

EU Regulation Between Uniformity, Differentiation, and Experimentalism: Electricity and Banking Compared

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Abstract

How far and under what conditions may experimentalist governance (XG) be an efficient and legitimate means of responding to diversity among EU member states, in comparison to both conventional uniform regulation (UR) and differentiated integration (DI)? By comparing two major domains where the dilemma of integrating national diversity has arisen prominently – electricity and banking – we find that under conditions of high interdependence and high uncertainty, diachronic experimentalism may be a necessary condition for synchronic uniformity, in that uniform rules can be accepted as efficient and legitimate by member states, provided they are regularly revised on the basis of implementation experience through deliberative review processes in which national officials themselves participate. Our findings on EU banking regulation further suggest that XG and DI may also be complementary, but asymmetrically so, in that the latter depends on the former to accommodate diversity within and across member states, but not vice versa.

1. Introduction: Alternative Approaches to Integrating Diversity within the European Union

How can advances in European integration be reconciled with diversity among member states? Rightly or wrongly, EU regulation has acquired an increasingly contested reputation, at least within the Union itself, where the “Brussels rule factory” has become a term of abuse even among committed supporters of the European project. This contested reputation is partly due to the perceived technocratic character of EU rule making, and its remoteness from national parliaments and citizens. It is likewise partly due to the politically contested character of EU rules themselves, which may involve value conflicts and distributive consequences for member states, firms, and taxpayers. But it is also due in no small measure to concerns about misfits between one-size-fits-all, centrally imposed uniform regulation (UR) and heterogeneity of socio-economic conditions, institutional structures, and policy preferences in an increasingly diverse Union of 27 member states, from which one (the UK) has recently departed (Matthijs et al. 2019).

One widely canvassed solution to this dilemma is differentiated integration (DI). Its underlying assumption is that deeper integration of markets and societies within the EU requires uniform, centrally determined rules, which some member states may be unwilling or unable to accept, at least initially. Where other member states wish nonetheless to push ahead, the result is DI: policies and rules that apply only to some member states (internal DI), as well as in some cases to certain non-member states (external DI). Most such internal DI, as recent research has shown, is temporary, resulting from transitional exemptions from EU rules in accession agreements or secondary legislation, which are eventually scheduled to expire (“multi-speed” integration). But other forms of internal DI are more durable, especially where they reflect “constitutional” reservations among some member states to the integration of so-called “core state powers”, in fields such as foreign and defense, interior and justice, or monetary policies. Among the best known and most visible forms of such durable “multi-tier” integration are the Euro Area and the Schengen borderless zone (Schimmelfennig et al. 2023; Schimmelfennig & Winzen 2020).¹

A number of scope conditions for such enduring DI have been identified in the recent literature. Beyond heterogeneity of national preferences, variations in their intensity and political salience are crucial to understanding why some member states choose to opt out from further integration in specific policy fields, while others forge ahead. So too is the degree of mutual interdependence, which must be sufficient to motivate closer integration among the vanguard, but not so high as to create externalities (whether negative or positive) that outweigh DI’s expected benefits. Another crucial scope condition is modularity: the key policy choice must be reducible to a binary option, which member states can choose to embrace or reject. Enduring, multi-tier DI thus appears most likely under

¹ Such opt-outs or derogations from EU-wide rules may be based on secondary legislation as well as Treaty provisions. A high-profile example is the 2015 amendment of the Deliberate Release Directive, which empowers member states to opt out from cultivation on their territory of genetically modified organisms (GMOs) authorized at EU level (Dąbrowska-Kłosińska 2022).

conditions of heterogeneous preferences, high but asymmetrical politicization, moderate interdependence, and high modularity (Schimmelfennig et al., 2023; Schimmelfennig & Winzen 2020; Schimmelfennig et al. 2015).

DI, defined in these ways, offers both advantages and disadvantages for European integration (Schimmelfennig et al. 2023). On the positive side, DI may allow a closer match between EU policies and rules on the one hand and member-state preferences and conditions on the other. In so doing, it allows greater self-determination for national *demos* within the Union, and may help to blunt euroscepticism and secessionist movements, such as Brexit. DI may also help to avoid sub-optimal, lowest-common-denominator solutions at EU level by permitting national opt-outs or closer cooperation among avant-garde member states (Special Issue Introduction; Bellamy & Kröger 2017; de Vries 2018; Schimmelfennig & Winzen 2020). On the negative side, however, DI may also divide member states and EU citizens into separate and unequal groups. It may likewise fail to address (unanticipated) externalities resulting from national policies and functional spillovers between interdependent policy fields (Schimmelfennig et al. 2023; Schimmelfennig & Winzen 2020). Finally, where DI becomes durably entrenched, it may fragment the European market and create opportunities for regulatory arbitrage by transnational firms (Howarth & Quaglia 2020).

Yet DI is not the only available approach to accommodating diversity within the EU. A growing body of recent research has shown that in many key policy domains, EU governance is characterized not by top-down imposition of rigid UR, but rather by an experimentalist architecture of provisional goal setting and revision, based on recursive learning from comparative review of implementation in different local contexts (Sabel & Zeitlin 2008, 2010; Zeitlin 2015, 2016). In this iterative, multi-level architecture, framework goals, rules, and metrics for assessing their achievement are established jointly by the EU institutions and the member states, typically following consultation with relevant stakeholders. “Lower-level” units (such as national administrations and regulatory authorities) are then given substantial discretion to pursue these goals in ways adapted to their local contexts. But in return for this autonomy, they must report regularly on their performance and participate in a peer review in which their results are compared to those of others following different means towards the same ends. Where member states are not making good progress, they are expected to take corrective measures, based on a plausible plan for improvement informed by the experience of their peers. The goals, rules, metrics, and decision-making procedures are then periodically revised in response to the problems and possibilities revealed by the review process, and the cycle repeats. For a diagrammatic representation, see Figure 1 below.

Figure 1: EU XG as an iterative, multi-level architecture



Source: Zeitlin (2015: 2)

Like DI, XG in this form also depends on several scope conditions. The first is strategic uncertainty, where policy makers cannot define their precise goals or how best to achieve them ex ante, but must instead discover both in the course of problem solving, because they are operating in a turbulent, rapidly changing environment. A second is a polyarchic or multi-polar distribution of power, in which no single dominant actor is able to impose their own preferred solution without taking into account the views of others. A third is a high level of diversity – in socio-economic conditions, institutional structures, and local preferences – which increases the difficulty of adopting and enforcing uniform rules. A final scope condition concerns interdependence, which must be sufficient to motivate actors to collaborate in seeking joint solutions to common problems, but not so high as to preclude decentralized experimentation by local units (Sabel & Zeitlin 2012: 174-5; Rangoni & Zeitlin 2021: 823-4).

Where these scope conditions are met, XG architectures have a number of fundamental advantages in terms of efficiency and legitimacy, relative both to conventional UR and to DI. First, they accommodate diversity by adapting common goals and rules to varied local contexts, rather than seeking to impose one-size-fits-all solutions or dividing member states into separate groups of “Ins” and “Outs”. Second, they provide a mechanism for coordinated learning from local experimentation through disciplined comparison of different approaches to advancing the same general ends, which can be used to generate new policy solutions and regulatory frameworks that may then be

applied in contextually specific ways across the Union as a whole. Third, the same processes of mutual monitoring, peer review, and joint evaluation that support learning from diverse experience also provide dynamic, non-hierarchical mechanisms for holding both central and lower-level actors accountable for their actions in pursuit of agreed goals. Finally, because both the goals themselves and the means for achieving them are explicitly conceived as provisional and subject to revision in light of experience, problems identified in one phase of implementation can be corrected in the next iteration.

Although XG architectures of this type are neither universal nor ubiquitous in the EU, they are widely diffused across a variety of policy domains. Well-documented examples include: regulation of competition, energy, telecommunications, and finance; food, drug, chemicals, and maritime safety; environmental protection; employment promotion and social inclusion; justice and home affairs; data privacy, anti-discrimination, and fundamental rights (Sabel & Zeitlin 2008, 2010). These architectures also play a growing part in EU external governance, where the revisable framework rules they generate are frequently extended to third-country actors (Zeitlin 2015). A typical pattern in recent years has been progressive formalization of EU regulatory networks, without full supranational centralization. In some sectors, under conditions of high interdependence coupled with high uncertainty, concern for the integrity of integrated markets has led to the creation of a single set of harmonized but provisional rules, revisable through ongoing monitoring and review of implementation experience, as for example in chemicals regulation. These developments in turn raise the possibility, which we will explore further in this paper, of the emergence in such cases of simplified XG architectures, combining synchronic uniformity with diachronic revisability (Zeitlin 2016; Rangoni & Zeitlin 2021).

The Introduction to this Special Issue defines efficiency in terms of the match between member state preferences and gains from integration, expecting that DI “(a) facilitates agreement in the EU, (b) shortens decision-making time, (c) increases the depth of integration and (d) improves the implementation of EU policies”. It defines legitimacy in terms of social acceptance of EU policies and the EU itself among EU actors and citizens (Schimmelfennig et al. 2023). Building on these definitions, this paper addresses the question of how far and under what conditions may XG represent an efficient and legitimate means of responding to diversity of preferences and conditions among EU member states, in comparison to both DI and conventional UR?

2. Cases and Methods

Drawing on new empirical research, the paper tackles this question through a comparative analysis of EU regulatory governance in two major policy domains: electricity and banking. In each of these domains, the dilemma of how to accommodate national diversity in EU policy making has arisen prominently. Each is also characterized by high levels of strategic uncertainty, associated with rapidly changing markets and technologies (positive scope condition for XG). Each domain belongs to the internal market, where interdependence and the resulting demand for uniform

rules is strong (negative scope condition for both DI and XG in its classic form); each is likewise politically salient and controversial, to varying degrees across member states (positive scope condition for DI). Comparison across these domains thus offers valuable analytical leverage in responding to the core research question about the relationship between XG, UR, and DI in integrating diversity within the EU, as well as their efficiency and legitimacy. In this paper, following the definitions set out in the Special Issue Introduction, we focus particularly on how far XG, in comparison to DI and conventional UR, enhances the match between EU policies and member state preferences, facilitates policy agreement, increases the depth of integration, improves policy implementation, and is accepted by national as well as EU policy actors and stakeholders.²

The research reported in this paper followed a process-tracing approach, combining a wide range of expert interviews with European and national policy actors with extensive review of official documents and literature to reconstruct the evolution of EU regulatory governance in each domain, assess the changing balance between XG, UR, and DI within it, and draw out its broader implications for efficiency and legitimacy.³

In the remainder of this paper, we briefly present the key findings of the research on each domain in turn, focusing on the incidence of XG relative to UR and DI, both in formal institutional structures and in organizational practices. The final section draws some comparative conclusions from the cases about the extent to which XG may in fact be considered an efficient and legitimate alternative – or complement – to both UR and DI.

3. Electricity: Uniform Rules Made and Revised Experimentally

The need to keep electricity demand and supply in balance at all times (due to the currently very limited storage possibilities), the fact that electricity follows the “laws of physics” rather than political boundaries, and the risk of negative externalities and cascading effects make this an especially interdependent sector (Roe & Schulman 2008; Dillon & Wright 2005). Such interdependence has only grown over time, as European markets have become more interconnected and unscheduled flows of electricity from renewable sources have increased. If the familiar need to avoid regulatory arbitrage and foster a “level playing field” in the European internal market already calls for uniform rules across countries, electricity’s high interdependencies makes such a demand particularly strong. Yet electricity is no exception to the diversity of preferences, institutional structures, and socio-economic conditions at the heart

² Of course, these same indicators could also be used to identify lack of efficiency and or legitimacy of XG relative to DI and/or UR, should they take negative values (e.g., failure to facilitate agreement or increased depth of integration).

³ For a full presentation of the research on each policy domain, see Rangoni (2020) and Zeitlin (2021). A complete list of expert interviews, anonymized where requested by the interviewees, together with a list of the main primary documents consulted, can be found in the online Appendix. For reasons of space, only the most essential citations to these sources are provided in subsequent sections. Supporting evidence from interviews and primary documents for empirical claims in the main text can be found in Section C of the Appendix. References to this material are indicated in the body of the text by bold numbers in square brackets.

of Europe. As part of the broader energy domain, it is also politically sensitive and subject to high-profile regulatory conflicts, at both national and European levels. Historically, member states jealously guarded their sovereignty over what was considered a strategic sector, and sought to protect “national champion” firms from foreign competition and takeovers; today, political debates over fuel mix, nuclear power, renewable energy, and the fight against climate change remain highly salient (Hancher 1997; Solorio & Jörgens 2020), with the current worldwide energy price crisis offering yet another demonstration of the politically sensitive nature of electricity. At the same time, moreover, electricity is also a complex and rapidly changing sector, characterized by high levels of uncertainty about the future development of markets, technologies, and consumer behavior. Within the EU, the challenges of managing interconnected cross-national power grids on a continental scale have raised a series of regulatory and operational problems to which no ready-made solutions were available in advance (Eberlein 2008; Rangoni & Zeitlin 2021).

Our research on EU electricity regulation examined the relationship between uniform, differentiated, and experimentalist governance across five key policy issues. These include, first, the conditions, and second the tariffs for using cross-border electricity networks, as both are essential to promote market competition and integration. Indeed, along with natural gas, electronic communications, rail transport, and water, electricity is considered a “network industry”, characterized by naturally monopolistic infrastructures which are economically inefficient to duplicate. Under these conditions, the possibility for new players to compete on the market depends on non-discriminatory access and pricing for using networks, which are typically controlled by historically publicly owned incumbents. But since electricity regulation extends beyond “market rules” such as network access and pricing, the third issue examined concerns “operational rules”, namely regional security coordination of electricity flows on high-voltage networks. While such coordination has a long history (e.g. to avoid blackouts), its importance has grown in recent years as European electricity markets have become more interdependent, and shares of renewables have risen. Fourth, we examined the regulation of market manipulation based on insider trading, a task at the crossroads between energy and financial regulation that was entrusted in 2011 to the newly formed EU Agency for the Cooperation of Energy Regulators (ACER) and its constituent national authorities. ACER’s foundational task, fifth, is to produce and revise, together with the European Commission and the European Network of Transmission System Operators (ENTSO), guidelines and network codes for a series of substantive areas, which together constitute the EU “rulebook” for governing cross-border electricity trade.⁴

Table 1 summarizes our findings about UR, DI, and XG in EU electricity regulation across these five issues on three dimensions, two concerning the nature of rules and the third the nature of processes: the uniformity or differentiation of the rules, their detailed or framework character, and the processes through which they have been developed and revised (experimentalist or otherwise). The results are strikingly consistent. Across all five policy issues, there is virtually no evidence of DI, while on the contrary, the rules generally apply uniformly to all member

⁴ In addition, we also examined EU regulation of renewables, a complex and rapidly changing policy issue, which we do not discuss in this paper for reasons for space. For details, see Rangoni (2020: 34-37).

states (with a partial, temporary exception in network tariffication). On all issues (with the partial exception of regional security coordination), furthermore, these uniform rules are rather detailed, and have become progressively more so. The “depth of integration” has thus increased. But at the same time, the rules always leave some discretionary room for local adaptation, whether explicitly or implicitly, which helps their legitimacy among national actors. Finally, in each of these sub-cases, the uniform and increasingly detailed rules have not been developed and imposed by EU institutions, i.e., through the hierarchical processes normally associated with such rules. Surprisingly, these rules have instead been defined and revised by polyarchic networks of EU and national stakeholders through experimentalist comparisons of different local implementation experiences, which has aided both legitimacy - thanks to often voluntary and always reversible choices – and efficiency - facilitating agreement as well as improvement of rules based on implementation reviews.

Table 1: Rules and processes in EU electricity regulation: comparative findings

Policy issue	Uniform or differentiated rules?	Detailed or framework rules?	Rule-making processes?
Network access	Uniform; no DI	Increasingly detailed	Much XG
Network tariffication	Generally uniform; almost no DI	Increasingly detailed	Much XG
Regional security coordination	Uniform; no DI	Moderately detailed	Moderate XG
Market integrity & transparency	Uniform; no DI	Increasingly detailed	Much XG
Network guidelines & codes	Uniform; no DI	Increasingly detailed	Much XG

Source: own elaboration based on Rangoni (2020).

A first key research finding is thus that across all the policy issues analyzed, rules have generally been uniform rather than differentiated. For any given issue, EU rules apply homogeneously to all member states, instead of dividing them into groups of “Ins” and “Outs”, as in DI. No matter whether one looks at network access, network pricing, regional security coordination, market integrity and transparency, or network guidelines and codes, their EU regulation applies in the same manner to all countries. Moreover, such formal uniformity has remained constant over time. To illustrate with two examples, EU rules on network access and tariffication initially established that rights to transport electricity over cross-border networks should be allocated and priced to market players in a non-

discriminatory manner [1]. Thereafter, EU rules mandated on the one hand market-based auctions, and on the other the abolition of transit fees and the compensation of Transmission System Operators (TSOs) for the costs incurred to host cross-border energy flows on their networks [2]. More recently, EU rules on network access have imposed “implicit auctions” based on “price coupling”, and EU institutions have recommended that inter-TSO compensation should focus on existing infrastructures and that network charges levied on generators should be set to zero [3]. What is striking therefore is that, aside from a temporary exception concerning only one aspect of network tariffication [4], at each moment in time, in both sub-cases the same set of EU rules applied across all member states (Rangoni 2020: 14-15, 16-19; Directive 96/92/EC: ch. VII; Regulation (EC) No 1228/2003: arts. 3-4, 6, Annex; Commission Regulation (EU) No 838/2010: Annex Part B; Commission Regulation (EU) 2015/1222: recs. 13, 18; ACER 2013, 2014: 1-2). The other sub-cases, too, exhibit such striving for uniformity [5].

A second key finding is that across most of the issues analyzed, these uniform rules have been quite detailed and indeed progressively so. To continue with the previous examples, as anticipated, EU regulation of network access at first only mandated the very generic solution that this should be non-discriminatory (Directive 96/92/EC: ch. VII). Shortly thereafter, it was clarified that such non-discriminatory network access should be granted based on auctions (Regulation (EC) No 1228/2003: art. 6, Annex). Years later, this uniform solution became even more specific, mandating that such auctions should be of a certain type, namely “implicit”, and should be implemented through a specific arrangement, known as “price coupling” (Commission Regulation (EU) 2015/1222: recs. 13, 18). Similarly, EU regulation of network tariffication initially only established the general requirement that this be non-discriminatory (Directive 96/92/EC: ch. VII). Shortly after, it was specified that transit fees ought to be eliminated, TSOs compensated for the costs resulting from hosting of electricity, and network charges levied on generators comprised within a given range (Regulation (EC) No 1228/2003: arts. 3-4; Commission Regulation (EU) No 838/2010: Annex Part B). More recently, recommendations have further specified that the inter-TSO compensation should be limited to existing infrastructures, and that network charges levied on generators be set directly to zero (ACER 2013, 2014). But the progressive specification of harmonized rules is perhaps at its clearest when one looks at network guidelines and codes governing all cross-border electricity exchanges: not only are these hundreds-of-pages-long rules impressive, when compared to the ten-page long initial EU rules (e.g. Directive 96/92/EC with Commission Regulation (EU) 2015/1222); they have led to the establishment of ever more detailed rules and procedures called “terms and conditions or methodologies”, which constitute the latest generation of EU energy rules and bring their detail to unprecedented levels. In short, while rules have always been uniform (the first key finding), the level of detail or scope of harmonization have been growing over time [6]. In the language of the Special Issue Introduction, the depth of integration has clearly increased.

At the same time, however, our research reveals that no matter how detailed and uniform EU rules may be, they always leave some discretionary space for local contextualization, either explicitly or implicitly (or both). This is not only the case for the “moderately detailed” rules on regional security coordination, which leave TSOs discretion over

whether or not to follow the remedial action recommended by the relevant RCC, when a potential operational security is diagnosed (Rangoni 2020: 20-21; see also Regulation 2019/943: art. 35.5). Equally, whereas the very first set of EU rules mandated that network access should be non-discriminatory, they left open the question of how this should be achieved (Directive 96/92/EC). The next set of EU rules mandated the use of market-based auctions, but explicitly allowed the use of two types of auctions, “explicit” and “implicit” (Regulation (EC) No 1228/2003: Annex). Most recently, EU rules clarified that implicit auctions should be used, based on “price coupling”, but they have also tasked actors to define the terms and conditions or methodologies under which such arrangements should be implemented (Commission Regulation (EU) 2015/1222: rec. 30, art. 9). Similarly in the case of network tariffication, initial EU rules established the principle of non-discrimination, but left member states free to choose between a “regulated” and a “negotiated” approach domestically (Directive 96/92/EC: ch. VII). The next generation of rules set up a common tariffication approach, which included an Inter-TSO Compensation (ITC) mechanism and largely harmonized charges for generators, which however explicitly allowed discretion within a certain range (Commission Regulation (EU) No 838/2010: Annex Part B). Despite the most recent EU recommendations on setting these charges to zero (ACER 2014), national regulators still retain considerable say, for instance on cross-border cost-allocation agreements for new investments, *ex-post* compensation for the losses induced by unscheduled “loop flows” of electricity, “connection charges” levied on generators, as well as distribution tariffs that play an increasingly important role in decarbonization by incentivizing households to alter their consumption behaviour (Rangoni 2020: 16-19) [7]. This role of national regulators in rule formulation and revision helps to maintain the match between member states’ preferences and EU policies, as well as the acceptance of the latter by the former.

A third key finding is that the uniform and increasingly detailed rules found in these policy issue-areas were not developed and imposed unilaterally by central actors such as the European Commission, as typical of UR, but were instead agreed and revised by a polyarchic combination of actors in a multi-stakeholder regulatory forum, based on deliberative comparison of different local implementation experiences. Continuing with the network access example (Rangoni 2020: 17-19), it was by discussing twice a year in the “Florence Forum” that the European Commission, European networks of national regulators and TSOs, and European associations of generators, power exchanges and consumers agreed in the late 1990s that the market-based auctions pioneered at the Spanish-French border were preferable to the then most-used “pro-rata” and “first-come, first-served” methods (Florence Forum 2000) [8]. Using the same architecture during the 2000s, these actors then monitored the implicit auctions successfully experimented especially by the “Trilateral Market Coupling (TMC)” project connecting France, Belgium, and the Netherlands, eventually judging them more effective than the more-widely used explicit auctions [9]. Thereafter, these actors developed consensus on the price-coupling arrangements tested by the TMC project, as opposed to alternative volume-coupling arrangements which had delivered disappointing results at the German-Danish border (Florence Forum 2009) [10]. Thus in network access, as in tariffication [11], social acceptance was supported by the fact that, before being codified, reforms were voluntarily agreed within the Forum by the relevant actors. Similarly in the market integrity field, the uniform rules laid down in the founding regulation have been

elaborated through non-binding guidance documents, which are frequently revised by ACER in response to feedback on implementation from national regulators and other stakeholders (Rangoni 2020: 25-30; Regulation 1227/2011; ACER 2021) [12]. Since 2011, the broader set of harmonized rules governing every aspect of cross-border electricity exchanges has been developed through inclusive experimentalist processes orchestrated by the ACER, ENTSO, and the Commission, but drawing on the expertise of national regulators, TSOs, and stakeholders (Regulation (EC) No 714/2009: art. 6). Today, these codes are overseen by a joint ACER-ENTSO-Commission implementation and monitoring group, which in consultation with multi-stakeholder committees has issued guidance and may propose amendments based on problems encountered and lessons learned through application (Rangoni 2020: 30-33; European Commission *et al.* 2017) [13]. Regional security cooperation likewise involved experimentalist processes, though these could be developed further [14].

Taken together, the findings of our research on the evolution of EU electricity regulation across these five key policy issues display a striking pattern, with major implications for both efficiency and legitimacy, as defined in the Special Issue Introduction. There is a clear trend towards the development of increasingly uniform, detailed rules, which apply to all member states, without formal DI, even if the rules themselves still leave some space for local discretion, whether explicitly, implicitly or both. Surprisingly, however, these rules have been developed through deliberative comparison of different local approaches by polyarchic networks of European and national stakeholders, rather than being centrally designed and imposed on member states by the EU institutions. The rules themselves, moreover, are explicitly conceived by the actors concerned as provisional, to be regularly revised based on lessons learned from comparative review of implementation experience in local contexts. Thus, the findings from electricity show the efficiency strengths of XG, demonstrating how it has regularly facilitated agreement in the EU, progressively deepened integration, and improved EU rules based on review of their own implementation. Equally, the findings reveal the legitimacy merits of XG, given that reforms often stemmed from voluntary choices among EU and national actors in architectures such as the Florence Forum, and are open to reversal by design. We will return in the conclusion to this distinctive pairing of synchronic uniformity with diachronic experimentalism, which arguably reflects the combination in this sector of high interdependence with high uncertainty, as well as to its implications for XG's efficiency and legitimacy.

4. Banking: Experimentalist Governance within Differentiated Integration

Like electricity, banking regulation is subject to a high level of interdependence, especially within the eurozone, but also within the EU internal market. The global financial and European sovereign debt crises graphically exposed the dangers of regulatory arbitrage and cross-border contagion in open, interconnected banking markets with incompletely harmonized rules and weak arrangements for supervisory cooperation and crisis management across EU member states (Ferran 2012). At the same time, however, banking regulation is also a highly politically sensitive field, closely linked to monetary policy, public finance, economic development, and other core state powers over

which national governments have been historically reluctant to relax sovereign control (Howarth & Quaglia 2015). Despite the reduction of legal barriers to free movement of capital, moreover, national banking markets within the EU remain significantly diverse, in terms of ownership mix, business models, concentration rates, and consumer behaviour, reinforced by regulatory variations in adjacent areas such as accounting, insolvency, housing, and corporate governance (Miklaszewska 2017). Finally, banking regulation is widely agreed to operate under conditions of high uncertainty, in the face of volatile and rapidly changing financial markets, technologies, and business strategies (Black 2012). In terms of scope conditions, therefore, the characteristics of this sector might be considered ex ante both favourable and unfavourable in different respects to all three forms of regulatory governance analyzed in this paper: UR, DI, and XG.

In practice, the EU has opted since 2012 for a distinctive form of DI in this sector: a Banking Union for the eurozone, comprising a Single Supervisory Mechanism (SSM) attached to the European Central Bank (ECB) and a freestanding Single Resolution Mechanism (SRM), nested within the Single Market and Union-wide financial regulation.⁵ The SSM, on which we concentrate in this paper as the most institutionally developed component of the Banking Union, was explicitly designed to break up the “cozy relationships” between banks and national supervisors, which were deemed to have contributed through lax oversight to the global financial crisis, as well as to cut the “doom loop” between banks and sovereigns, which had become a key source of contagion during the euro crisis (Moloney 2014; Veron 2015; Howarth & Quaglia 2015). Participation is obligatory for countries within the Euro Area, but other EU member states may also apply to join the SSM (and the SRM) under a system of “close cooperation” with the ECB. So far, only Croatia and Bulgaria have joined the SSM on this basis, as part of their preparations to adopt the euro, though Romania has announced its aspirations to follow suit in the mid-2020s. Denmark and Sweden are both considering entering the Banking Union as non-euro member states, but neither has yet come to a decision, for reasons that appear to have more to do with domestic political sensitivities than substantive concerns about the governance and functioning of the SSM itself. The other non-euro member states (Poland, Hungary, and Czechia) show no current interest in joining, because of political preferences for “banking nationalism” combined with broader “constitutional” concerns about sovereignty and integration of core state powers (Schimmelfennig & Winzen 2020: 130-131; Mack 2020; Danish Ministry of Industry, Business, and Finance 2019; Government of Sweden 2019; M  r   & Piroška 2016).

The SSM (and the Banking Union project more generally) are thus closely linked to euro membership, and display an element of path dependency, in which DI in one area may lead to further DI in an adjacent functionally interdependent policy field (Special Issue Introduction; Schimmelfennig & Winzen 2020: 122-24). Not only was the Banking Union originally proposed during the euro crisis as a condition for allowing the newly created European Stability Mechanism (ESM) to provide funds for bank recapitalization, but the exemption of non-euro member states

⁵ The original Banking Union project included a European Deposit Insurance System as a third pillar, but no agreement on its establishment has yet been reached.

from mandatory participation was undoubtedly crucial to allowing the project to go ahead in the face of opposition from countries like the UK with stronger preferences for retaining national control (Schimmelfennig & Winzen 2020: 130-135).

Like other national supervisors outside the Banking Union, the SSM is expected to apply EU financial regulation, which applies equally to all member states. Oversight of the EU's "single rulebook" in this field remains the purview of the European Banking Authority (EBA), created after the financial crisis to promote stronger convergence of national supervisory practices and improve coordination among National Competent Authorities (NCAs). The EBA is empowered to propose binding technical standards for the elaboration of EU banking regulation, which the Commission must endorse or present compelling reasons not to do so. It is likewise empowered to develop a body of non-binding guidelines on the implementation of EU banking regulation, with which supervisory authorities (including the SSM itself) are required to "make every effort" to comply, subject to peer review of national practice. As a condition for the acceptance of Banking Union, the EBA Board of Supervisors, which includes representatives of all NCAs, has adopted a double majority voting arrangement to safeguard the interests of non-euro member states, with the ECB as a non-voting participant (Ferran 2012, 2016).

The creation of the SSM reflects variations in member state preferences towards stronger and more integrated European banking supervision, rooted in the higher level of interdependence within the eurozone and in the differential intensity of concerns for preserving national sovereignty in this field. At the same time, however, joining the SSM is a binary choice, which does nothing to address the very significant challenges of integrating diversity in banking markets and business models among the participating member states. In this respect, the efficiency of DI in matching member state preferences with integration choices is intrinsically limited. Our research investigated how the SSM has sought to reconcile the pursuit of stronger and more uniform supervision of eurozone banks on the one hand with accommodation of banking diversity within volatile and rapidly changing financial markets on the other. In so doing, we analyzed the evolution and functioning of the SSM's institutional structures, decision-making processes, and organizational practices, from its inception in 2014 to the present. In the remainder of this section, we summarize our findings in relation to three overlapping perspectives on the SSM: first, as a centralized hierarchy, seeking to impose and enforce uniform rules, standards, and procedures across the Banking Union; second, as a polyarchic network, seeking to orchestrate intensive cooperation between the ECB and NCAs; and finally as an experimentalist organization, seeking to accommodate and learn from diversity by adapting common rules and procedures to the specificities of individual banks, and revising them regularly through peer review of implementation experience at multiple levels.

The SSM was explicitly designed as a more centralized and hierarchical institution than the EBA. The ECB has final authority to grant and withdraw banking licenses within the SSM, and is directly responsible for supervising the largest and most systematically important eurozone banks. It can also take over supervision of less significant institutions (LSIs) from NCAs where it deems this necessary to "ensure consistent application of high supervisory

standards". The SSM is committed to "intrusive, hands-on" supervision of significant credit institutions (SIs), through Joint Supervisory Teams (JSTs) of ECB and national officials, supported by on-site inspection missions and central benchmarking. Through its annual Supervisory Review and Evaluation Process (SREP) decisions, the SSM can require SIs to hold additional capital to cover specific risks, as well as to revise their governance arrangements, planning processes, controls, and other internal systems. The SSM has created a large body of detailed and prescriptive internal manuals, operational guides, and guidance documents to promote harmonization and convergence of supervisory approaches across participating units. It has likewise sought to develop "joint supervisory standards" to steer and harmonize national supervision of LSIs. The ECB has consistently sought to enhance the uniformity of the Single Rulebook for EU banking regulation and harmonize its implementation at national level, notably by restricting the use of options and discretions provided to NCAs under EU legislation. Such harmonization and supervisory convergence is considered crucial to advance the SSM's mission and strategic aims of "contributing to the safety and soundness of credit institutions and the stability of the financial system" while "promoting European financial integration", by reducing opportunities for regulatory arbitrage, removing national barriers to cross-border operations, and ensuring a level playing field for all eurozone banks (Zeitlin 2021: 11-14; ECB Banking Supervision 2018: 4-6, chs. 3-5, 2015: 5, 2016).

Alongside these centralized hierarchical features, however, the SSM also displays significant characteristics that support an alternative view of eurozone banking supervision as a polyarchic network. Thus, all major decisions of the SSM must be approved by its Supervisory Board, where NCA representatives account for 21 of 27 votes. Hence all important SSM initiatives and policies are developed through joint working groups, task forces, and drafting teams convened by ECB divisional networks, but often led by NCA officials, thus facilitating agreement and social acceptance of decisions within the Supervisory Board [15]. The ECB has never exercised its powers to take over supervision of LSIs from national authorities, and prefers co-development of joint supervisory standards to the imposition of binding instruments, which are slow and difficult to change [16]. The ECB does not directly employ or control the large numbers of NCA staff involved in off- and on-site supervision through the JSTs and inspection missions [17]. NCAs themselves retain an independent voice on EU banking regulation through their dominant position in the EBA, which they value as a means of ensuring that distinctive national preferences and concerns are taken into account in framing the rules the SSM is expected to apply [18]. The institutional design of the SSM can thus be said to encourage a cooperative rather than a hierarchical approach by the ECB to joint supervision with the NCAs, thereby enhancing its legitimacy and social acceptance (Zeitlin 2021: 14-19; Petit 2019; Gren 2018).

Like EU electricity regulation, the SSM clearly diverges in significant respects from the classic experimentalist architecture identified in previous studies of EU governance (represented graphically in Figure 1). Rather than setting open-ended framework goals and giving national or sub-national actors substantial autonomy to pursue them in ways adapted to their own local circumstances, the SSM has developed increasingly detailed and prescriptive rules and methods, which banking supervisors are expected to apply as consistently as possible across credit

institutions and jurisdictions. But within these limits, experimentalist practices of learning from diversity, peer review, and continuous revision based on local implementation experience are central to its operations. Adoption of these experimentalist practices flows directly from the SSM's deliberate efforts to adapt its rules, methods, and procedures to banks' diverse business models on the one hand, and constantly to update them in response to uncertain and rapidly changing markets and technologies on the other.

Thus, despite the SSM's emphasis on regulatory harmonization and supervisory convergence, it does not seek to homogenize banks' business models or impose a one-size-fits-all approach to their supervision. Instead, it seeks to accommodate banking diversity across the eurozone by tailoring common rules and methods to firms' specificities, "balancing uniform supervisory anchor points with constrained supervisory judgment", while combining the "deep specific knowledge of national supervisors with the broad-ranging experience of the ECB" (ECB Banking Supervision 2015: 5) [19]. To advance these objectives, the design of the SSM's supervisory model was itself the outcome of joint deliberation and comparison of national practices by mixed ECB-NCA teams [20]. The development of the JSTs and on-site inspection missions has similarly involved an intensive process of cross-fertilization and "learning from difference" among supervisors from different national systems [21]. To foster this multi-perspectival approach to bank supervision, the SSM systematically combines multiple forms of comparison both nationally and cross-nationally through ongoing peer review and benchmarking within and between JSTs, onsite inspectors, and ECB divisional networks [22]. NCAs of banks with subsidiaries or headquarters in other member states appreciate the deeper insight into each other's national markets and supervisory approaches provided by the JSTs [23]. Systematic peer review and benchmarking play crucial roles in resolving disagreements between ECB and national officials about the SREP decisions on individual banks, and in ensuring consistent outcomes across the SSM, thereby increasing both effective implementation and social acceptance of EU banking regulation [24] (Zeitlin 2021: 20-24).

From the outset, the SSM has sought to engage in "forward-looking" supervision, aimed at identifying emerging prudential risks and threats to financial stability, rather than "looking backward towards audited accounts". Its manuals and guides are therefore regarded as "living documents, subject to continuous review and improvements" in light of implementation experience and new developments (ECB Banking Supervision 2015: 5, 56; 2018: 4, 6) [25]. Peer review and benchmarking at multiple levels serve as powerful mechanisms for clarifying reasons for disagreement, exposing blind spots, and identifying opportunities for improvement, which should be addressed in subsequent iterations. In this process, frontline supervisors can and regularly do propose revisions to rules, procedures, and methodologies based on problems and possibilities revealed by local application, which are then taken up through joint ECB-NCA networks [26] (Zeitlin 2021: 24-28). The EBA, whose own peer review and supervisory convergence activities are likewise conducted on experimentalist lines, provides a complementary framework for learning from difference among NCAs across the Banking Union divide in drafting, overseeing, and revising the EU's Single Rulebook [27] (Zeitlin 2021: 28; Bozina Beřos 2021; Ferran 2016). Here again, the iterated, deliberative character of experimentalist rule making and revision, in which national officials and frontline

supervisors participate directly, enhances both the efficiency and legitimacy of EU banking regulation.

The SSM, as we have seen, represents a distinctive form of DI, in which integrated supervision of banks within participating member states is nested within Union-wide financial regulation. This dual arrangement in turn reflects asymmetries in national preferences and interdependence in this field, path-dependently linked to euro membership, together with concerns to safeguard the integrity of the Single Market and limit negative externalities for non-participating member states. Within its sphere of authority, however, the SSM is firmly committed to the development of uniform rules, methodologies, and procedures, which supervisors are expected to apply as consistently as possible across banks and jurisdictions. Such uniformity and consistency, its leaders firmly believe, are crucial to advance the SSM's overarching goals of financial stability and market integration, by reducing opportunities for regulatory arbitrage, removing barriers to cross-border operations, and ensuring equal treatment for credit institutions across the Banking Union.

Yet as our research has shown, the SSM does not seek to impose a "one-size-fits-all" approach on eurozone banks, but instead to calibrate its supervision ever more finely to the latter's diverse business models and risk profiles, by combining local knowledge with broader comparative perspectives through the JSTs and the ECB's horizontal benchmarking services. Despite the far-reaching powers over eurozone banks and NCAs granted to the ECB, the SSM's common policies, rules, methodologies, and procedures have been collaboratively developed by a dense network of joint working groups, task forces, and drafting teams of European and national officials. Such collaboration is rooted in the SSM's polyarchic governance structure, in which all major policies and decisions must effectively be agreed by the NCAs, while supervision of individual banks depends in large measure on tasks carried out by national officials over whom the ECB lacks direct hierarchical control. But the ECB and NCAs created these elaborate joint structures for feeding local knowledge into the design and application of common methods and procedures not merely because they felt obliged to do so for legitimacy reasons, but also because they considered them functionally efficient for tackling the diversity of business models and conditions across the Banking Union, while adapting to rapid changes in financial markets, technologies, and lending practices. The SSM has accordingly instituted a remarkable array of experimentalist processes for recursive revision of its rules, methodologies, and procedures through continuous peer review and benchmarking of their application at multiple levels. While at any given moment, the SSM seeks to apply uniform policies, processes, and practices across eurozone banks, as in conventional UR, the latter are thus regularly updated and revised on the basis of learning from comparative review of implementation experience in different local contexts, as in the classic XG architecture.

5. Conclusions

EU electricity and banking regulation clearly diverge on one key point. In electricity, EU-wide policies and rules for cross-border exchange and management of interconnected power grids apply equally to all member states, with no

possibility for opt-outs. In banking, by contrast, supervision of eurozone credit institutions has been integrated into a single authority under the aegis of the ECB, with far-reaching powers over bank licensing, capital holdings, governance, and internal processes, but nested within EU-wide financial regulation. Participation in the SSM is mandatory only for the Euro Area, though other EU member states may also apply to opt in under a system of “close cooperation” with the ECB. This distinctive form of DI reflects asymmetries in national preferences and interdependence, path-dependently connected to the binary choice for euro membership, coupled with concerns to safeguard the integrity of the Single Market and limit externalities for non-participating member states. Although energy policies are likewise historically linked to core state powers and remain highly sensitive politically, it has nonetheless proved possible to extend European integration of electricity regulation step-by-step, without dividing member states into separate groups of “Ins” and “Outs”.

Beyond this crucial difference, however, the evolution of EU regulatory governance displays a similar trajectory across these two major sectors. In both electricity and banking, the integrated rules themselves and the methodologies for their application have become progressively more uniform and detailed. At the same time, however, these increasingly uniform and detailed rules and methodologies always leave room for local adaptation and contextualization, whether through a margin of discretion (explicit or implicit) for national authorities, as in electricity, or through customization to firm specificities and direct participation in their application by national supervisors, who can flag misfits and propose changes in response to local conditions, as in banking. In both sectors, moreover, the common policies, rules, and methods are not centrally designed and hierarchically imposed by the EU institutions, as in conventional UR, but are instead developed collaboratively by polyarchic networks of European and national officials, with varying degrees of participation from other stakeholders.⁶ In both sectors, finally, these increasingly uniform policies, rules, and methods have been developed through experimentalist comparisons of different national and regional approaches, and are regularly updated and revised through joint review of their implementation in different local contexts.

The cases of EU electricity and banking regulation thus show that the conjunction of high interdependence with high uncertainty may indeed result in the emergence of simplified XG architectures, combining synchronic uniformity with diachronic revisability. In such simplified XG architectures, framework rules and procedures may be progressively specified and discretion for lower-level actors at any given moment narrowed, but the rules and procedures themselves remain contestable in light of local application, while revisions over time based on learning from comparative review of implementation experience provide a crucial source of improvement and adaptability for the governance system as a whole. Such architectures have previously been identified in sectors like chemicals, where there is at any given time a single harmonized list of authorized substances whose commercialization member

⁶ Such participation is broader in electricity than in banking, where financial institutions and other interested parties are regularly consulted by the SSM and the EBA, but play no direct role in the rule-making process itself, unlike that of TSOs in the drafting of network codes.

states are obliged to accept, but which is open to challenge and regularly revised through review processes involving not only national and European regulators, but also a wide range of stakeholders within and beyond the EU (Biedenkopf 2015). Simplified XG architectures of this type may also become increasingly prevalent in other sectors of EU regulation subject to rapid and unpredictable changes in markets and technology, where concerns to promote a level playing field and prevent regulatory arbitrage are similarly strong, such as competition or telecommunications (Svetiev 2020; Mathieu & Rangoni 2019).

The cases of electricity and banking regulation support the view that while conditions of high interdependence coupled with high uncertainty require efficient rules and practices to be both uniform and revisable, these can be accepted as legitimate by diverse EU member states, provided they are applied in contextually sensitive ways and regularly revised on the basis of local implementation experience, through deliberative review processes in which national officials themselves participate. In this sense, these two cases further suggest that *far from uniformity and experimentalism being antithetical to one another, diachronic experimentalism may be a necessary condition for synchronic uniformity of regulation within a heterogeneous polity like the EU.*

What finally of the relationship between XG and DI? The SSM is obviously an instance of DI, whose creation would not have been possible without an opt-out for non-euro member states, especially the UK. But if DI allowed the Banking Union to move forward initially, it does nothing to address the very substantial efficiency and legitimacy challenges of integrating diversity among participating member states, for which the SSM's experimentalist organization and practices are instead essential. The EBA, whose own peer review and supervisory convergence activities are conducted on experimentalist lines, likewise provides a parallel framework for learning from difference among NCAs across the Banking Union divide. The case of EU banking regulation thus suggests that *XG and DI may be complementary, but asymmetrically so, in that the latter depends on the former to accommodate diversity within and across separate groups of member states, but not vice versa.*

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Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency.

Regulation (EU) 2019/943 of the European Parliament and of the Council on the internal market for electricity.

Appendix: Supplementary Materials

A. Complete List of Expert Interviews

1. Electricity

Interview key

BUS = Businesses (companies and trade associations)

REG = Regulators (national authorities and their European networks)

EUI = EU Institutions (European Commission and regulatory agency)

Acronyms

ACER Agency for the Cooperation of Energy Regulators

CEER Council of European Energy Regulators

EFET European Federation of Energy Traders

ENTSO-E European Network of Transmission System Operators for Electricity

Eurelec Union of the European Electricity Industry

Number	Name	Institution(s)/Organization(s)	Date & place of interview	Interview Code
1	Dr. Guido Cervigni	Head of Market Development at Italian power exchange	Email exchanges 7/4/2015	BUS1
2	Dr. Juan José Alba Rios	Vice-President for regulatory affairs at Endesa and Chairman Markets Committee of Eurelectric	Brussels 17/5/2016	BUS2a
3			Florence 1/7/2019	BUS2b
4			Email exchanges 1- 5/8/2019	BUS2c
5	Marco Foresti	Market Advisor at ENTSO-E	Brussels 18/5/2016	BUS3
6	Dr. Matti Supponen	Policy Coordinator for Wholesale Markets at Directorate General for Energy of the European Commission	Brussels 19/5/2016	EUI1a
7			Phone 2/7/2019	EUI1b
8			Phone 2/8/2019	EUI1c
9	Edith Hofer	Assistant to the Director General for Energy of the European Commission	Brussels 19/5/2016	EUI2
10	Stephen Rose	Head of Gas Market Design at RWE and	London	BUS4

		Chairman Gas to Power Working Group at Eurelectric	25/5/2016	
11	Prof. Pippo Ranci Ortigosa	President of Italian regulatory authority and Vice President of CEER	Email exchanges 26/5/2016	REG1a
12			Email exchanges 20/6/2019	REG1b
13	Alberto Pototschnig	Director of ACER	Ljubljana 9/6/2016	EUI3a
14			Florence 1/7/2019	EUI3b
15			Phone 29/4/2020	EUI3c
16	Dr. Martin Povh	Officer for framework guidelines at ACER	Ljubljana 9/6/2016	EUI4
17	Dr. Annegret Groebel	Director of International Relations at German regulatory authority and Vice-President of CEER	Phone 10/6/2016	REG2a
18			Phone 15/7/2019	REG2b
19			Email exchanges 24- 25/7/2019	REG2c
20	Fernando Lasheras Garcia	Director of Brussels representative office of Iberdrola	London 23/6/2016	BUS5
21	Mark Copley	Associate Partner for wholesale markets at British regulatory authority and Vice-Chair Electricity Working Group of ACER	London 24/6/2016	REG3
22	Peter Styles	Chairman Electricity Committee of EFET	London 28/7/2016	BUS6a
23			Phone 9/7/2019	BUS6b
24	Jérôme Le Page	Director for European electricity markets at EFET	Phone 24/09/2019	BUS7
25	Anonymous Interviewee	Head of European company	Amsterdam 7/10/2019	BUS8
26	Maria Popova	Manager for market supervision and renewable electricity at EFET	Phone 17/10/2019	BUS9
27	Anonymous Interviewee	Senior Expert in policy making and regulation at national company	Skype 15/4/2020	BUS10
28	Anonymous Interviewee	Senior Officer at Directorate General for Energy of the European Commission	Phone 8/5/2020	EUI5
29	Volker Zuleger	Head of Market Integrity and Transparency at ACER	Phone 8/5/2020	REG4a
30			Email	REG4b

			exchange 25/5/2020	
31	Anonymous Interviewee	Senior Representative of EU-level trade association	Zoom 12/5/2020	BUS11a
32			Email exchange 26- 28/5/2020	BUS11b
33	Eleonora Nagali	Policy Officer at Market Integrity and Transparency department of ACER	Email exchange 26- 28/5/2020	REG5

Banking

Interview Key:

ACPR L'Autorité de contrôle prudentiel et de resolution (France)

BaFin Bundesanstalt für Finanzdienstleistungsaufsich (Germany)

COM European Commission

DNB Dutch National Bank

EBA European Banking Authority

ECB European Central Bank

NCA National Competent Authority

Number	Institution	Function	Date & place of interview	Interview Code
1	DNB	On-site Supervision & Banking Expertise Division	Amsterdam 8.3.2019	NCA 1
2	DNB	Banking Policy Department	Amsterdam 20.3.2019	NCA 2
3	DNB	On-site Supervision & Banking Expertise Division	Amsterdam 7.5.2019	NCA 3
4	DNB	European Affairs Banks Department, Supervisory Policy Division	Amsterdam 2.10.2019	NCA 4.1
5	DNB	SSM Coordination Unit	Amsterdam 2.10.2019	NCA 4.2
6	Bank of Slovenia	Banking Supervision Department	Ljubliana 10.1.2020	NCA 5.1
7	Bank of Slovenia	On-site Supervisor	Ljubliana 10.1.2020	NCA 5.2
8	Bank of Slovenia	On-site Supervisor	Ljubliana 10.1.2020	NCA 5.3
9	Bank of Slovenia	On-site Supervisor	Ljubliana 10.1.2020	NCA 5.4
10	BaFin	Directorate Supervision of SIs	Bonn 4.3.2020	NCA 6
11	BaFin	Directorate Coordination & Supervision of Foreign Banks, SSM Supervisory	Bonn 4.3.2020	NCA 7

		Board Coordination Division		
12	BaFin	Directorate Supervision of Bausparkassen, Private Banks & Leasing	Bonn 4.3.2020	NCA 8
13	ECB Banking Supervision	Centralized On-site Inspections Division, DG MS IV	Frankfurt 29.1.2020	ECB 1
14	ECB Banking Supervision	Supervisory Quality Assurance Division, SSM Secretariat	Frankfurt 29.1.2020	ECB 2.1
15	ECB Banking Supervision	Supervisory Quality Assurance Division, SSM Secretariat	Frankfurt 29.1.2020	ECB 2.2
16	ECB Banking Supervision	Supervisory Quality Assurance Division, SSM Secretariat	Frankfurt 29.1.2020	ECB 2.3
17	ECB Banking Supervision	Significant Bank Supervision Division II, DG MS I	Amsterdam 29.1.2020	ECB 3
18	Banca d'Italia	SSM Coordination Division	Online 18.6.2020	NCA 9.1
19	Banca d'Italia	Banking Supervision Expert	Online 18.6.2020	NCA 9.2
20	Banca d'Italia	SSM Coordination Division	Online 18.6.2020	NCA 9.3
21	Banca d'Italia	SSM Coordination Division, LSIs	Online 18.6.2020	NCA 9.4
22	Small New Member State NCA	Prudential Regulation Department	Online 6.8.2020	NCA 10
23	ECB Banking Supervision	Decision-Making Division, SSM Secretariat	Online 10.7.2020	ECB 4.1
24	ECB Banking Supervision	Decision-Making Division, SSM Secretariat	Online 10.7.2020	ECB 4.2
25	ECB Banking Supervision	Decision-Making Division, SSM Secretariat	Online 6.8.2020	ECB 5
26	ECB Banking Supervision	DG SSM Governance & Operations	Online 20.10.2020	ECB 6
27	EBA	Policy Expert	Online 21.10.2020	EBA 1.1
28	EBA	Policy Expert	Online 21.10.2020	EBA 1.2
29	ACPR	SSM Coordination Unit	Online 24.11.2020	NCA 11.1
30	ACPR	Policy Unit	Online 24.11.2020	NCA 11.2
31	ACPR	Quality & Methodology Unit	Online 24.11.2020	NCA 11.3
32	ACPR	1 st Banking Supervision Directorate	Online 24.11.2020	NCA 11.4
33	ECB Banking Supervision	DG SSM Governance & Operations	Online 27.11.2020	ECB 7

34	European Commission	Banking Regulation & Supervision Unit, DG FISMA	Online 5.1.2021	COM 1
35	ECB Banking Supervision	DG Universal & Diversified Institutions	Online 11.1.2021	ECB 8
36	ECB Banking Supervision	Supervisory Risk -- Non-Financial Risks, Supervisory Strategy & Risk Division, DG SSM Governance & Operation	Online 20.1.2021	ECB 9.1
37	ECB Banking Supervision	Supervisory Risk -- Non-Financial Risks, Supervisory Strategy & Risk Division, DG SSM Governance & Operation	Online 20.1.2021	ECB 9.2
38	ECB Banking Supervision	DG Specialized Institutions & LSIs	Online 28.1.2021	ECB 10.1
39	ECB Banking Supervision	DG Specialized Institutions & LSIs	Online 28.1.2021	ECB 10.2
40	ECB Banking Supervision	Supervisory Policy Division, DG Horizontal Line Supervision	Online 24.2.2021	ECB 11.1
41	ECB Banking Supervision	Supervisory Policy Division, DG Horizontal Line Supervision	Online 24.2.2021	ECB 11.2
42	ECB Banking Supervision	Supervisory Methodologies Division DG Horizontal Line Supervision	Online 16.3.2021	ECB 12.1
43	ECB Banking Supervision	Supervisory Methodologies Division DG Horizontal Line Supervision	Online 16.3.2021	ECB 12.2
44	ECB Banking Supervision	SSM Supervisory Board	Online 21.7.2021	ECB 13

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2. Supporting Evidence from Interviews and Primary Documents

1. Electricity

[1] Thus the first Directive on the internal electricity market established “common rules”, which *inter alia* mandated that the organization of access to the system - including tariffication - be in “accordance with objective, transparent and non-discriminatory criteria” (Directive 96/92/EC: Ch. VII).

[2] Thereafter, the first Regulation on cross-border electricity exchanges imposed that “Network congestion problems shall be addressed with non-discriminatory market based solutions”, without making any distinction between different groups of Member States (Regulation (EC) No 1228/2003: art. 6, see also Annex). Equally, the same Regulation did not make any such distinction while mandating that “Transmission system operators shall receive compensation for costs incurred as a result of hosting cross-border flows of electricity on their networks”, and that “there shall not be specific network charges on individual transactions for declared transits of electricity” (Regulation (EC) No 1228/2003: arts. 3-4; see also Commission Regulation (EU) 838/2010).

[3] Thus the Commission Regulation establishing a (binding) guideline on capacity allocation and congestion management states that network “capacity should be allocated [...] using implicit allocation methods”, clarifying that “In order for the implicit auctions to take place Union-wide, it is necessary to ensure Union-wide price coupling” (Commission Regulation (EU) 2015/1222: recs. 13, 18). Equally, neither ACER’s Recommendation that the current inter-TSO compensation mechanism should be limited to existing infrastructures (ACER 2013b) nor its Opinion that transmission charges paid by electricity producers should be set equal to zero (ACER 2014) make

any distinction between separate groups of Member States. On the contrary, they use general language like “across the EU” (ACER 2014: 1).

[4] The (binding) guidelines on a common regulatory approach to transmission charging mandated that the transmission charges paid by producers in each member state shall be within certain ranges, allowing three distinct ranges for three distinct groups of Member States (Commission Regulation (EU) 838/2010: Annex Part B). However, as mentioned in the previous note, ACER has then recommended these charges to be set to zero “across the EU”, because “The increasing interconnection and integration of the European market implies an increasing risk that different levels of G-charges distort competition and investment decisions” (ACER 2014: 1-2).

[5] In particular, this also applies to regional security coordination, where although formal EU regulation is new, EU rules have nonetheless mandated the establishment of Regional Coordination Centres (RCCs) and stipulated a standardized list of tasks that these should perform (Regulation 2019/943: arts. 35, 37). It is also evident in the rules on insider trading and market manipulation, which aim at the “provision of a harmonised framework” (Regulation (EU) No 1227/2011: rec. 32). It is equally clear in the broader set of network codes, which also aim at the “provision of a harmonised framework for cross-border exchanges of electricity” (Regulation (EC) No 714/2009: rec. 30).

[6] An additional illustration is offered by the rules on insider trading and market manipulation, where the “provision of a harmonised framework” has been pursued throughout the last decade by harmonising key definitions and then even transaction reporting user manuals (Regulation (EU) No 1227/2011: rec. 32, art. 16.1; ACER 2021a, 2021b, 2021c; Rangoni 2020: 25-26).

[7] Also the rules on insider trading and market abuse leave some national discretion, for example on the penalties to be imposed for breaches of such rules (Author 2020: 26).

[8] At the Florence Forum meeting of November 2000, the European Commission, Member States, national regulatory authorities, TSOs as well as producers, consumers, traders, power exchanges and other market players agreed on common Guidelines, which stated that network congestion problems be addressed with market-based solutions, particularly auction systems, and be designed in such a way that all available transport capacity be offered to the market (Florence Forum 2000: 4-8). This reform built on the Florence Forum meeting of November 1999, where participants agreed that network access “should be based on market solutions that give proper and justified incentives to both market parties and transmission system operators to act in a rational and economic way. [...] In this light, the draft agreement towards a transparent auctioning-based allocation mechanism at the French–Spanish interconnector was noted” (Florence Forum 1999). This voluntary agreement was then codified and given binding power by Regulation (EC) No 1228/2003.

[9] Building on the comparison and review in “Mini Fora” and the Florence Forum of experiences with different types of auctions in macro “Regional Initiatives”, by 2007, key authorities and market participants had expressed their preference for implicit rather than explicit auctions. For instance, the Directorate-General for Competition of the European Commission declared that, “Although explicit auctioning is theoretically and with perfect foresight, an efficient mechanism

and it is in practice compatible with Regulation 1228/2003, it has efficiency deficits compared to implicit auctioning” (European Commission 2007a: X). Equally, the DG for Transport and Energy stated that “in the future, more capacity will be allocated through implicit auctions. The so-called market coupling method, developed by ETSO and Europex, has the highest potential of truly integrating the European electricity market through implicit auctions. On the contrary, explicit auctions as currently practiced often lead to inefficient use of interconnection capacity and prevent market integration” (European Commission 2007b: 5). The ERGEG claimed that “it is now widely recognized that [...] implicit allocation methods are more efficient than explicit auctions and should be the target mechanism for all regions” (ERGEG 2007b). And Eurelectric explained its change of preferences from explicit to implicit auctions by arguing that “it is now appropriate to restate our position as regards the preferred solution and the way forward” (Eurelectric 2005: 7). As suggested by Peter Styles, Chairman of the Electricity Committee of the European Federation of Energy Traders (EFET), this was far from obvious because until 2006, implicit auctions had not been implemented in Europe except that in the Nordic market (BUS6a).

[10] By reviewing the implementation experiences with different sub-types of implicit auctions carried out in distinct macro Regional Initiatives, the Project Coordination Group (PCG) of experts created by the Florence Forum came to consider the volume-coupling arrangements as less efficient, because in the Danish-German project they had delivered economically incoherent results (i.e., energy flowing from higher to lower priced areas) and had created problems of market power by allowing transport capacity to be often booked but unused. “Volume coupling was not producing the correct results and was considered unpredictable”, explains the Chairman of the Electricity Committee of EFET (BUS6a). Indeed, “the Danish-German volume coupling project was a disaster, as it failed to launch twice”, confirms the Director of ACER, Alberto Pototschnig (EUI3a). But until then, many believed this was a feasible alternative, explains the same interviewee (EUI3a). By contrast, by reflecting in particular on the TMC project connecting France, Belgium and the Netherlands, PCG participants concluded that price coupling arrangements had proven their ability to operate efficiently since 2006 (PCG 2009a). In 2009 they thus recommended that solution to the Florence Forum (PCG 2009b), which endorsed it (Florence Forum 2009). A few years later, Commission Regulation (EU) 2015/1222 gave binding power to the “target model” developed in the Florence Forum. As suggested by Dr. Matti Supponen, a long time official at DG ENER who was closely involved in the process, the reform of network access regulation essentially entailed the adaptation of the Nordic model to the continental Europe context, including the application of such a model in the absence of a central European electricity exchange. But in practice, this proved to be so complicated that neither the Commission nor any other actor could not have conceived it on its own and imposed it hierarchically. Instead, this required experimentalist processes, in which the TMC project represented “the” experiment and the Commission acted as the main convener (EUI1a).

[11] On tariffication, too, comparison of experiences among authorities and firms in the Forum during the late 1990s-early 2000s first produced agreement on the abolition of transaction-based fees, an ITC mechanism, and limitations on differential transmission charges (Rangoni 2020: 14-16; Florence Forum 1999:1, 2002: 1, 2003: 4). Thus it was in the Florence Forum that actors reached consensus on: charges providing access to the whole interconnected EU network “independent of the commercial transactions that the network users may engage in’ (Florence

Forum 1999: 1); that “an inter-transmission system operator compensation mechanism should be created, to ensure that transmission system operators recover the costs of hosting cross-border flow of power on their networks” (Florence Forum 2002: 1); and that “transmission tariffs levied on generators should be harmonized to avoid distortion of competition among producers located in different countries” (Florence Forum 2003: 4). Thereafter, based on analogous experimentalist reviews of experiences – including the novel loop flows, ACER recommended refining the ITC mechanism and fully harmonizing charges on generators (Regulation (EC) No 1228/2003: art. 14; Commission Regulation (EU) No 838/2010: Annex Part A: 1.4, 5; Florence Forum 2012: 2; ACER 2013, 2014). Regulation 1228/2003 provided for the Commission to monitor implementation and submit to the European Parliament and Council, no more than three years later, a report on the experience gained, if appropriate accompanied by proposals for revision (Regulation 1228/2003: art. 14). These provisions were reinforced by Commission Regulation 838/2010, which tasked ACER with overseeing the implementation of the common tariffication rules and reporting on them every year, as well as carrying out a technical and economic assessment and providing an opinion to the Commission after two years (Commission Regulation 838/2010: Annex Part A, 1.4, 5). In 2012, moreover, in the context of discussions on the issue of “loop flows”, “the Florence Forum also requested the ACER to determine whether the current inter-transmission system operator mechanism scheme needs enhancement” (Florence Forum 2012: 2). It was based on these experimentalist provisions on rule revisability, the invitation of the Florence Forum, and reviews of implementation experiences in the early 2010s that ACER recommended to the European Commission that a new regulatory framework be set up to “better reflect all the on-going developments” (ACER 2013a: 2).

[12] Thus ACER explains that the non-binding Guidance “is updated as needed to reflect the changing market conditions and the experience gained by the Agency and NRAs in the implementation and application of REMIT, including through the feedback of market participants and other stakeholders” (ACER 2021a: 3). Indeed, over the last ten years, ACER has revised the Guidance six times. Like the Guidance, also the Q&A documents are intended as revisable in the light of implementation experiences and feedback from national actors; here the revisability is even more impressive, with 26 editions (ACER 2021b). The same goes for the Transaction Reporting Manual, which is currently at its version 4.1 (ACER 2021c). As suggested by the Head of ACER’s Market Integrity and Transparency department, Volker Zuleger, “this is a very dynamic area, even though the founding Regulation has not changed” (REG4a). According to the same interviewee, it is possible to identify four main drivers of revision: legal developments, especially in EU financial regulation; market developments and market design changes; “own initiative changes through ACER’s lessons learnt”; and stakeholder requests (REG4b). In sum, ACER’s Head of Market Integrity and Transparency believes “these examples demonstrate that a legal framework like REMIT is a living creature in a vibrant environment which requires regular updates of ACER Guidance due to legal changes in neighboring fields, market developments, lessons learnt and stakeholder queries, even if the REMIT legal framework itself does not change” (REG4a, REG4b).

[13] The success of the binding network codes and guidelines is considered to depend on “efficient and intensive sharing of views and information by all interested parties throughout the process as a whole”, with stakeholders being “kept abreast of developments and be provided

with a forum to express their views and feedback” (ACER & ENTSO-E 2015: 3). Although to date there has been no substantive amendment to any of the codes, ACER’s Director Alberto Pototschnig suggests that this is due to the Agency’s preference for accumulating a “critical mass” before proposing a set of amendments jointly, rather than one by one (EUI3b). At any rate, the guidance document on the amendment process recently produced by the Network Code Implementation and Monitoring Group clearly exhibits experimentalist features, including the clarifications that ACER “will review the proposals submitted on a more flexible basis rather than with a specific periodicity. This means that the assessment will be performed either when a need arises following implementation monitoring or on the basis of the requests submitted, their priority and urgency”, as well as that ACER will consider how far a given amendment proposal “relates to new arguments or facts not known at the stage of the preparation and adoption” (NC-IMG 2019: 6).

[14] In the sub-case of regional security cooperation, the latest rules mandate continuous monitoring of implementation practices and annual reporting by the RCCs, including on security failures and responses to them, to both ACER and ENTSO, so that lessons can be identified and spread. But this incident reporting system could be developed further to take place in real time, as for example in US nuclear power safety regulation, rather than on a periodic basis. It is for this reason that we characterize the processes in this area as “moderately experimentalist” (Rangoni 2020: 22-24).

2. Banking

[15] As Danièle Nouy, the founding Chair of the Supervisory Board, explained during the 2015 negotiations over the harmonization of national options and discretions: “for such decisions, I need a majority in the Supervisory Board...which comprises six of our own people and 19 representatives of the 19 national supervisory authorities” (Nouy 2015a). A top official of the ECB’s Supervisory Policy (SPO) Division further observed that, “in general, we have a no surprise policy so that the Supervisory Board isn’t blindsided.” For this purpose, it is helpful that the NCAs can “raise issues at an early stage. It’s always better when we get to know their problems before it goes to the SB, because sometimes we might agree with their solution. It’s not always that this needs to be a controversy” (ECB 11.1). NCAs, for their part, consider participation in SSM divisional networks and joint drafting teams crucial to ensure that their perspectives are taken into account before any proposals go to the SB. As an interviewee from one large NCA remarked, “in terms of influencing decisions, what is also important is all the work done prior to the final phase of the decision making. There is some arbitrage, some decisions taken at the Board level, but obviously a lot of the final decision comes from the preparatory work. So it’s key for us to be involved in this preparatory phase” (NCA 11.1).

[16] In the early years of the SSM, as a top official of the responsible DG explained, “certain stakeholders expected that the ECB could maybe intervene much, much more in some LSIs, the largest ones essentially”, and “there was a whole methodology developed for these high-priority LSIs, with...larger involvements.” But over time, the ECB’s oversight approach has evolved away from such efforts to implement a sort of “direct-indirect” supervision of individual LSIs, shifting

instead towards “a more system perspective” focused on the co-development of Joint Supervisory Standards with NCAs through the Senior Management Network (SMN). While the ECB is empowered by the SSM Regulation to issue general instructions to NCAs on LSI supervision, they now find it more effective to rely more on informal guidance and persuasion than on binding instruments, not only because it creates less “stress in the system”, but also because the latter are slower and more difficult to change in response to implementation problems and new developments (ECB 10.1; ECB 10.2; NCA 8). To date, the ECB has never exercised its power to take over direct supervision of an LSI from an NCA against the latter’s objections, which the Chair of the SSM SB termed “an exceptional response – a measure of last resort which should be considered only when all other appropriate supervisory measures have been unsuccessful” (Reply by Danièle Nouy to a written question by MEP Nuno Melo, 2.5.2016, quoted in Petit 2019: 125, n. 113).

[17] As a top official of the ECB’s centralized on-site function remarked, to conduct these missions “I rely on 1000 inspectors, but I have no hierarchical power on 95 percent of these people” (ECB 1). And as an ECB official responsible for JSTs supervising four large multinational banks put it: “We really want to work with these people as if we are one team....But the problem is because it’s hierarchy, the [NCA] people work for [the NCA], and not for ECB.” For such an arrangement to function effectively, it is “important to create good relationships, to create buy in, because you have to cooperate with people, but you don’t have any hierarchical power. So you depend on their willingness to cooperate [and] you better make it work” (ECB 3; cf. NC6; NCA 4.1).

[18] SSM NCAs value the EBA as “a different channel to communicate your stance, with full independence”, especially on issues concerning smaller banks, and regularly take different positions from one another as well as the ECB within the Board of Supervisors (BoS) (NCA 9.2; NCA 5.1; NCA 5.2; NCA 2; EBA 1.1; COM 1). While the ECB seeks to coordinate with the NCAs before each BoS meeting, in order to develop a common position on matters of particular interest to the SSM, it cannot compel the NCAs to follow their lead. As one top official observed: “Normally, there’s quite some readiness to find a common position, but if it really concerns things that are very politicized in their national jurisdiction, I think we will not be successful. If the broader public is looking at the financial markets authority in a given country and say that if you make this decision, we will have a huge damage, then it’s probably difficult for us to convince that country to go in the other direction” (ECB 11.1). An NCA official concurred that national authorities’ willingness to follow the ECB’s lead depends on the nature of the topic: “when it’s more about how ‘do we run this process?’”, such as the conduct of the biannual EBA stress tests, “where 90 percent of the work is done by the SSM and their centralized quality assurance”, “the ECB has a stronger position, and when it’s more towards real policy making the balance is more towards the NCAs” (NCA 2).

[19] “Our goal”, in the words of the SSM’s first Chair, “should be a truly European banking market – a market that is closely integrated but still comprises different kinds of banks. Such a market would have room for all types of banks: small and large, specialized and universal, listed as well as mutual and cooperative....So striving for a truly European banking sector does not take away from diversity.” Hence the SSM, as she explained at an early stage, seeks to “ensure consistency across institutions and supervision tailored to [their] specificities...by balancing uniform

supervisory anchor points with constrained supervisory judgment”, thereby accommodating banking diversity, which remains “very desirable from a financial stability perspective”, and whose “systemic benefits” are explicitly recognized in the recitals to the SSM Regulation (Nouy 2018b, 2015b; Council Regulation (EU) No 1024/2013, recital 17). More recently, Andrea Enria, Nouy’s successor as SB Chair, has argued that whereas in the early years of the SSM, “a more rigid frame was needed to ensure consistency...the closer we get to a common supervisory approach and culture, the more flexible the frame can be, and the more room can be given to judgement...coupled with ex post quality and consistency checks”. The core idea is thus to treat similar institutions similarly and different institutions differently across the Banking Union, irrespective of national origin, using “a common methodology to provide a level playing field” for assessing each bank, while “tailor[ing]...supervisory expectations to its specific situation” (Enria 2019a).

[20] As one of the chief architects of the SSM’s horizontal services put it: “We had a vision, the methodology must be a methodology that is as simple as possible, and still being able to cover a hundred banks...From then on...you have the chance to select from 19 countries, because...supervision was not a new field...[so] you pick and select the best practices from each...I would describe it as a big box of puzzle pieces and you put them together in a different way, but you had existing puzzle pieces, rather than drawing on a green sheet” (ECB 8). Other participants in the drafting of the SSM Manual described how the key design decisions emerged from this process of cross-national comparison and mutual reflection: “So we were sitting together eight years ago, and thinking about how can you process a JST decision, how would that go? What is a JST, how does it function? What is the governance of a JST? How do you escalate conflicting decisions? How do you bring in NCA opinions?...This phase was quite interesting because we were a team of people that were coming from different backgrounds from different NCAs...and they all had in mind their own language and their own approach. I think we struggled quite a bit to get over how differently things are done in different countries, so basically we said, we need to step away from what we do in our countries and we need to...identify the underlying concepts, see where it’s a problem of language, where it’s a problem of substance, external drivers, etc....So that was most of the work, understanding where we actually have differences, like on-site, whether on-site is a separate function, does it need to be independent or not, whether it is led by the ECB or not” (ECB 11.1).

[21] The SSM’s on-site inspection (OSI) function was based on the practices of a few national authorities, notably the French, the Italian, and the German, “with some minor variations in order to try to take the best out of each of those models”, as one of its architects observed. But OSI was largely new to many NCAs, like the Dutch or the Irish, and differed significantly from that of others, like the Spanish, who as another ECB official remarked, “did offsite supervision onsite”, processing reporting that they were getting from the banks on the latter’s premises (ECB 1; ECB 3; NCA 9.2; NCA 9.3; NCA 11.4; NCA 1; NCA 3; NCA 6). The SSM’s comparative, numerical approach to supervision, focused on calculating specific ratios, benchmarking banks against peer groups, and identifying outliers, likewise drew heavily on the practices of certain NCAs “who worked to a very large extent quantitatively beforehand”, like the Spanish, French, and Italians, while representing a bigger change for others like the Germans and the Dutch, whose supervisory culture was more qualitative and principles-based. As one top ECB official recruited from the DNB

observed, “We had invited a few of the big supervisors to present the way they do supervision. And then the Spanish came. They had analysis and numbers, it was incredible to us. We had nothing like this.” But they were “mainly focused on credit risk....They didn’t look at governance....In the Netherlands, after the disaster with ABN Amro, there was a lot of focus on governance.” In the end, however, as one NCA official noted, the German and Dutch authorities’ qualitative emphasis on strengthening banks’ governance and risk management procedures “has also now been implemented into the SSM’s common rules and...manuals”, resulting in a sort of hybrid synthesis of the two approaches” (NCA 6; ECB 1; NCA 1; NCA 3; NCA 4.1; NCA 4.2; ECB 6; COM 1).

[22] Thus, in preparing the SREP decision for each bank, JSTs draw not only on the reports of on-site investigations into key issues, but also on the work of specialized risk teams, often led by NCA experts, whose purpose is to “connect the dots” on each major type of risk across the banking group as a whole. These experts from the different JSTs in turn participate in knowledge-sharing groups on specific topics such as liquidity or credit risk coordinated by the vertical DGs to which they belong, while interacting with the horizontal line services of the ECB on methodological issues. Each SSM Member State also has a Country Coordination Group, “where all the JSTs...in that member state discuss, exchange views on common topics, which are relevant for these SIs.” In the French case, as one national official explained, topics discussed in these fora include specificities of the national banking market, such as regulated savings and mortgage guarantee schemes, which have “helped other supervisors and the ECB colleagues to understand what is the real risk related to these instruments” (ECB 3; NCA 11.4). Alongside regular experience-sharing workshops on specific topics, the ECB OSI Division organizes coordinated “campaigns”, where the same type of investigation is conducted in different banks more or less simultaneously, on topics such as residential real estate, commercial real estate, leveraged finance, market risk, or IT risk, “in order to enable heads of missions to be able to share experiences more or less in real time with other colleagues...in order to make sure that the outcome will be as homogeneous as possible regardless of the fact that we are dealing with different countries and banks” (ECB 1; NCA 1). As the architect of the ECB’s OSI function explained, “We all know that if you give the same document, the same methodology to two people who are coming from a very different background, say a Portuguese inspector and a Finnish inspector...most likely the outcome will not be perfectly comparable. So what we are trying is precisely encouraging missions where we would have mixed teams composed of both Portuguese and Finnish inspectors. Offering to these people the possibility in the course of the mission to discuss and compare their views on the same supervisory issues...and techniques is the best way to homogenize step by step” (ECB 1).

[23] Dutch supervisors, for example, particularly appreciate the depth of insight into banks’ operations obtained through on-site investigations, which “everybody at the Dutch Central Bank today would never ever let go anymore of”, whereas Spanish supervisors were especially interested in the SSM’s focus on corporate governance, which they had “never looked at”, and which gave them “access to the CEO and the Chairman of the bank, while in Spain, only the Governor could talk to people like this” (ECB 3; NCA 1; NCA 3). For multinational banks, as one national official commented, “It’s very helpful to have the input from...colleagues who know very well the specificities of the national market of this specific transaction, a real added value to the

supervision of the group. On top of their experience of their national market, their background of supervising, their experience on how to maybe have a slightly different approach to supervision. So together we can promote the best approaches to deal with the risk of the bank.” Before the SSM, “you had and you still have the Colleges of Supervisors” for non-eurozone banks, “but it’s only once or twice a year, where you can exchange information, exchange experiences. But now with the SSM and the JSTs you have these chances on a daily basis.”

[24] As one national supervisor observed, horizontal comparison of SREP scores across banks really helps in resolving disagreements between JST coordinators and NCAs “because now you can realize...if you were tougher or maybe too mild than [on] the other banks, and maybe adjust your decision....The comparative analysis is a process that can help us...to realize if we were wrong or if the JST coordinator was wrong. If it was difficult to reach agreement in the JST, you can always compare this decision...with others. So you have these different layers where you can discuss, which is really helpful (NCA 9.2; cf. ECB 3; ECB 12.2).

[25] As an architect of the ECB’s horizontal services observed, “it’s a dynamic approach, you need to be flexible, you need to see what’s happening in the world....[I]f you are a horizontal guy, you cannot believe...this is the methodology now, and now it stops...[Y]ou need to be aware that you develop all the time, it never stops” (ECB 8). And as the architect of the ECB’s on-site inspection function explained, a common methodology “is of course indispensable for a multicultural organization like the SSM. It is essential to have a common document because otherwise...one thousand inspectors at the SSM have no reason to carry out missions in the same way.” But he “was very keen to make sure that the methodology keeps being updated because the worst thing is that you...waste a lot of resources in drafting a methodology and afterwards nobody takes care of it and therefore very quickly, maybe one to two years, it is totally obsolete (ECB 1).”

[26] The SREP methodology is now updated on an annual cycle, based on inputs from joint NCA-ECB drafting teams convened by the SMD network, “which allows us to make sure that all the evolution and changes in the regulation can be included in the process.” As one NCA member of this network explained, “the updating is a process that is conducted throughout the year. It’s not one meeting in December to have the update, it’s the work that is conducted by the drafting teams”, dealing with topics such as business model or liquidity risk assessments. “Each drafting team that is launched has to end up with a deliverable that in the end will be included in the SSM Manual, so that’s really ongoing work that is conducted in a one-year period, and the final concretization is validated by the SB for the revised manual” (NCA 11.3; NCA 9.3; NCA 9.2; ECB 12.1; ECB 3). Frontline supervisors can and do challenge specific procedures for the SREP assessment prescribed by the Manual, on the grounds that they do not fit the bank in question, leading to a discussion within the core JST, which may decide not to apply it. In many though not all cases, the issue will then be raised in the SMD network, resulting in a possible revision of the Manual, for example to take account of national differences in bank board structures. The French NCA holds a regular weekly meeting of managers and representatives of the various teams involved in the SSM, where frontline supervisors can raise practical problems experienced with the methodologies and procedures, which are then taken up within the network drafting teams preparing revisions to the Manual, in which experts from the JSTs may themselves be invited to participate (NCA 6; ECB 3; NCA 11.3). In on-site inspection, similarly, the divisional network

convenes five to ten joint drafting teams of ECB and NCA officials per year to update the methodologies on specific risks, so that each component of the 1500-page on-site inspection guide will be updated at least every two-three years. To help identify points for revision, each JST coordinator and head of mission fill out a feedback form at the end of each mission, in which they are encouraged to “precisely mention cases where the methodology has not been useful, should be updated or extended.” The comparative experience-sharing workshops for heads of missions likewise often “come to the conclusion that they have to maybe revise the way they are implementing their supervisory techniques. Sometimes [they] lead to the proposal to update the methodology because there is something that’s not clear, that is understood differently by different people, so this is also something that we are using to decide to set up a new drafting team” (ECB 1; NCA 1).

[27] Within the framework of its own peer reviews and supervisory convergence activities, the EBA focuses more on identifying opportunities to improve existing guidelines and regulations through comparison of good practices and difficulties experienced in the implementation process than on “naming and shaming” of weak enforcement by NCAs (EBA 1.1; EBA 1.2).