

Democratic Accountability in the Banking Union

Is There Really a Gap?

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5.1 INTRODUCTION

The creation of the Banking Union (BU) in 2012 represented an important change in the Economic and Monetary Union (EMU), and in the European Union (EU) in general. Indeed, it entailed the delegation of new competences in the areas of banking supervision and bank resolution to the EU level, and it demanded the creation of unique procedures and original governance mechanisms. It has no doubt represented a big step forward in the process of European integration as it is only the second area in which full integration is realised.¹ At the same time, it has also certainly increased the existing level of complexity within the EU. This is the case among other reasons because euro area Member States are part of the BU, but membership to the BU is also open to the rest of the Member States. In fact, in 2020, Bulgaria and Croatia availed themselves of this possibility to join the BU without having adopted the common currency. By creating a third category of Member States next to the EU27 and those that belong to the euro area within the EMU, the BU added a new layer of differentiation in an already largely differentiated Union.²

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¹ Grundmann and Micklitz, 'The European Banking Union and Constitution – The Overall Challenge' in Grundmann and Micklitz (eds.), *The European Banking Union and Constitution – Beacon for Advanced Integration or Death-Kell for Democracy?* (Hart, 2019) 1–24.

² As evidenced, for instance, by the different chapters contained in Fromage (forthcoming) and in *ibid.* 'Introduction' in Fromage (ed.), *(Re-)defining Membership: Differentiation in and Outside the European Union* (Oxford University Press, 2023).

As a result of this and of the (unaltered) EU legal framework on which basis it was created, the institutional architecture in which the BU is embedded, and the procedures that underpin it, are extremely complex. This is also the case because banking matters are of concern to all EU Member States since banks operate across the Internal market and are thus governed by its rules. Moreover, non-BU EU Member States are also naturally affected by the developments that happen within the BU, not least because BU banks commonly operate in non-BU Member States.³ To make matters worse, whilst banking supervision and resolution are now the ultimate responsibility of an EU institution and agency (the European Central Bank (ECB) and the Single Resolution Board (SRB), respectively), national institutions continue to exercise part of the competences. A division of tasks is operated between various EU authorities, on the one hand, and the national ones, on the other.⁴ Also, within the Single Supervisory Mechanism (SSM), the ECB, for instance, supervises Significant Institutions (SIs) directly, whereas National Competent Authorities (NCAs) remain in charge of the supervision of smaller credit institutions (or Less Significant Institutions, LSIs).⁵

The existing literature on democratic accountability in the BU has, so far, focused on the ECB in its quality as banking supervisor (ECB-SSM), and to a lesser extent on the SRB.⁶ However, a comprehensive assessment of democratic

³ See Smoleńska, 'Multilevel Cooperation in the EU Resolution of Cross-border Bank Groups: Lessons from the Non-euro Area Member States Joining the Single Resolution Mechanism (SRM)', *Journal of Banking Regulation* 23 (2022), 42–53.

⁴ See further on this Della Negra and Lo Schiavo, 'The Relationship between the ECB and the National Competent Authorities in the Single Supervisory Mechanism: Problems and Perspectives' in Beukers, Fromage and Monti (eds.), *The 'New' European Central Bank: Taking Stock and Looking Ahead* (Oxford University Press, 2022).

⁵ The specific role of the ECB and the NCAs has given rise to somewhat diverging interpretations by the Court of Justice of the EU and the German Federal Constitutional Court in their *L-Bank* and *European Banking Union* decisions, respectively. See *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank (ECB) and BVerfG* [2019] ECLI: DE: BVerfG:2019:RS20190730.2BVR168514, paras. 1–320; See for some comments on these cases: Annunziata, 'European Banking Supervision in the Age of the ECB: Landeskreditbank Baden-Württemberg – Förderbank v ECB', *European Business Organization Law Review* (2020) 21, 545–570; Schammo, 'Matching or Clashing? Landeskreditbank Baden-Württemberg v ECB and the Decision of the German Bundesverfassungsgericht on the Banking Union', Durham University, 28 November 2019. Accessed via <http://dx.doi.org/10.2139/ssrn.3495226> (16.05.2022).

⁶ In particular, to date no substantive analysis of the use of accountability mechanisms within the SRM have been performed. Recent analyses include: Amtenbrink and Menelaos, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism', *European Law Review* 1 (2019), 3–23; Fromage and Ibrido, 'Accountability and Democratic Oversight in the European Banking Union' in Schiavo (ed.), *The European Banking Union and the Role of Law* (Edward Elgar, 2019), 66–86; Vlachou,

accountability standards in this area of EU public policy requires that a more holistic, all-encompassing view is taken as only such an approach allows to determine whether the four goods that accountability should provide, which are openness, non-arbitrariness, effectiveness, and publicness, can be delivered.⁷ This is precisely the perspective adopted in the present chapter, which aims at going beyond the mere analysis of the accountability mechanisms applicable to these two EU instances. Although both substantive and procedural accountability are considered, this chapter arguably already adds to the existing state of the art by providing a mapping of the accountability mechanisms in place considered altogether, that is from the inception – at the EU level – of the norms that are in force within the BU to their application by national and EU authorities.

To fulfil this objective, the present chapter is divided into four sub-sections: (1) It first examines how the BU operates and disentangles the various mechanisms in place, and the role of the different EU institutions and bodies within them. (2) It then proceeds to map the existing democratic accountability mechanisms. (3) The subsequent sub-section turns to the substantive part of the analysis, that is it considers how these mechanisms operate in practice. (4). The final section concludes by offering an assessment of the democratic accountability standards as they exist following the creation of the BU. It considers in particular whether any gap exists, whether in substance or in practice.

5.2 WHO DOES WHAT AND HOW? A MAPPING OF THE EXISTING PROCEDURES

The first substantive section of this chapter will detail the characteristics of the existing mechanisms and the specific role played by the various institutions and bodies involved therein.

For the purposes of this chapter, it suffices to note that European integration in the banking domain differs from what is the norm in other areas of the EMU, for instance, because different from what is the rule in the field of monetary policy, banking supervision is an area of shared competence in which the ECB does not adopt the necessary norms itself but, instead, applies those designed by the EU legislator and by the EU regulator. It is led to apply the standards primarily prepared – for the whole of the EU – by an EU agency,

⁷ 'Ensuring the Democratic Accountability of the Single Resolution Board: Which role for the European Parliament and National Parliaments?', *Revue Internationale des Services Financiers/International Journal for Financial Services* 1 (2017), 8–20; Božina Beroš and Beroš, 'The Single Resolution Board: What About Accountability?', in Pollak and Slominski (eds.), *The Role of EU Agencies in the Eurozone and Migration Crisis*, pp. 127–148.

⁷ See further the introductory chapter to this edited volume.

the European Banking Authority (EBA), but which must be formally adopted by the European Commission to become legally binding. This notwithstanding, the ECB may itself also adopt certain norms such that the divide between supervisor and regulator is not as clear-cut as it could seem at first sight.⁸

As noted above, two EU authorities are primarily in charge of banking supervision and resolution within the BU. Their status, as well as the legal bases that underpin their existence, are however radically different. Whereas the ECB is an EU institution in its own right, the SRB is an EU agency. Powers in banking supervision could be conferred upon the ECB, thanks to the existence of a ‘reserve of competence’ contained in Article 127(6) Treaty on the Functioning of the EU (TFEU). It could nevertheless only be entrusted with new competences with regard to those BU Member States that also belong to the euro area, such that specific mechanisms had to be designed to allow the participation of non-euro area Member States in the BU.⁹ By contrast, the SRB was created on the basis of Article 114 TFEU, an EU-wide Internal Market legal basis, even if only BU Member States participate in the Single Resolution Mechanism (SRM).¹⁰

Considering all this, studying the democratic accountability standards of the BU requires a substantive and a procedural analysis of several accountability mechanisms in place, that is those applicable to the ECB-SSM, to the SRB but also those applicable to the EBA, to the Commission and even to the ECB in as far as the ECB’s Governing Council ultimately is the organ that formally approves the supervisory decisions prepared by the ECB’s Supervisory Board.¹¹

⁸ For instance: Brescia Morra ‘From the Single Supervisory Mechanism to the Banking Union. The Role of the ECB and the EBA’, LUISS Guido Carli School of European Political Economy, working papers, 13 June 2014. Accessed via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448913 (16.05.2022); To ensure consistency between the actions pursued by the EU legislator and those pursued by the ECB, a specific procedure of cooperation has been established by means of the interinstitutional agreement concluded between the EP and the ECB. See: International agreements 2013/694/EU, Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L320/1.

⁹ This is the so-called close cooperation regime defined in Article 7 SSM Regulation. See on practice to date: Beck and Bruno, ‘The ECB’s close cooperation on supervising banks in Bulgaria and Croatia’, In-depth analysis for the EP ECON Committee, PE 699.521 (2022) and Darvas and Martins, ‘Close cooperation for bank supervision: The cases of Bulgaria and Croatia’, In-depth analysis for the EP ECON Committee, PE 699.523 (2022).

¹⁰ See for a discussion on the resort to this legal basis: Tuominen, ‘The European Banking Union: A Shift in the Internal Market Paradigm?’, 54 *Common Market Law Review* (2017), 1359–1380.

¹¹ The exact role of the ECB in the approval of SRB decisions was also unclear, but eventually the Court of Justice designated the SRB as the sole decision maker. See *ABLV Bank AS and Others v European Central Bank* [2021] ECLI:EU:C:2021:369, paras 58f; Budinská,

To obtain a full picture of the existing situation, a multilevel perspective that considers the national dimension, as well as multilevel (administrative) cooperation and multilevel democratic accountability mechanisms, should also be adopted. Considering the limited space available here, however, this chapter will focus on the EU level and on the existing accountability mechanisms vis-à-vis EU institutions and bodies. The national and multilevel dimensions will only be underlined and considered in as far as it is necessary to assess the EU dimension of this issue.

5.3 ACCOUNTABILITY MECHANISMS IN PLACE

5.3.1 *Accountability Mechanisms Applicable to the ECB*

The question of the ECB's accountability plays a primary role in the guarantee of high (or adequate) democratic accountability standards in the BU because, as noted, the ECB is in charge of banking supervision. Its Supervisory Board – which is an internal organ of the ECB created for the specific purpose of banking supervision by the SSM Regulation¹² – is in charge of preparing supervisory decisions, which are later adopted by the Governing Council following a non-objection procedure. Its involvement is necessary because according to the Treaties, the Supervisory Board is not a decision-making organ of the ECB. As such, both the mechanisms in place to hold the ECB-SSM and the ECB to account are of importance when considering democratic accountability of and within the BU. However, because the role of the Governing Council is secondary to that of the Supervisory Board, the mechanisms in place vis-à-vis the latter will be examined first.

The accountability of the Supervisory Board is to be ensured following procedures defined in the SSM Regulation.¹³ Its Article 20 is dedicated to '[a]ccountability and reporting'. According to this provision, the ECB is accountable to both the Council and the European Parliament (EP) for the implementation of this Regulation. To this end, it shall submit every year a

¹² Op-Ed: "Of Auctoritas and Potestas in the Banking Union: The ECB, the SRB, Failing Credit Institutions and Judicial Review", *EU Law Live* (2021).

¹² Article 26(1), Regulation (EU) No 468/2014 of 16 April 2014 of the European central bank establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), OJ L 141/1 (hereafter SSM Framework Regulation 2014).

¹³ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63.

‘report on the execution of the tasks conferred on it by this Regulation, including information on the envisaged evolution of the structure and amount of the supervisory fees’ to the EP, the Council, the European Commission and the Eurogroup. That report shall be presented by the Chair of the Supervisory Board to the EP and to the Eurogroup in presence of those Member States that participate in the BU but do not belong to the euro area (they are also involved in the procedures mentioned subsequently where reference to the Eurogroup is made). This format of the Eurogroup is known as the ‘Eurogroup in BU format’. Both the Eurogroup and the EP also have the possibility (on an individual basis and independently from each other) to invite the Chair of the Supervisory Board to appear before them (or before the responsible committee in the case of the EP) to discuss the execution of its supervisory tasks. Oral or written questions may additionally be put to the ECB (i.e., the ECB-SSM) by both the Eurogroup and the EP.¹⁴

Next to these procedures, the possibility exists that, upon initiative of the Supervisory Board’s Chair, confidential oral discussions behind closed doors be held with the Chair and the Vice-chairs of the responsible EP Committee, that is the Committee on Economic and Monetary Affairs (ECON Committee), where these ‘are required for the exercise of the European Parliament’s powers under the TFEU’. The details of these arrangements are to be defined in an interinstitutional agreement between the EP and the ECB, which was adopted in 2013.¹⁵ Finally, a duty is set on the ECB to cooperate with the EP in its conduct of investigations. To this end,

[t]he ECB and the European Parliament shall conclude appropriate arrangements on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB by this Regulation. Those arrangements shall cover, inter alia, access to information, cooperation in investigations and information on the selection procedure of the Chair of the Supervisory Board.

The interinstitutional agreement details the content of the annual report, which the ECB has to submit to the EP. It also specifies that the Chair of

¹⁴ Note though that the questions submitted to the ECB in that framework are deducted from the total of six questions MEPs may ask every month as per Article 140 EP Rules of procedure. Likewise, the questions addressed by MEPs to the SRB – to which more below – are also deducted from this maximum number of six-monthly questions: See Rule 141, Rules of Procedure of the European Parliament (2019).

¹⁵ International agreements 2013/694/EU, Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L320/1.

the Supervisory Board shall be submitted at least to two ordinary hearings, although additional ad hoc exchanges of views may be organised too. Additionally, it specifies how confidential oral discussions have to take place in practical terms. Likewise, the modalities for the submission of written questions are specified, and the aim is that the ECB answers them within five weeks (as opposed to the six-week target set for the questions put to the ECB by MEPs on monetary policy issues as per the EP's Rules of procedure). Specific provisions furthermore detail how information on the ECB's tasks as a supervisor is to be made available. This includes, for example, access to the record of proceedings of the Supervisory Board by the ECON Committee or non-confidential information regarding a credit institution that has been wound up. The EP is to establish sufficient safeguards for the confidentiality of the ECB documents submitted to it to remain preserved.

As noted previously, also the EU executives (e.g. Commission, Council and Eurogroup) are addressees of the ECB-SSM's annual report. What may, however, appear as more surprising is the fact that it is with the Eurogroup and not the Council with which the true relationship of accountability is established. Indeed, the annual report shall be presented to the Eurogroup, which may invite the Chair of the Supervisory Board to appear before it and submit both written and oral questions to the ECB-SSM. This state of fact is disturbing for several reasons. As recalled by the Court of Justice on several occasions,¹⁶ the Eurogroup is not an institution of the Union but an informal group whose *raison d'être* is to allow for the coordination of euro area Member States' policies. Neither the informal nature of the Eurogroup nor the purpose of its existence squares well with the role it is called to play in guaranteeing the ECB-SSM's democratic accountability.

Moreover, according to Article 10 TEU, democratic accountability rests upon two pillars within the EU since the entry into force of the Lisbon Treaty: the EP and Member States government representatives participating in the Council. Considering all this, the ECB-SSM could rather have been held accountable by the Council. This would have made all the more sense as the Council (and formally at least, not the Eurogroup) is involved in the approval of (part of) the secondary legislation the ECB has to apply in its quality as banking supervisor. Additionally, the argument can be made that developments within the BU are of interest to all of the EU Member States, as is

¹⁶ *Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P Council of the European Union v Dr. K. Chrysostomides & Co. LLC, and the other parties whose names appear in Annex I* [2020] ECLI:EU:C:2020:390, paras 62f.; Markakis and Karatzia, 'Financial Assistance Conditionality and Effective Judicial Protection: Chrysostomides', *Common Market Law Review* 59 (2022), 501–542.

indeed confirmed by the fact that BU matters are, at least in some instances, discussed in Eurogroup meeting in inclusive format, that is with representatives from all EU27 Member States.¹⁷ The Lisbon Treaty already opened the door to a ‘differentiated Council’, that is one within which on some occasions only euro area representatives may cast their vote, and thus the Council could have been used as an accountability forum. Admittedly, since the possibility formally exists that non-euro area (candidate) Member States may join the BU, an accountability forum that would only bring together BU representatives had to be set up, and only the Eurogroup (and not the Council) could easily be adapted for that purpose. But it remains the case that the solution found is largely unsatisfactory for the reasons outlined previously.

Next to these relationships of accountability with EU organs, ‘relationships with national parliaments’ are also foreseen in the SSM Regulation. Although formally, and according to the ECB itself, it is ‘primarily accountable to the EP’ and not to national parliaments, and although the question as to whether these relationships between the ECB-SSM and national parliaments serve the purpose of democratic accountability has been subject to debate,¹⁸ there is little doubt that the powers with which parliaments have been entrusted vis-à-vis the ECB (written questions, reasoned observations on the annual report and exchange of views) resemble those that commonly exist between parliaments and any institution they hold accountable.

These relationships of accountability add to those that have existed between the EP (and the Council) and the ECB since the creation of the ECB. Indeed, the ECB’s (strong) independence is to be compensated by its relationship of accountability towards the EP (primarily). It must therefore address an annual report on ‘the activities of the ESCB [European System of Central Banks] and on the monetary policy of both the previous and the current year to the European Parliament, the Council and the Commission, and also to the European Council’.¹⁹ This report shall be presented to the Council and to the EP, which ‘may hold a general debate on that basis’. Additionally, the possibility exists for the President of the ECB or the other members of the Executive Board to be heard before the ECON Committee

¹⁷ This was notably the case on the occasion of the meeting of 12 July 2021. See European Council, ‘Meeting of Eurogroup, 12 July 2021’, July 2021. Accessed via www.consilium.europa.eu/en/meetings/eurogroup/2021/07/12/ (16.05.2022).

¹⁸ Fernández Bollo, ‘Democratic Accountability Within the Framework of the SSM and the SRM as a Complement to Judicial Review’ in Zilioli and Wojcik (ed.), *Judicial Review in the European Banking Union – Elgar Financial Law and Practice Series* (Edward Elgar Publishing, 2021).

¹⁹ Article 15(3), Protocol (No 4) on the Statue of the European system of central banks and of the European Central Bank, OJ C 202/230, (here after ESCB Statute).

on their own initiative, or on that of the ECON Committee. MEPs are also entitled to submit six questions for written answers to the EP.²⁰ In the framework of monetary policy, although some exchanges were indeed organised in the past,²¹ formally no relationship exists between the ECB and national parliaments, as may appear logical considering that monetary policy is a competence of the Union.²²

The existence of a relationship of accountability between the ECB and the Council makes sense historically as, originally, the status of ‘Member State with a derogation’, that is that of Member State outside the euro area, was meant to remain temporary for all Member States bar Denmark and the United Kingdom which had obtained a permanent opt-out. Thus, correspondence largely existed between the geographical area within which the ECB’s monetary policy would take effect (at that point in time or eventually), and the Member States represented in the Council. However, already at the time when the Lisbon Treaty was drafted, it may be argued that this had become wishful thinking. This notwithstanding, Member States did not choose to change the identity of the forum in charge of holding the ECB accountable and instead the Council kept this prerogative, despite the fact that it is precisely that Treaty (i.e. the Lisbon Treaty) which formalised the existence of the Eurogroup. The choice in favour of the Eurogroup when the SSM was established could point to the willingness to further empower the Eurogroup, a forum which had already been significantly reinforced as a result of the euro area crisis. Furthermore, to state the obvious, a choice in favour of the Eurogroup is also to the benefit of the Member States, since the accountability and transparency standards it is submitted to are much less stringent than those applicable to the Council.²³

5.3.2 *Guaranteeing the SRB’s Accountability*

The SRM was established a few years after the SSM, and the latter’s accountability mechanisms no doubt inspired those of the former. Indeed, the obligations set on the SRB by the SRM Regulation are similar to those

²⁰ Rule 140 (1), Rules of Procedure of the European Parliament (2019)

²¹ Jančić, ‘Accountability of the European Central Bank in a Deepening EMU’ in Jančić (ed.), *National Parliaments After the Lisbon Treaty and the Euro Crisis – Resilience or Resignation?* (Oxford University Press, 2017), 141–158.

²² Relationships have still developed on an informal basis since the Eurocrisis. Whether they serve information/pedagogical purposes or are deemed to serve as an additional accountability channel for the ECB (or whether they ought to) is up for debate. See Fromage *Changing parliaments in a changing European Union* (Hart forthcoming).

²³ See further on the Eurogroup’s accountability: Markakis in this volume.

set on the ECB-SSM by the SSM Regulation.²⁴ However, considering that the SRM is an agency and not an EU institution like the ECB, it is accountable not only to the EP and the Member States – coming together in the Council and not in the Eurogroup but also to the Commission. The annual report is submitted to the EP, the national parliaments of participating Member States, the Council, the Commission and the European Court of Auditors. As a result of this, differently from what is the case within the SSM, the Eurogroup is not supposed to be involved in any way in this instance, which could be the case because the SRB is an EU-wide agency. The report is then presented to the EP and the Council. The EP may additionally invite the Chair of the SRB to a hearing, and a minimum of one hearing per year is set by the SRM Regulation. Written and oral questions may be submitted to the SRB by the Council and the EP, and the possibility to hold confidential oral discussions is also provided. Like it is the case between the ECB-SSM and the EP, an agreement that details the modalities of these discussions shall be concluded,²⁵ and the SRB is set to cooperate in any investigation the EP may initiate.

Like the interinstitutional agreement between the ECB-SSM and the EP, the Agreement between the EP and the SRB details the content of the report that the SRB has to submit every year. The topics addressed in the ordinary public discussions are also defined, as is the possibility to organise ad hoc meetings and the practical modalities of the confidential oral discussions. A minimum of two ordinary hearings per year is set. The EP shall be kept duly informed as a ‘comprehensive and meaningful record of the proceedings’ of every executive or plenary meeting is to be submitted to it within the six weeks that follow said meeting. The rest of the provisions contained in the Agreement are similar to those included in the interinstitutional agreement between the ECB-SSM and the EP.

Likewise, the SRM Regulation establishes a direct relationship between the SRB and the national parliaments of the participating Member States. Their nature (i.e., whether they constitute a relationship of accountability) is also not specified, but as they are very similar to those established with the EP they

²⁴ Articles 45 and 46, Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225/1 (hereafter SRM Regulation).

²⁵ Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism.

may also be viewed as contributing to the SRB's accountability credentials. The powers vested with national parliaments in this framework are indeed very similar to those attributed to them vis-à-vis the ECB. However, the SRB is set under stronger obligations towards them than the ECB is.²⁶

5.3.3 *The EBA's Accountability Credentials*

Guaranteeing democratic accountability within the BU demands that also the EBA be submitted to democratic control. This is the case because it prepares technical standards that are officially adopted by the European Commission at a later stage, and because it still fosters coordination among National Competent Authorities, including but not only in areas closely linked to banking supervision.

The accountability mechanisms applicable to the EBA were significantly enhanced when the European Supervisory Authorities (ESAs) Regulations were amended in 2019.²⁷ In its original version, the ESAs Regulation only established that '[t]he Authorities referred to in points (a) to (d) of Article 2(2) [among which is the EBA] shall be accountable to the European Parliament and to the Council'. By contrast, it is now foreseen that the EBA be accountable to the EP and the Council but that it shall also cooperate with the EP in the event that the latter decides to conduct an investigation. Despite the EBA's quality as an agency – and differently from the SRB – the EBA is not accountable to the Commission. Several reasons could account for this. Perhaps the most evident one is that this provision concerns not only the EBA (or the ESAs) but also the European Systemic Risk Board (ESRB), which is not an agency but an independent body chaired by the President of the ECB. The EBA's prerogatives are also more circumscribed than those of the SRB. The Commission is called to formally adopt the

²⁶ Lamandini and Ramos Muñoz, 'Study Requested by the ECON Committee: SSM and SRB Accountability at European Level: What Room for Improvements? Banking Union Scrutiny', European Parliament, April 2020. Accessed via [www.europarl.europa.eu/RegData/etudes/STUD/2020/645711/IPOL_STU\(2020\)645711_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2020/645711/IPOL_STU(2020)645711_EN.pdf) (11.5.2022).

²⁷ Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (Text with EEA relevance), OJ L 334/1.

normative acts, which the EBA prepares such that it already is in a position to exercise some form of control over its actions, although the procedures differ for non-normative acts.

The EBA's 'Board of Supervisors shall adopt an annual report on the activities of the Authority, including on the performance of the Chairperson's duties, and shall, by 15 June each year, transmit that report to the European Parliament, to the Council, to the Commission, to the Court of Auditors and to the European Economic and Social Committee'. As such, the duty that is now set on the Board of Supervisors is similar to that which the ECB-SSM and especially the SRB have to fulfil. However, in this case, a precise date is set by which the EBA has to fulfil its obligation. The European Economic and Social Committee is, too, an addressee of the report.

Additionally, it is prescribed that the EBA's Chairperson be heard by the EP – upon its request – at least once a year 'on the performance' of the EBA. The format of the hearing is quite precisely defined in the Regulation, as it calls for the Chairperson to make a statement and to answer the questions put to it by MEPs. The EP may ask the Chairperson to report on the activities of the EBA at least fifteen days before the hearing. Specific mention is also made to the possibility for the EP to request that the EBA reports on its participation in international forums, which is all the more welcome as those (which include, for instance, the Basel Committee on Banking Supervision²⁸) have assumed an ever larger role following the outbreak of the Great Financial Crisis.

Next to these procedures, the possibility also exists for the Council or the EP to put written questions to the EBA, which it shall answer within five weeks. As with the ECB-SSM and the SRB, confidential oral discussions may be organised since the EBA Regulation was amended.

5.3.4 *The Commission*

One last actor that arguably plays an important role in the BU is the European Commission. This is the case for numerous reasons, chief of which are the facts that it is involved in several of the procedures that exist (for instance, in

²⁸ See on this: De Bellis, 'Reinforcing EU Financial Bodies Participation in Global Networks: Addressing Legitimacy Gaps?' in Hofmann et al. (eds.) *The External Dimension of EU Agencies and Bodies Law and Policy* (Cheltenham: Edward Elgar Publishing, 2019), 126–144; Fromage, 'The (multilevel) Articulation of the European Participation in International Financial for a: The Example of the Basel Accords', *Journal of Banking Regulation* 23 (2022), 54–65; Viterbo, 'The European Union in the Transnational Financial Regulatory Arena: The Case of the Basel Committee on Banking Supervision', 22 *Journal of International Economic Law* 2 (2019), 205–228.

banking resolution), that it has the last word on the standards developed by the EBA, and naturally also that it proposes the norms of secondary legislation that are of application within the BU.

In consequence, upholding suitable accountability standards within the BU demands that the Commission be submitted to sufficient controls. Put differently, in seeking to evaluate whether any accountability gap exists within the BU, one should also check whether the Commission's actions in this domain are sufficiently scrutinised by the EP.

The EP has numerous means to hold the European Commission to account. Its strongest power lies in its possibility to remove its confidence in the Commission and thus force it to resign collectively.²⁹ The EP and its members may also put some oral and written questions to the Commission or submit Commissioners to major interpellations,³⁰ organise hearings to provide the Commission an opportunity to explain its decisions,³¹ and create committees of inquiry.³²

5.3.5 Conclusion

The preceding analysis has evidenced that mechanisms exist to guarantee the democratic accountability of BU institutions. An evolution towards an enhancement of these mechanisms may additionally be witnessed, both in terms of their nature and in terms of their very existence. Indeed, the accountability of the EBA was significantly reinforced following the reform performed in 2019. Also, the mechanisms in place towards both the ECB-SSM and the SRB are more stringent than those applicable to the ECB. Several reasons may account for this. First, the ECB benefits from a stronger degree of independence in the area of monetary policy than it does in the field of banking supervision.³³ Second, accountability standards have evolved significantly over the past twenty years. For example, the EP is only consulted when the President of the ECB is appointed.

²⁹ Article 18(7) TEU.

³⁰ Article 230 TFEU and Rules 136, 137, 138 and 139, Rules of Procedure of the European Parliament (2019)

³¹ Rule 133, Rules of Procedure of the European Parliament (2019).

³² Article 227 TFEU and Rule 208, Rules of Procedure of the European Parliament (2019)

³³ As recalled, for instance, by Kerstin af Jochnick, Member of the Supervisory Board of the ECB on 1 March 2022. Supervisory independence and accountability. Af Jochnick, 'Speech by Kerstin af Jochnick, Member of the Supervisory Board of the ECB, at the IMF High-Level Regional Seminar in Sub-Saharan Africa', European Central Bank, 1 March 2022. Accessed via www.bankingsupervision.europa.eu/press/speeches/date/2022/html/ssm.sp220301~66eb4805eb.en.html (16.05.2022).

In contrast, its consent is necessary for the chair of the Supervisory Board to be nominated,³⁴ that is the EP's role has become larger over time.

Accountability mechanisms, be they formalised or not, make it more likely that democratic accountability is upheld. However, the mere existence of those mechanisms does not suffice, as there is, for example, no guarantee that they are used by the actors to which they are available. The next sub-section therefore turns to the practice of accountability in the BU to date.

5.4 THE PRACTICE OF DEMOCRATIC ACCOUNTABILITY SO FAR

To evaluate the practice of democratic accountability so far, two dimensions in particular will be considered: *formal* accountability, that is if and how the existing instruments have been used, and *substantive* accountability, that is what these mechanisms have been used for in terms of substance. The data examined in this sub-section covers the period between November 2014 and April 2022, that is from the start of the functioning of the SSM until the date of submission. It consists of minutes of EP debates, written questions and the responses they received, as well as the yearly reports produced severally by the institutions examined.³⁵ The focus is set on the ECB-SSM, the SRB and the EBA owing to the ECB and the European Commission playing a secondary role in the BU if compared to the ECB-SSM, the SRB and the EBA.

Before proceeding with the proposed analysis, it should be noted that any conclusion drawn at this stage may only be provisional since the two pillars of the BU have only been functioning for a short period of time. This notwithstanding, the proposed study is still valuable because it allows to gain some knowledge of how the existing mechanisms have been used and which shortcomings inherent to them or gaps among them may exist. The conclusion thus provides an assessment of the current situation, as well as some suggestions for improvement.

5.4.1 *Practice of Accountability to Date*

It must be said from the start that research reveals that the existing democratic accountability procedures have been used indeed: Parliamentary hearings

³⁴ See on this evolution: Fromage, 'Guaranteeing the ECB's Democratic Accountability in the Post-Banking Union Era: An Ever More Difficult Task?', 26 *Maastricht Journal of European and Comparative Law* 1 (2019), 48–62.

³⁵ This data was used either directly or via the proxy on analysis available in the literature duly referenced in footnotes.

and ad hoc exchanges of views have been organised, reports have been produced and parliamentary questions have been put to the ECB-SSM and to the SRB. However, differences in terms of frequency and fluctuations over time have existed. The following paragraphs first consider the ECB-SSM before turning to the SRB and to the EBA.

As regards parliamentary questions put by MEPs to the ECB-SSM, it must first be said that they were not very numerous in the first years of the functioning of the SSM, as is only logical. They peaked in 2017 and 2018 although they remained infrequent at approximately forty questions per year (by comparison, the number of questions put to the ECB as the European institution in charge of monetary policy was similar in 2017 but it rose to more than three times this amount in 2018).³⁶ The number of questions has since been decreasing and there was only a dozen of them in 2021. Perhaps this could be explained by the varying levels of interest among participating MEPs, with notably one of the most active of them, Sven Giegold, having ceased to be an MEP. Also, the SSM no longer is a new instrument, thus MEPs' interest could have faded with time, in particular seeing as no new banking crisis has emerged and the ECB thus seems to be fulfilling its tasks satisfactorily. It could be expected that MEPs' interest would rise again if the ECB-SSM were to deal more closely with controversial issues such as climate change. Despite recommendations in favour of the creation of a space dedicated to questions posed by MEPs to the ECB-SSM (and the SRB),³⁷ no such step has been taken by the EP to date, which is regrettable as it makes relevant information harder to find.

Also, some questions have been put by national members of parliaments, most often from the German Bundestag. It is perhaps unsurprising that the members of the Bundestag are those who have used this mechanism most, considering the fact that the creation of the BU had raised concerns that democratic accountability standards would be lowered as a consequence thereof. Indeed, the German NCA, the BaFin, is functionally placed below the responsibility of the ministry of finance, which may be held accountable for the actions of the NCA.³⁸ More generally, and perhaps most importantly, a tradition exists for German MPs to ask written questions. In terms of their

³⁶ These figures are extracted from the ECB's annual reports and from the dedicated sections of its website.

³⁷ Smits, 'Study Requested by the ECON Committee: SSM and the SRB Accountability at European Level: Room for Improvements?', European Parliament, April 2020. Accessed via [www.europarl.europa.eu/RegData/etudes/STUD/2020/645726/IPOL_STU\(2020\)645726_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2020/645726/IPOL_STU(2020)645726_EN.pdf) (15.5.2022), p 26.

³⁸ Thiele, *Finanzaufsicht: der Staat und die Finanzmärkte* (1st Ed, Mohr Siebeck, 2014), p. 415f.

content, some of the questions are very specific and regard a specific credit institution, whilst others are much more general and address, for instance, non-performing loans, the implementation of the Basel standards or supervision in general. Such a mixed set of macro- and micro-topics seems to be healthy for the whole system of supervision.

Parliamentary hearings and ad hoc exchanges of views, as well as hearings before the Eurogroup, have taken place on a regular basis, and the annual reports were duly presented. Though some fluctuations over time may be observed in this regard as well – perhaps also due to the pandemic and the widespread ‘Zoom-fatigue’, it may generally be said that exchanges with MEPs have been more frequent than the minimum set by the SSM Regulation as they have often included a couple of ad hoc exchanges of views in addition to the standard bi-annual hearings.³⁹ The topics covered during these exchanges were varied as they ranged, for example, from the consequences of the pandemic to climate risks and the finalisation of Basel III.

Confidential oral discussions have taken place before hearings of the Chair of the Supervisory Board by the ECON Committee, and they have been ‘reported to be much more confrontational than public hearings, with “tough” language that is often absent in public interactions between the two institutions’.⁴⁰

Finally, the Chair of the Supervisory Board has regularly appeared before the Eurogroup, and these meetings have commonly been organised together with the Chair of the SRB (this is examined more in depth below). Fluctuations in their frequency have existed as well, with notably 2017 standing out as a year of particularly close exchanges, but this was also the year when the first resolution ever took place such that this is perhaps rather unsurprising. As these exchanges are not public, they are harder to assess. Nonetheless, the ECB had noted in the past that ‘[t]he topics of interest to the finance ministers overlapped to a large extent with those discussed in the European Parliament’⁴¹ and the overall issues discussed may be found in the account of the main results of Eurogroup meetings since they exist. The topics covered have included, for example, broader issues such as non-performing loans and anti-money laundering.

³⁹ 2021 is a notable exception to this, which the need to resort to a virtual format could perhaps explain.

⁴⁰ Akbik, *The European Parliament as an Accountability Forum: Overseeing the Economic and Monetary Union* (1st Ed, Cambridge University Press, 2022), p. 77f.

⁴¹ European Central Bank, ‘Annual report on supervisory activities’, March 2018. Accessed via www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2018~927cb99de4.en.html (14.05.2022).

If one considers the SRB, one may first regret that the part devoted to accountability in its annual reports remains particularly succinct. Also, it appears that its exchanges with the EP have been less frequent than those organised between the ECB-SSM and the EP as they have generally been limited to two exchanges per year in addition to the presentation of the annual reports. This could be explained by the fact that the SRM has only been activated on one occasion during the period considered here. On the other hand, the fact remains that the setting up of the SRM has raised questions indeed, in terms of its functioning and its financing but also in relation to questions related to the overall architecture of the BU and notably its missing pillar, the European Deposit Insurance Scheme, and the role the SRB could play therein. Therefore, more interest on the side of MEPs could have been reasonably expected.

MEPs have likewise devoted much less attention in their questions to the SRB than they have to the ECB-SSM. To date, they have addressed fifteen questions in total, of which seven were addressed by the same MEP (Sven Giegold).⁴² These questions have sometimes consisted in requests for access to documents, or more general questions such as the architecture of the SRM in general, as well as questions on the Banco Popular case, for example.

Like was the case with the ECB-SSM as well, questions from national parliaments have not been numerous (ten in total) and only German MPs have asked questions to date. The identity of these MPs largely corresponds to those who raised questions to the ECB-SSM. Interestingly, although the answers to these questions are available on the SRB's website, they are not translated into English but are, instead, only available in German. Whilst this is understandable as translation is demanding on resources, one may wonder whether this does not, in fact, diminish the SRB's accountability potential vis-à-vis the larger public. Considering how few these questions are, it would be advisable for the SRB to make a courtesy translation available to all. As concerns the topics touched upon by these letters, they have regarded very factual issues, including the number of credit institutions whose resolution planning the SRB oversees, as well as questions related to specific credit institutions or related to findings of the European Court of Auditors.

The relationship between the SRB and the Eurogroup follows a similar pattern as the one between the ECB-SSM and the Eurogroup, not least because the Chair of the Supervisory Board and the Chair of the SRB commonly appear together before the Eurogroup. Issues addressed with the

⁴² Some, like the one by MEP de Lange of 6 December 2016, were raised during hearings held before the EP.

Chair of the SRB have included resolution planning, the built-up of the Single Resolution Fund or resolvability (continuity seems to exist in the topics discussed, which is only logical as the SRB's main task in normal times is to prepare for potential resolution cases such that the issues that need addressing are rather recurrent as opposed to being individual events). It must be noted that although this practice of joint hearings with the Chair of the Supervisory Board and the Chair of the SRB makes perfect sense as they allow for a more comprehensive control by the EP of what is going on in the BU, it remains that it contradicts the content of the SRM Regulation, which foresees that the SRB – an EU-wide agency – be held to account by the Council. As noted above, it probably would have been best to entrust the Council with the task of controlling both the ECB-SSM and the SRB in the first place, also to guarantee higher transparency and thus higher accountability standards.

The relationship between the SRB and the Commission seems to unfold on a smooth basis, as the SRB noted, for instance, in its annual report for the year 2020 that it 'continued to maintain its close cooperation with the relevant directorates-general of the Commission, in particular with the Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) and the Directorate-General for Competition (DG COMP) at all levels on various aspects, which are relevant to the SRB's work and functions, and participated actively in the meetings of the Expert Group on Banking Payments and Insurance (EGBPI)'.⁴³ Further details are not available.

Finally, one may regret that the information regarding the EBA's accountability is not much detailed; its annual reports and its website indeed only contain scarce information on this topic, and it is not easy to find. The EBA fulfils its duty to present its annual report to the EP, and it entertains relationships with other EU institutions.⁴⁴ Most of the correspondence publicly available is addressed to the European Commission, and it covers issues that go beyond banking supervision owing to the EBA's broad mandate. This notwithstanding, some of the letters are indeed addressed to MEPs, but they remain scarce.⁴⁵

⁴³ Single Resolution Board, 'Annual Report 2020', June 2021. Accessed via: www.srb.europa.eu/system/files/media/document/Annual%20Report%202020_Final_web.pdf (14.05.2022).

⁴⁴ See the section dedicated to 'Correspondence with EU institutions' of the EBA's website. www.eba.europa.eu/about-us/missions-and-tasks/correspondence-with-eu-institutions

⁴⁵ It is however not clear whether these letters are addressed to the EBA on the basis of Article 3(7) EBA Regulation, that the possibility open to MEPs to address questions to the EBA. As these questions do not appear when using the search function of the EP's website, it would seem as though formally these are not parliamentary questions.

5.4.2 Conclusion

The preceding analysis of the use of the existing accountability mechanisms to date reveals first that information on this issue is scattered around the various websites and uneasy to find. This is regrettable, and efforts should be made to improve this situation, as already proposed by René Smits.⁴⁶

Second, it appears that, at the EU level, the existing procedures are being used indeed, as hearings and exchanges of views are organised, questions are posed, and reports are produced. The EP additionally produces annual reports on BU.⁴⁷ Parliamentary questions are, though rather infrequent, and fluctuations have existed over time in the frequency of the oral exchanges held. It is interesting to note that despite its duty to hold the EBA accountable too, the EP only keeps regular records of practice of accountability towards the ECB-SSM and the SRB but not towards the EBA (or any of the European Supervisory Agencies).⁴⁸ This is regrettable as the EBA and these agencies in general play an increasingly important role in financial supervision within the EU, and as the acts of soft law they adopt produce significant effects for banks and have been the object of litigation before the Court of Justice.⁴⁹

In any event, shortcomings exist in the practice of accountability: despite the fact that external experts are regularly invited to produce briefings, the questions put by MEPs are not always sufficiently to the point.⁵⁰ Most importantly, the same questions are not consistently picked up during debates.⁵¹ Also, MEPs are not always clear about the appropriate forum or addressee for

⁴⁶ *Supra* note 37.

⁴⁷ See, for instance, European Parliament, 'Draft Report on Banking Union – Annual Report 2020 (2020/2122(INI))', April 2021. Accessed via www.europarl.europa.eu/doceo/document/ECON-PR-658703_EN.pdf (13.05.2022).

⁴⁸ These take the form of briefings, which are regularly updated. See for instance: European Parliament, 'Single Supervisory Mechanism: Accountability Arrangements (9th Parliamentary Term)', November 2021. Accessed via [www.europarl.europa.eu/RegData/etudes/BRIE/2020/659623/IPOL_BRI\(2020\)659623_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659623/IPOL_BRI(2020)659623_EN.pdf) (13.05.2022) and European Parliament, 'Single Resolution Board: Accountability Arrangements (9th Parliamentary Term)', November 2021. Accessed via [www.europarl.europa.eu/RegData/etudes/BRIE/2020/659621/IPOL_BRI\(2020\)659621_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659621/IPOL_BRI(2020)659621_EN.pdf) (13.05.2022).

⁴⁹ *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* [2021] ECLI:EU:C:2021:599; See for a comment of the case: Quelhas, 'The EBA Guidelines on Retail Banking Products' Saga Lessons from an Attempted Judicial Review of European Supervisory Authority Guidelines', *EU Law Live Weekend Edition* (2022) 97.

⁵⁰ This was notably noted by Fabian Amténbrink and Menelaos Markakis, as well as by Adina Maricut-Akbik, *supra* note 6 and Maricut-Akbik, 'Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament', 58 *JCMS: Journal of Common Market Studies* 5 (2020), 1083–1358.

⁵¹ Lamandini and Ramos Muñoz, *supra* note 26, at p. 35.

a specific issue. For instance, some of the questions put to the ECB were not addressed to it in the right setup, that is MEPs mixed up the setup designed for dialogue on monetary policy issues with the one reserved to banking supervision. Although this confusion could have been due to the very numerous forums in which MEPs have the opportunity to debate with the ECB, it could also be the case that they deliberately chose not to care for political reasons and simply use any channel they had at their disposal.

Beyond all this, it has been found that, in effect, MEPs only have had limited influence on the ECB-SSM's policy, although this is because MEPs only rarely require such changes but rather use their interaction with the ECB to request information on policy views.⁵² This could point to a usage of public hearings and questions primarily for communication purposes, as opposed to their being used for accountability purposes.⁵³ Confidentiality in banking supervision is a further hindrance in MEPs' quest for accountability,⁵⁴ and reform proposals have been made to improve this situation.⁵⁵

Finally, and although this issue is only subsidiary to the analysis conducted here, one may observe that very limited use has been made by national parliaments of the possibility they now have to directly interact with the ECB-SSM and the SRB. To assess whether this results in an accountability gap, research should determine whether this is compensated by adequate mechanisms of accountability towards NCAs and the use thereof by parliaments at the national level.

5.5 CONCLUSION: IS THERE A GAP AND IF SO, HOW TO BRIDGE IT

This chapter intended to adopt a holistic view of democratic accountability in the BU with a view to determining whether any gap exists. Some gaps appear to exist indeed, and they derive from (a) the EU's constitutional framework, (b) the BU's architecture and its characteristics, and (c) from practice, that is how the existing accountability mechanisms are used.

5.5.1 *The EU's Constitutional Framework Has Become Unfit for Purpose*

The existing flaws are generally related to both the EU's architecture and functioning, and specific to EMU. The shortcomings inherent to the EU's architecture are twofold, and are caused by, on the one hand, the trend of

⁵² *Supra* note 50.

⁵³ *Supra* note 51.

⁵⁴ *Supra* note 50.

⁵⁵ *Supra* note 37.

agencification within the EU,⁵⁶ and relatedly to the absence of specific and precise legal basis for EU agencies, which would allow a much necessary update and adjustment of the Meroni doctrine. On the other hand, they derive from the gap that has grown between the existing legal framework, and the degree and the variety of differentiation within today's EU (where differentiated integration is understood in the largest possible sense). As noted above, the co-existence of the BU, the euro area and the EU27 and the corresponding institutional variations of the meetings of national ministers at the EU level certainly blur the boundaries between the various groups of Member States, and thus the accountability channels applicable to the various procedures. This then must bring back to a reflection on the question of (internal and external) differentiation and membership within the EU more generally.

Some of the existing shortcomings are, though, specific to the EMU and its sub-area the BU. Whereas differentiation is a feature commonly observed within the EU and not specific to the EMU, the EMU is arguably the most extreme example of differentiation in terms of its breadth and reach with, among others, the ECB conducting the euro area's monetary policy, or the existence of an intergovernmental European Stability Mechanism as an emergency safety net reserved to euro area Member States but one that also serves as a backstop to the (EU) BU. Differentiation within the EMU is then also visible in terms of its institutional embedding with the Eurogroup as a *quasi* institution, the existence of Euro Summit, of specific voting rules in the Council, and the recurrent proposals in favour of a euro area parliament or at least a euro area sub-committee to the ECON Committee,⁵⁷ to the point that the principle of institutional unity that used to be a requirement to any initiative of enhanced cooperation under Amsterdam could come under threat.⁵⁸ As has been evidenced in this chapter, the mechanisms formally in place within the BU are oftentimes pragmatic solutions to the lack of suitability of the existing legal framework as is illustrated by the Eurogroup's role in

⁵⁶ On which see, among many others: Busuioac et al., *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making* (1st Ed, Manchester University Press, 2012).

⁵⁷ Curtin and Fasone, 'Differentiated Representation: Is a Flexible European Parliament Desirable?' in de Witte et al. (eds.) *Between Flexibility and Disintegration. The Trajectory of Differentiation in the EU* (Edward Elgar, 2017), pp. 118–145; Henette et al., 'Draft Treaty on the Democratization of the Governance of the Euro Area (T-Dem)' in *Ibid. How Democratize Europe* (Cambridge: Harvard University Press, 2019), pp. 63–86.

⁵⁸ See on this question of institutional unity in the framework of EMU: Fromage 'Moving beyond "institutional unity" within the EU? Euro area versus non-Euro area representation in the EU institutions', Maastricht University Law Faculty Working paper, 2019. Accessed via www.maastrichtuniversity.nl/maastricht-faculty-law-working-paper-series-2019 (16.05.2022).

guaranteeing the ECB-SSM's accountability. Practice shows a further adaptation of the established mechanisms as in the case of the Eurogroup, which also serves as accountability forum for the SRB. Both of these phenomena nonetheless only illustrate that the existing institutional framework is unfit for purpose, because it has not been adapted to match the evolutions that have happened in the breadth of the policies conducted at the EU level and to the form that these take, even if it must be admitted that the framework currently in place has proven to be sufficiently flexible for informal arrangements to be developed.

5.5.2 *Flaws Inherent to the BU*

Next to these shortcomings related to the EU's institutional framework, there are also shortcomings that are specific to the BU, although they partially derive from the problems that exist within the EU's constitutional structure generally.

The BU is in-between the EU27 and the euro area, and relies on both structures. From this derives inherent complexity that in turn makes guaranteeing democratic accountability particularly challenging. Accordingly, democratic accountability standards within the BU may not be assessed by only looking at the ECB-SSM and the SRB. As this chapter has posited, other actors including the Commission and the EBA play an important role as well, and their accountability credentials must, too, be taken into consideration.

Mark Bovens has defined accountability as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences'.⁵⁹ When the last step is taken within the framework of the BU, that is when the forum that holds the agent to account is to take actions based on its assessment of how the principle has performed, it must hold not only the ECB-SSM or the SRB to account but also the Commission and the EBA because of their role as regulator. The ECB's nature as an independent EU institution and as a central bank also acting as banking supervisor complicates matters further, as does the EBA's and the SRB's nature as independent agencies. As a result of the ECB's numerous functions, accountability becomes more difficult to ensure because the same group of MEPs are called to regularly interact with the ECB in different capacities, thus demanding from them that they first identify in which forum they must ask which kinds of questions. In any event, however, as recently noted by the former Governor

⁵⁹ Bovens, 'New Forms of Accountability and EU-Governance', 5 *Comparative European Politics* 1 (2007), 104–120.

of England Paul Tucker, '[t]he European Parliament's Econ committee is too big to conduct effective oversight of the ECB's stewardship of the monetary regime'.⁶⁰ The same could be said of the ECON Committee when it is called to hold the ECB-SSM to account although in that context, the possibility for smaller meetings to be organised in the form of confidential oral discussions may partially contribute to solve this problem. Be this as it may, even if Paul Tucker is certainly right in considering the EP ECON Committee to be too large an accountability forum, it is difficult to imagine which other format would have sufficient legitimacy based on its representativeness of the (large) euro area to play such a role. Furthermore, other practical problems outlined below may in fact be a bigger hindrance to effective accountability than the ECON Committee's large size.

Beyond all this, because the EU does not have exclusive competence in the field of banking supervision and bank resolution, national authorities continue to play a large role. Additionally, harmonisation is only partial such that the applicable rules vary across the BU. EU organs, and primarily the ECB, have to apply national norms upon whose content and legality they have no control.⁶¹

Finally, democratic accountability within the BU does not solely rest on EU institutions and bodies; national institutions, too, play a large role. This is the case because they approve national legislation as noted previously, because they remain competent in areas that are closely linked to BU matters (for instance: anti-money laundering) and because they are closely involved in the functioning and the operation of both the SSM and the SRM.

5.5.3 *How to Bridge the Existing Gaps?*

If all were best in the best of possible worlds, differentiation within the EU would vanish, that is the three currently co-existing categories of Member States, which the EU₂₇, the euro area and the BU form would disappear. Thus, some of the regulatory gaps and of the institutional complexity would cease to exist.

Likewise, if Treaty change were a realistic option, a better design for EU agencies could be introduced, a proper legal basis for the BU could be created,

⁶⁰ Tucker, 'How the European Central Bank and Other Independent Agencies Reveal a Gap in Constitutionalism: A Spectrum of Institutions for Commitment', 22 *German Law Journal* 6 (2021), 999–1027.

⁶¹ See on this the section dedicated to the application of national law by the ECB in the proceedings of the ECB Legal Conference 2019. European Central Bank, 'Building Bridges: Central Banking Law in an Interconnected World – ECB Legal Conference 2019', December 2019. Accessed via www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf (12.05.2022).

including the formal acknowledgement of a third category of Member States next to the euro area and the EU27, that is that of BU Member States. A true discussion on whether the ECB should be the BU's supervisor could be had, and the Chinese wall that separates its monetary policy from its banking supervision functions better designed.

However, unfortunately, none of these options seem to be realistic at this stage of European integration. Even the Conference on the future of Europe is unlikely to lead to the full opening of Pandora's box, as it might do so but only in specific areas with a specific objective.⁶² It is true that following Brexit the most adamant advocate of the interests of non-euro area Member States is gone, and no non-euro area Member State has as large a financial market as the UK used to have. Consequently, none of them has the UK's leverage in EU27-negotiations. But a discussion on Treaty change would likely regard many areas other than the BU, and taking account of all the challenges they are already facing internally, including the economic recovery post-COVID, the threats to the rule of law and to EU values, or the ecological and digital transition, EU Member States may not want to take this path at this point in time. Neither would they realistically be in a position to find a compromise solution at this stage if one considers how long they have been unable to come to a compromise solution on the completion of the BU, for instance.

If Treaty change is not an option, what is, then? In addition to the solutions already included in the main sections of this chapter, one could consider additional avenues to improve the existing situation.

First, institutional engineering, that is the improvement of existing practice through the actions of the institutions involved themselves should continue to be exploited. Institutional engineering commonly takes the form of arrangements put in place by institutions on an informal basis or their promoting regulatory change. In a nutshell, it means that institutions use their margin of discretion and action to the largest extent possible. One form this could take would consist in the creation of a dedicated BU sub-committee of the ECON Committee, a possibility that was already considered for the euro area in 2013–2014.⁶³ This would allow for some of the MEPs to become more specialised in BU matters, and they would not necessarily all have to stem from BU Member States.

⁶² The EP did call for the constitution of a Convention, but it is unclear whether it will be constituted. European Parliament, 'Treaty Review Necessary to Implement Conference Proposals, Parliament Declares', European Parliament Press Releases, 4 May 2022. Accessed via www.europarl.europa.eu/news/en/press-room/20220429IPR28227/treaty-review-necessary-to-implement-conference-proposals-parliament-declares (12.05.2022)

⁶³ See Fasone and Curtin, *supra*, note 57.

Changes in secondary legislation (and in primary law where this is easily feasible) should also be considered with a view to upgrading the mechanisms in place, and to simplifying the existing architecture where possible.

Further harmonisation at the EU level should be pursued too, not only in terms of the norms applicable but also perhaps in terms of the minimum requirements set with respect to the features of the national institutions involved. At present, NCAs and NRAs are hosted by very different institutions that correspond to different national traditions and rules. Arguably, if for instance the applicable standards of independence were more strongly defined at the EU level, it would be easier to guarantee democratic accountability in this area, as the institutional setups would be less complex.⁶⁴ It may thus only be hoped that the Court of Justice will be called to continue to perform its duty of clarification and definition of the tasks and responsibilities of the different institutions involved within the BU.

Lastly, it may also only be hoped for that MEPs and MPs will improve the use they make of the existing mechanisms. This would include, as mentioned, asking more informed questions, making more demands for policy changes where necessary, and ensuring better synergies between the mechanisms that exist in parallel. To this end, interparliamentary cooperation should also be fostered, for instance, the Interparliamentary Conference on Stability, Coordination and Governance could be better exploited: to date, it has only rarely addressed BU-related matters. But other mechanisms should be established too, in the form of interparliamentary committee meetings hosted by the EP, and on the initiative of the Presidency parliament and with the involvement of national parliaments only.

As reforms to improve and complete the BU are high on the EU's agenda again,⁶⁵ it is urgent that they be also accompanied by matching improvements of the democratic accountability mechanisms in place in the whole of the BU.

⁶⁴ The institutional embodiment of NCAs and NRAs is an issue, which has been largely neglected by research to date in the sense that there have not been large comparative studies of it. The EBA recently published the outcome of a survey on independence, which allows to gain some insights. Additionally, in the proposal of reform of the Capital Requirements Directive issued in October 2021, the requirements in terms of the independence of the NCAs are significantly enhanced. Proposal (COM/2021/663 final) for a directive of the European Parliament of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, and amending Directive 2014/59/EU.

⁶⁵ Ammann, 'Eurogroup President Launches New Push to Complete Banking Union', *euractiv.com*, 4 May 2022. Accessed via www.euractiv.com/section/economy-jobs/news/eurogroup-president-launches-new-push-to-complete-banking-union/ (13.05.2022).