earlier described. This, again, is closely related to this particular need to achieve consistency and concrete results, that goes beyond other institutional mandates that focus on ex

[22] In any case, the Commission has supported the SSM's approach via other documents. For instance, the proudly cited "footnote 8" of the Report from the Commission to the European Parliament and the Council on the SSM (COM(2017) 591 final) was used to highlight that these tasks are part of their supervisory mandate in page 4 of the final version of the Addendum: "Such powers are enshrined in Article 16(2)(d) of the SSM Regulation, which has the same wording as Article 104(1)(d) of the CRD. They do not amount to accounting powers that would allow the ECB to impose a specific provision, but they allow the ECB to influence the provisioning policy of a bank within the limits of accounting standards, for instance where such framework allows for flexibility in selecting policies or requires subjective estimations, and the specific implementation chosen by the institution is not adequate or sufficiently prudent from a supervisory point of view. Furthermore they allow the ECB to require credit institutions to apply specific adjustments (deductions, filters or similar measures) to own funds calculations where the accounting treatment applied by the bank is considered not prudent from a supervisory perspective." (page 14).

[23] Recordings publicly available on YouTube: https://www.youtube.com/watch?v=9F72l1nS2Cg

ante rule harmonisation, or ex post assessments on whether convergence of practices has been achieved (tasks that have been conferred to the EBA).

Some of the stakeholders referred to the need to consider specific local circumstances, mostly related to national legal frameworks, lengthy court proceedings, and the lack of alternative out-of-court tools to tackle the NPL problem in a more efficient way. In general, supervisors' made use of these two alibies: on the one hand, it was mentioned that their expectations, even those quantitatively defined, are based on best practices' experiences and, on the other, that national authorities are also responsible for these differences, which should not be tolerated in the context of the Banking Union, where the same tools and solutions should be available in all the jurisdictions involved. The other side of the coin was expressed by the Association of German Banks, who asked for clarifications in relation to the scope of application of the addendum – i.e., if it was primarily addressed to high NPL banks, they believed those who don't belong to this category would be "punished" (sic) by having to implement these measures. Nouy was clear that the SSM needs to be consistent, so in the interest of preserving a level playing field they expected everyone to be ready, albeit the supervisory dialogue was expected to be more intense with those banks that had manifest NPL issues.

To conclude the analysis of the NPL saga, the first case illustrates some key elements that depict the SSM's modus operandi, supervisory rationale, and consistency mechanisms. The case reveals fundamental tensions between the horizontal view of the SSM and the careful calibration of local specificities. The need for standardised information and results must be balanced against the existence of diverse institutional frameworks that go well beyond baking supervision, such as the organisation and efficiency of the national judicial systems, and alternative out-of-court remedies. The other aspect that has caused major tensions concerns the level of granularity of the documents and its intrusiveness, in the sense that some prescriptions were deemed to be too detailed and that might interfere with the banks' decisional autonomy.

In order to show that these are not isolated events, but rather part of the institutional characteristics of the supranational supervisor, the next case deals with the recognition of IPS for prudential purposes

Table 2: Italy and Germany: NPL management status before the Guidance and Addendum

	Item (country situation as of December 2016) reviewed in 2nd Stocktake July 2017	**Italy**	**Germany**
Supervisory practices	Supervisory Regime (principal legal sources)	CRD IV and BdI circulars (283/13 provides detailed description of credit risk management functions)	CRD IV and MaRisk. The latter is principles-based, and institutions are required to implement the principles by defining own loan category and procedures
	NPL recognition and classification	EBA ITS on definition/classification of NPLs + supervisory reporting circular BdI	EBA ITS on definition/classification of NPLs + additional MaRisk criteria
	NPL measurement and provisioning	IAS-IFRS – no regulation on specific provisioning rules for NPLs	German GAAP & IAS-IFRS – BaFin has NO powers regarding accounting and auditing
	NPL write-offs	No national guidelines or rules – it follows derecognition rules from IAS 39	Regulated according to nGAAP provisions, and IFRS too.
	Collateral valuation	No specific rules on entities allowed to value collateral	Not an obstacle to private debt resolution – evaluated by independent unit
	NPL governance/workout	Principles-based guidance, regulation + supervisory action of BdI; frequent meetings with senior management – case by case analysis and SREP capital targets used as incentive.	Generally stipulated in MaRisk, but room for discretion to the institutions
	Supervisory reporting	EBA ITS requirements + BdI circulars asking for granular data	Additional national requirements
	On-site, off-site supervisory practices & methodologies	Credit risk analysis both on and off site. If no adequate provisioning level: P2 requirements	Supervisory approach has 3 pillars: 1) On-site: BuBa or external auditors; 2) external auditors' annual reports – BaFin might mandate to look into specific topics; 3) off-site
Legal, judicial, and extra-judicial framework	Sale of portfolios	Not developed market for NPLs, but GACS decree[24] aims to remove bad loans from banks' balance sheets	Not developed market for NPLs
	Debt enforcement/foreclosure	Law 132/2015 amending procedure for the foreclosure of assets, to reduce time and costs + Decreto Legge May 2, 2016, n. 59	Out of court contractual arrangements that enable faster enforcement
	Corporate insolvency-restructuring	IS an important challenge to private debt resolution (PDR) → no data on the average out-of-court procedure	Deficiencies in corporate debt resolution are NOT an obstacle to PDR → average 1 year long
	Judicial system	Jud. Procedure IS an obstacle to NPL workout – smaller courts have no specialized judges	NOT an obstacle - specialized courts or judges dealing with insolvency issues only.
	Tax regime	New regulation should eliminate disincentive for NPL disposal	Tax deductions for loan write-offs
CCR	Central Credit registers	Data reported monthly on a borrower by borrower basis	Based on EBA definitions
NPL ratio December 2016		**16.4 %**	**3.1 %**

Table 2: Author's elaboration based on the information provided in the Stocktake of National Supervisory Practices related to NPLs (ECB, July 2017), Annex VII (Germany), and Annex X (Italy).

[24] GACS were stipulated for the first time in 2016, prorogated by Legislative Decree of March 25, 2019, for additional 24 months. See http://www.dt.tesoro.it/it/attivita_istituzionali/interventi_finanziari/gacs/

2.2 Another Challenge to Consistency and ECB-NCAs Cooperation: The case of Institutional Protection Schemes

IPSs are defined by the European regulator as a "contractual or statutory liability arrangement which protects those institutions and in particular ensures their liquidity and solvency to avoid bankruptcy where necessary" (Article 113(7) Capital Requirements Regulation, CRR).[25] Within the SSM context, IPSs regulation has been part of a broader regulatory project related to the exercise on National Options and Discretions (NODs) mentioned above. Even in a more indirect fashion, the second case has controversial elements too. As explained below, the NPL and the IPS cases share other key elements from a supervisory priority perspective: the achievement of consistency in diverse and heterogeneous contexts and the need to strengthen financial stability. An important difference, however, is that the instruments issued in the NPL case – the Guidance and the Addendum – are not listed among the Central Bank's list of legal acts, while the Guideline (EU) 2016/1994[26] on IPS recognition is listed within the ECB/SSM legal acts. This is in line with the ECB/SSM's approach that strengthen the non-binding nature of such instruments.[27]

As far as the decision-making process is concerned, the consultation period lasted from February to April 2016, and the public hearing took place on March 31, 2016.[28] The authorities, again, highlighted the importance of the publication of the Draft for transparency considerations. It was also expressed that the interest of the ECB derives from the existence of both SIs and LSIs within this framework. In general terms, one key element from the IPS is that it can be officially recognised as a Deposit Guarantee Scheme (DGS). This means that in this case IPSs could perform a double function: on the one hand, as a pure IPS, its funds will be devoted to the support of its members; on the other, the funds of the DGS serves to protect deposits. The SSM's role is not to supervise the DGS but to protect solvency and liquidity of IPSs' members and help reduce the risk of failure.

The main objective from a supervisory perspective, as stated by the SSM representative and reinforced by the slides, was to develop a common approach for the recognition of the IPS so as to ensure supervisory *consistency*. This common approach stems from the coexistence of both SIs and LSIs within the same network, and the need to coordinate action with the corresponding NCAs.

[25] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1), which has been in turn recently amended, but these aspects have not changed.

[26] Guideline (EU) 2016/1994 of the ECB of 4 November 2016 on the approach for the recognition of institutional protection schemes for prudential purposes by national competent authorities pursuant to Regulation (EU) No 575/2013 of the European Parliament and of the Council (ECB/2016/38), OJ L 306, 15.11.2016, p. 37. The "Guide on the approach for the recognition of institutional protection schemes (IPS) for prudential purposes", however, is not listed among the legal acts.

[27] The list of all the SSM-related legal acts can be found in https://www.bankingsupervision.europa.eu/legalframework/ecblegal/date/2019/html/index.en.html

[28] Recordings publicly available at https://www.youtube.com/watch?v=8nFvqZGHSYU – These paragraphs draw upon the material from the recordings.

This first part of the talk ended with the main criteria to be considered when assessing an IPS – i.e., the provision of sufficient support to the members in a timely fashion – and concludes with a friendly "we are here to answer your questions",[29] a phrase that summarises the Q&A nature of the hearing as opposed to a more authentic discussion. Regarding specific stakeholders' observations, the German Savings Banks Association (*Deutscher Sparkassen- und Giroverband*, DSGV), posed two fundamental issues. DGSV is the umbrella organisation of the Savings Banks Finance Group (*Sparkassen-Finanzgruppe*), which has an IPS recognised as a DGS under Germany's Deposit Guarantee Act in 2015,[30] so it was already organised and recognised with the double function alluded to prior to the ECB's regulatory efforts. The DSGV's representative addressed the need to make the IPS Guide compatible with the DGS Directive and the corresponding EBA Guidelines on the topic, which shows that the rules proposed by the ECB have to be examined in the context of pre-existing binding and non-binding instruments, issued at the national and supranational levels. The second remark entailed moral hazard, which is an essential issue that deserves to be analysed in the context of these schemes, since an ill-designed IPS risks creating a free rider problem. In this sense, there are two points that in the DSGV's view the proposed rules should make it clear by changing the current wording of the Draft. First, the importance of ensuring a proactive risk management to detect potentially disruptive issues and intervene in a timely fashion; however, they believe the current wording indicated that they need uniform risk management processes, and it might be read as if the members need to have uniform risk management standards. Although they acknowledged the need for comparability, IPS members are by definition autonomous institutions, this is why such a level of uniformity could hamper this feature.

Second, the current wording might also suggest some sort of automatic mechanism when it comes members' protection, which is not in the spirit of the type of protection granted by and IPS, that needs some prior individual assessment. The SSM authorities clarified that they want to avoid any automatic interpretation, and, on the uniformity issue, they raised consistency concerns that are essential to monitor IPSs. Likewise, another participant addressed the issue of uniform risks management not from the autonomy perspective but from the proportionality one, considering the different sizes of the members belonging to the same IPS – i.e., the central institution might be a large and complex one, but other members are small and less complex institutions. The same person later on made reference to the proportionality issue but this time from the perspective of the "naturally non homogeneous" situations within IPSs. Again, these comments go to one of the fundamental issues that requires a very balanced exercise of the SSM's prudential powers: the need to accommodate consistency to inherently diverse scenarios.

Another association that raised some concerns in relation to the confusing wording was the EACB: in their view, the commitment of the IPS to support their members in case of default had a limit and could not be understood as an unconditional one. The Association of German Cooperative Banks (*Bundesverband der Deutschen Volksbanken und Raiffeisenbanken*, BVR)

[29] Minute 20 of the hearing. As a matter of personal view, and in line what has been earlier mentioned in relation to the "press conference setting", this public hearing was no exception. The first 20 minutes (out of an hour and eight minutes) were used to present the slides, following more of a lecture or press conference approach.

[30] See https://www.dsgv.de/en/savings-banks-finance-group/institutional-protection-scheme.html

stressed another issue that has been posed by many respondents in the NPL case too: they got the impression that "some of the point might go too deep into detail on a level of a single bank, which is a micro-management level" (minute 44). In their view, the ECB's Draft was going beyond the criteria set in Article 113 of the CRR. Given that these provisions are to be applied on a case by case basis and are highly dependent upon the so-called supervisory dialogue, the responses by the SSM representatives tended to be elusive, in the sense that answers were delayed to later implementation stages that could not be foreseen at the time of discussing the draft.

As earlier mentioned, IPSs represent an important feature for the SSM not just given the presence of SIs within these networks, which are directly supervised by the SSM, but also in connection to the risk monitoring functions performed by these organisational types. In fact, IPSs are "primarily based on prevention, which involves structured risk monitoring aimed at identifying potential risks and applying prevention measures" (Semenyshyn 2017, 184). This double function as a deposit protection scheme, and as a way to enhance the stability of the network and preserve the autonomy at the same time, highlights the importance of their proper and coordinated recognition. Together with the NPL case, they illustrate the supervisory concerns about both risk reduction and management, and mirror the need to learn from the existing practices in the euro area countries. In fact, IPSs embody a case in which cooperation between the ECB and the NCAs is necessary given the usual mixed composition of SIs and LSIs belonging to the same network.

To conclude, these two cases illustrate the interaction of the phenomena that constitute the key research objects: Europeanisation – i.e., the impact and feedback effects between the EU and national levels – and its interplay with European integration. As has been pointed out throughout this work, in spite of the "top-down" modes that the centralising features of the SSM might display and the impact of the supranationalisation of banking supervision at the national level, the SSM is largely dependent upon the NCAs and their local knowledge. Second, the cases show that the need for supervisory *consistency* goes beyond the legal harmonisation of instruments or the broader notion of policy convergence. Consistency essentially entails the achievement of homogeneous and comparable results, in an attempt to preserve the much sought-after "level playing field" but at the same time avoiding "one-size-fits all" approaches that do not take into account specific circumstances.

Finally, although these two cases deal with different features of banking supervision and regulation, it is possible to denote some commonalities between them. The first fundamental aspect is of a procedural nature, and it refers to the processes by which the instruments monitoring both NPLs and IPS were drafted and subsequently approved. In this sense, the public consultations that were held in both cases (or three, considering that the NPL case consisted of two different consultations as described below, one for the Guidance, and the other one for the Addendum) had a particular format that resembles more of a press-conference setting with the corresponding Q&A than a discussion between the supervisory authorities and the different stakeholders. A second common element arising from the analysis of these cases is the consistency and comparability aims from the supervisors' side, and the need to balance these requirements against a wide array of local scenarios and legal frameworks. The third but nevertheless important element is the level of detail of these instruments, which raises concerns not only in relation to the competence of the ECB to adopt such instruments as exemplified by the NPL Addendum case, but also in relation to banks' decisional autonomy.

While this section has considered the IPS and NPL issues from a multi-stakeholder's perspective, the next one will do so from the LSIs' point of view.

3. Zooming in on LSIs: less or diversely significant?

The LSI sector has been actively involved in the consultation processes of both NPLs and IPSs. In the former case, the main concerns revolved around proportionality issues and how the detailed NPL management procedures were to be implemented in smaller institutions. For the latter, the question of the IPS recognition was of the utmost importance even for those existing IPS that have already been recognised by their local supervisors. Again, the focus was on how proportionality was meant to be applied but, more specifically, from the perspective of the autonomy of the single institutions belonging to the same IPS, contrary to other organisational model such as banking groups. Even if, in the NPL case, the documents make reference to their applicability to the SI sector only, there are different channels through which the instruments can be applied to the LSIs. First, the Council's Action Plan to tackle non-performing loans precisely tasked the ECB in collaboration with the NCAs with the drafting of similar instrument with the corresponding adaptation to the LSI sector.[31] Second, some of the associations representing the interests of, for the most part, SIs, raised level playing field concerns should those instruments are not applied to the LSIs as well – chiefly in the Addendum case, which requires a higher level of provisioning, thus incrementing banks' costs.[32]

A third mechanism by means of which these instruments conceived for SIs can also be applied to LSIs stems from legal and operational aspects of the SSM. As far as the former is concerned, the SSM Regulation allows the ECB the possibility to directly exercise its supervisory powers upon LSIs "when necessary to ensure *consistent* application of high supervisory standards"[33] (emphasis added), according to Article 6 (5) (b) of the SSM Regulation. This does not mean that the LSI in question would be asked to comply with requisites that are

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[31] For instance, Banca d'Italia has published the corresponding document in January 2018 entitled "Linee Guida per le banche Less Significant italiane in materia di gestione di crediti deteriorate", available in English and Italian, which is further analysed below: https://www.bancaditalia.it/compiti/vigilanza/normativa/orientamenti-vigilanza/Linee-Guida-NPL-LSI.pdf

[32] To illustrate the point, in its submission to the Addendum consultation process, Unicredit expressed that "Concerning the scope of application of the Addendum, only the Significant Institutions under the SSM supervision are required to comply with the Addendum, while the Less Significant Institutions and the banks outside the SSM are excluded, at least until the national supervisors do not decide to adopt similar measures. This would mean that, should the misalignments with the proposed Pillar I measure not be addressed, *SSM's supervised banks will have to adapt their level of provisioning much earlier than banks outside the SSM perimeter*. Moreover, the ECB Addendum is more stringent not only in terms of perimeter but also in terms of calibration of the backstop (seven vs eight years threshold for full provisioning of collateralized exposures and different criteria for collateral treatment) compared to the European Commission proposal. Therefore, *should the two backstops be in place simultaneously in their current form, the burden for SSM significant banks (Pillar I plus Pillar II backstops) would be much higher than for other banks, posing a significant level playing field issue*" (emphasis added).

applicable to larger institutions; however, the intensity and probably the intrusiveness of the supervision would be higher, thus leading to more extensive requirement. The latter is related to the concrete way supervision is being carried out in the LSI sector: the ECB together with the NCAs have adopted a methodology that classifies these institutions into low, medium, or high priority, on the bases of their intrinsic riskiness and probable impact on the domestic financial systems (ECB 2017c). Even if the effect of being considered a high priority LSI does not per se imply the application of those standards imposed to SIs - which might clash with proportionality issues – it nevertheless leads to an intensification of the supervisory activities (ECB 2017c), which might lead to additional information requirements and a more intense supervisory dialogue, similar to what happens under Article 6 (5) (b) of the SSM Regulation.

As far as interest representation is concerned, LSIs acted either through their national or European association. Even if it is true that LSIs are still under the direct oversight of their respective national supervisors, it has been a while now since the banking regulatory space has moved from the national to the supranational spheres. Thus, banks belonging to the LSI sector are aware of the need to diversify their strategies and channels of influence. This is facilitated by the associations that gather interests at the European level, such as the ESGB in the case of saving banks, or EACB, for the co-operative banks. For instance, German savings banks (*Sparkassen*) have been mobilising to enter the European lobbying channels as a consequence of the growing influence of EU legislation on the national banking system.[34] Their close collaboration with the ESBG[35] provides them with a fundamental support at the supranational level to counterbalance the power wielded by the banking sector's main lobby association at the European Level: the European Banking Federation (EBF) (Semenyshyn 2017).

In order to strengthen mutual interests, the Sparkassen establish alliances with other locally-focused credit institutions such as cooperative banks. An instance that has triggered such reciprocal support is given by the European Deposit Insurance Scheme (EDIS), which is meant to be the pillar that would enable the completion of the Banking Union. "Cooperative and savings banks fear a double burden of additional costs, as they will need to pay the contributions to their own IPS as well as provide funds to the European deposit insurance fund (DIF) under the … EDIS" (Semenyshyn 2017, 184). This concern denotes an interesting point that once again highlights the need to balance mutualistic aspects derived from the Banking Union with local specificities. The question is whether there is a relationship between the recognition of IPSs, not only in relation to the exemptions provided for in the prudential framework but also as guarantee schemes, and the firm opposition from the Sparkassen's side to the creation of EDIS, in order to avoid this funds duplication. Far from constituting merely a technical discussion, this is at the heart of the risk reduction v. risk sharing conundrum that has dominated the narrative about finalising the Banking Union.

In spite of the shift towards European spheres in both banking regulation and supervision, the LSI sector cannot overlook the national channel. In fact, the Sparkassen have strong ties to the local governments thanks to their presence in most of German municipalities,

[34] Another example of the diversification of influence channels is the case of Federcasse, who has an additional office in Brussels.
[35] Interviews conducted with DSGV and ESBG.

which helps create an additional channel of influence when it comes to EU rulemaking via national authorities (Semenyshyn 2017). In the case of Italian LSIs, most of them belong to the Co-operative banking sector (*Banche di credito coopearativo*, BCC), represented by Federcasse. This sector, however, is undergoing important transformations by way of the BCC reform effective as of January 1st, 2019, which aims to integrate the sector by forcing individual cooperative banks to merge into two cooperative banking groups (*Gruppi Bancari Cooperativi*: *Iccrea Banca* and *Cassa Centrale* Banca). From a banking supervision and ECB-NCAs' dynamics perspective, there are two key issues that emerge. First, given the size of these new cooperative banking groups, they will fall within the scope of the SSM's oversight. Thus, Banca d'Italia ceases to be the supervisor of a large part of the BCC sector. Second, the reform was not without its controversies at both the banking and political levels, which initially deferred its entry into force. The fact is that a specific sector, the South Tyrolean Raiffeisen, decided not to adhere to these cooperative groups and thus have started the corresponding procedure to create their own IPS.[36]

Leaving aside associations or lobbyist perspectives, the LSI sector has another important channel that, although is not meant to represent their interests as such, should "translate" or adapt those requirements initially envisaged for SIs to the LSIs. These are the NCAs themselves. In fact, the conditions under which they operate are not simple: on the one hand, their decisional autonomy or discretion has been curtailed by the SSM's regulatory powers, on the other, they have the duty to cooperate, provide the necessary information and assistance to the supranational authorities, and also come up with proportionality criteria in order to implement a set of decisions that belong to the SI side.

In order to assess this capacity to act as a buffer between the requirements of the supranational supervisor and the situation of local credit institutions, the last part of the section examines the case of the "Guidance on the management of non-performing loans for Italy's 'less significant institutions'" issued by BdI in January 2018, which was meant to adapt the content of the Guidance (the Addendum was not in force by the time BdI's instrument was out, as it was applicable from April 1st, 2018) to the Italian LSIs.[37] When taking into account both the content of BdI's Guidance and the industry's views on the issue, evidence suggest that proportionality is still the missing holy grail.

First, the document explains that it contains *similar* guidance (emphasis added) and it highlights that the content "is in line with that published by the SSM, to which banks are invited to refer as regards operational details" (Banca d'Italia 2018, 1). The case is that some of these "operational details" have been challenged by the industry in the course of both public consultations related to NPLs (Guidance and Addendum), due to their level of granularity,

[36] The reform has foreseen the creation of three groups, being the third *Cassa Centrale Raiffeisen*, which in the end will not be created given the choice of organising under the IPS form. No matter the organisational arrangement adopted by the banks i.e., the cooperative banking group or the IPS form, Federcasse continues to act as the common association (confirmed by a Federcasse official in the Brussels office).

[37] In compliance with the Council's Action Plan to tackle NPLs described in the previous section, by means of which the SSM and NCAs were required to adapt the NPL Guidance's content to the LSI sector. The situation of the German NCA will not be considered given that, to the best of my knowledge, there was no Guidance issued to cover the LSI sector. This is to be expected though given the low NPL ratio of 1.7 % according to the last stocktake carried out by the European Parliament in October 2018, thus it is unlikely to be a supervisory priority.

prescriptive tone – contrary to more principles-based supervisory approaches –, and the practical or operational difficulties that some of the provisions entail in terms of both human and material resources. In this sense, LSIs are asked, for instance, to conduct a quarterly review on the progress made, which is the same frequency imposed on SI. On this specific point, ABI has asked to amend this provision in order to submit these assessments on a bi-annual basis, in line with Intesa Sanpaolo's request in order to align it with the periodicity of target definition. In other sections, such as valuation of real state collateral, the same requirement of an annual update was kept. This requirement has been heavily criticised during the consultation period but has been kept in the final text. Banca d'Italia was nevertheless aware of proportionality concerns and thus clarifies in the Guidance that some adaptations have been considered taking into consideration the situation of smaller banks. For example, the governance and operational arrangement section does not contain the granular arrangements that are present in the SSM Guidance, whose content was criticised by banks and associations given the clash with existing practices and the operational difficulties that implementing such detailed provisions.

In spite of these organisational exemptions that aim to adjust uniform requirements to the characteristics of LSIs, the industry is concerned about the degree of autonomy and decision making leverage that BdI still has.[38] In this sense, even if LSIs continue to be under the direct supervision of the local authority, the SSM's impact is increasingly important and it materialises not so much via *supervisory* actions per se, but via the *regulatory* requirements that, once applicable to SIs, have to be transposed to LSIs. NCAs' end up in a Catch-22 situation, given that they are supposed to adapt these requirements to LSIs but, at the same time if some requirements are eased, SIs – or the SSM itself – could raise level playing field concerns. Therefore, the simplest way out is to keep requirements pretty much the same or apply some cosmetic proportionality. This scarce room for manoeuvre in the adaptation of supervisory instruments is reflected in the way supervision is exercised over LSIs.

To conclude, this section has shown the LSI situation in relation to both interest representation and adaptation of SSM rules. Regarding the first point, it is observed that LSIs, for the German and Italian cases analysed above, need to swiftly mover between the national and supranational levels in order to channel their interest and main concerns. When it comes to SSM rules that are not meant to be directly applicable to them, LSIs need to be ready to make their opinion and interests clear, given that sooner or later it will impact on them. This impact should be cushioned by NCAs. However, this adaptation and the quest for proportionality is not straightforwardly achieved for the following reasons. First, a proportional approach does not mean less stringent rules i.e., differentiating between SIs and LSIs does not entail that the latter are to be regulated in a more relaxed manner. Therefore, a "lazy" approach focused on reducing or removing some rules is not appropriate to tackle the issue. Second, NCAs that aim to create a more proportionate regulatory space for LSI are likely to face the resistance from SI that claim that the level playing field is not being taken into consideration, given the risk of differential rules over SSM countries. Proportionality, then is meant to be achieved via the application of these rules i.e., the exercise of supervision. However, the supranationalisation of banking supervision means that the SSM is the final responsible for the

[38] Conclusions drawn from interviews with an Italian LSI and bank association.

whole eurozone banking sector, not just the SIs. Therefore, NCAs no longer enjoy the same level of autonomy even in relation to LSIs supervision, which is also mirrored by the reasoning followed by the CJEU in the above-cited *Landeskreditbank Baden-Wüttenburg v. ECB* case, when it characterises the supervisory exercise of the NCAs as a "decentralized implementation" of the original powers held by ECB.

4. Conclusions

While previous research has focused on how international and EU-wide standards had been politically imposed, it is now critical to examine the "operational management of divergence and friction in standard implementation, the coordination of supervisory approaches, and mutual regulatory and supervisory learning" (Moloney 2017, 139).

The two cases illustrate the interconnectedness between Europeanisation and EU integration. Regarding the former, the cases reveal the existing dynamic feedback between the supranational and the national levels: although the SSM was meant to act as a centripetal force via the supranationalisation of banking supervision, its everyday tasks heavily rely on the collaboration and expertise of the NCAs. The Europeanising effects, therefore, can be either top-down or bottom-up. As far as the latter is concerned, integration plays a crucial role as it is for the most part the logic that lies underneath the ECB's actions. The need to achieve supervisory consistency as shown in the NPL and IPS cases, ultimately stems from the need to strengthen the single market. The level playing field narrative is also strongly embedded in the logic of integration: given that financial institutions are part of the same market, the application of different rules undermines a fair competition among them. The level playing field concept, however, does not take proper account of the fact that financial institutions in the euroarea, albeit enjoying "EU passporting rights", are inherently diverse and operate at different levels.

In fact, what the cases indicate is that a key concern for both supervisors and stakeholders, is the accommodation of diversity in light of increasingly standardised and granular provisions. Such detailed provisions interfere, on the one hand, with banks' internal processes and decisional autonomy and, on the other, with the margin of interpretation left to the NCAs when they need to adapt the content to the LSIs. The SSM is fully aware of this need, which is also enshrined in recital no. 17 of the SSM Regulation: "the ECB should have full regard to the diversity of credit institutions and their size and business models, as well as the systemic benefits of diversity in the banking industry of the Union".

One final aspect that emerges from the analysis, and in line with broader EU Economic Governance trends, is the revisability feature, as per the experimentalist characterisation. In fact, revisability epitomises this fluctuation and fuzzy lines between supervision and regulation: while exercising its supervisory competences, the SSM needs to clarify or specify its field of action, which results in the development of the instruments that have been analysed above. These instruments, in turn, are meant to be revised if the circumstances so require. The issue here is whether, in defining its supervisory perimeter, the ECB's actions abide by the regulatory boundaries set in Article 4 (3), Paragraph 2, of the SSM Regulation. Evidence suggests that, even if motivated by legitimate supervisory concerns, the exercise of the SSM's regulatory competences has bypassed other institutional instances.

References

Annunziata, Filippo. 2018. "European banking supervision in the age of the ECB. Landeskreditbank Baden-Wüttenburg v. ECB." *Bocconi Legal studies research paper series*.

Banca d'Italia. 2018. "Guidance on the management of non-performing loans for Italy's 'less significant institutions.'" (January).

Centro Europa Ricerca. 2017. "Le Asimmetrie nella Nuova Regolamentazione Bancaria Europea: Analisi e Proposte." (Gennaio).

Cremona, Marise, and Claire Kilpatrick. 2018. *EU Legal Act. Challenges and Transformations*. Oxford University Press.

Dawson, Mark. 2018. "New Governance in the EU after the Euro Crisis – Retired or Reborn?" In *EU Legal Act. Challenges and Transformations*, edited by Cremona et al., Chapter 4. Oxford University Press.

European Central Bank. 2016a "Public hearing on institutional protection schemes – 31 March 2016" (video). Posted March 1st, 2016. Accessed April 26, 2019. https://www.youtube.com/watch?v=8nFvqZGHSYU

European Central Bank. 2016b. "Public consultation on the draft ECB guidance to banks on non-performing loans – 07 November 2016" (video). Posted November 7th, 2016. Accessed April 26, 2019. https://www.youtube.com/watch?v=L32Nwwh25jo

European Central Bank. 2017a. *Guidance to banks on non-performing loans*. (March)

European Central Bank. 2017b. *Stocktake of national supervisory practices and legal frameworks related to NPLs*. (June).

European Central Bank. 2017c. "LSI supervision within the SSM." (November) https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.reportlsisupervision2017.en.pdf

European Central Bank. 2017d. "Banking Supervision – Public hearing: Guidance to Banks on non-performing loans – 30 November 2017" (video). Posted November 30, 2017. Accessed April 26, 2019. https://www.youtube.com/watch?v=9F72l1nS2Cg

European Central Bank. 2019. *ECB Annual Report on Supervisory Activities 2018*. (March).

Council of the European Union. 2017. Action plan to tackle non-performing loans in Europe. (July).

European Parliament. 2018. *Non-performing loans in the Banking Union. Stocktaking and challenges*. (October). http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614491/IPOL_BRI(2018)614491_EN.pdf

Gardella, Anna. 2014. "Ruolo dell'EBA e della BCE nella regolamentazione bancaria europea." Presentation at Banca d'Italia, Perugia (May 16).

Magliari, Andrea. 2017. Il sistema di ripartizione delle competenze all'interno del Single Supervisory Mechanism: Una questione di "significatività." *Rivista di Diritto Bancario*, no. 9.

Moloney, Niamh.2017. "The European Union in International Financial Governance." *RSF: Russell Sage Foundation Journal of the Social Sciences* 3, no. 1: 138-152.

Sabel, Charles F., and Jonathan Zeitlin, eds. 2010. *Experimentalist Governance in the European Union: Towards a New Architecture*. Oxford: Oxford University Press.

Scherrer, Christoph, ed. 2017. *Public Banks in the Age of Financialization. A Comparative Perspective*. Cheltenham: Elgar.

Semenyshyn, Halyna. 2017. "Marginalizing the German savings banks through the European Single Market." In *Public Banks in the Age of Financialization. A Comparative Perspective*, edited by Scherrer, Chapter 10. Cheltenham: Elgar.

Smits, René. 2017. "Competences and alignment in an emerging future after L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop." ADEMU WP 77 (October).

Zeitlin, Jonathan, ed. 2015. *Extending Experimentalist Governance? The European Union and Transnational Regulation*. Oxford: Oxford University Press

Zeitlin, Jonathan. 2016. "EU Experimentalist Governance in Times of Crisis." West European Politics 39, no. 5: 1073-1094, DOI: 10.1080/01402382.2016.1181873