

Estonia

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Question 1

Banking Union can be defined as a transfer of responsibility for banking policy from the national to the EU level and entailing the following components:

- 1) uniform supervision (ECB/SSM³- the SSM is composed of the ECB and the NCAs of participating Member States);
- 2) prudential regulation (such as CRD IV⁴, CRR⁵, Single Rulebook);
- 3) reorganisation and resolution with common funding (on the basis of BRRD⁶ + SRM⁷ + ESM direct recapitalisation instrument⁸);

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³ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63 (hereinafter: '*SSM Regulation*').

⁴ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338 (hereinafter: '*CRD IV*').

⁵ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, p. 1 (hereinafter: '*CRR*').

⁶ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190 (hereinafter: '*BRRD*').

⁷ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1 (hereinafter: '*SRM Regulation*').

- 4) lender of last resort (also referred to as emergency liquidity assistance - ELA) function;
- 5) deposit insurance (DGS⁹).

The most important challenges for the Banking Union are the following issues:

- 1) Banking Union is open to all EU member States;
- 2) SSM/SRM is applicable to participating Member States (in other words, not restricted to the euro-area);
- 3) ESM is only available to euro-area Member States.

As a result, the BRRD applies for all EU banks, while the SRM Regulation applies only to the euro-area banks, the latter being related to the SRM's Intergovernmental Agreement, which has been adopted outside the EU's law-making procedures. The Intergovernmental Agreement governs part of the Single Resolution Fund, which is an element of the SRM but lies outside the EU's harmonised regime. At the same time the Intergovernmental Agreement is to be applied and interpreted in accordance with EU law. When the ECB Governing Council will decide on SSM-related issues, it will do so in its original composition (composed of Governors of euro-area national central banks and the ECB Executive Board), thereby leaving out any Governor from a 'close cooperation' Member State.

Question 2

In a broad sense, the issue whether the legal bases of Banking Union are appropriate is depending on the relative comparison base.

On one hand, the structure is relying on Article 114 TFEU,¹⁰ an Intergovernmental Agreement,¹¹ an Interinstitutional Agreement,¹² an International Treaty,¹³ a

⁸ ESM Guideline on Financial Assistance for the Direct Recapitalisation of Institutions, <http://www.esm.europa.eu/pdf/20141208%20Guideline%20on%20Financial%20Assistance%20for%20the%20Direct%20Recapitalisation%20of%20Institutions.pdf>.

⁹ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149 ('DGS Directive').

¹⁰ In contrast, most EU agencies have been established under Article 352 TFEU, under which most Member States have veto powers. A further issue under Article 114 TFEU may arise from the fact that while the Banking Union is not restricted to the euro-area, most of the Banking Union participants are euro-area Member States.

¹¹ For example, on certain Single Resolution Fund elements of the SRM. Intergovernmental Agreement on the single resolution fund (Council Document 8457/14), <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT>.

¹² Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, p. 1.

Memorandum of Understanding,¹⁴ a Commission communication,¹⁵ legislative measures adopted by co-legislators,¹⁶ legislative measures adopted by the Council alone,¹⁷ as well as non-legislative measures adopted either by the Commission or by the ECB.

On the other hand, the Banking Union embraces two structures with different set of legal bases:

- 1) SSM brings the supervision of significant SSM Member States' banks under the control of the ECB and entails bank supervision and with early intervention to prevent bank crises;¹⁸
- 2) SRM brings the resolution of SSM supervised banks within the control of the SRB and puts in place a Single Resolution Fund to support resolution.¹⁹

The SSM became operational on 4 November 2014 while the SRM will be operational from 1 January 2016.

Question 3

[Insert answer]

Question 4

Under Article 4(3) SSM Regulation, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those directives; where the relevant Union law is composed of Regulations and where those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options. This is probably a novel

¹³ The Treaty Establishing the European Stability Mechanism (the ESM Treaty), <http://www.esm.europa.eu/about/legal-documents/ESM%20Treaty.htm>.

¹⁴ Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM) 11.12.2013, http://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf.

¹⁵ For example, Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC0730\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC0730(01)).

¹⁶ DGS Directive.

¹⁷ For example, the SSM Regulation.

¹⁸ (1) SSM Regulation; (2) Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ L 287, 29.10.2013, p. 5.

¹⁹ (1) SRM Regulation; (2) Intergovernmental Agreement on the single resolution fund.

approach under EU law obliging an EU institution to apply national law, as it would effectively mean that the ECB has to apply national laws of all SSM-participating Member States and be subject to relevant national judicial control mechanisms under Article 13(2) SSM Regulation.

The national court's competence appears to be limited to the 'authenticity control' and that the envisaged coercive measures are neither arbitrary nor excessive. However, two issues emerge. First, it is not clear what the 'authenticity control' actually means. Secondly, one may wonder how it is possible to assess proportionality of a measure without reviewing the necessity of the measure or without access to the information on the ECB's file, both of which shall belong to the prerogatives of the Court of Justice of the European Union.²⁰

How the Court of Justice of the European Union would assess the ECB's compliance with national law still remains to be seen.

Question 5

At this stage it is difficult to assess whether Banking Union is successful in safeguarding the principle of equality of Member States and financial institutions.

Question 6

[Insert answer]

Question 7

At this stage it is difficult to assess the extent and ways how Banking Union will affect the internal market, including the rules of competition law and state aid. One can assume that European banks will benefit from a centralisation of competences and the reduction of supervisory burden but this is yet to be proved. However, at the same time the gap between the euro-area and the non-euro-area financial system governance has widened, with parallel structures being created for the two distinct groups.

Question 8

[Insert answer]

Question 9

²⁰ See Article 263 TFEU, Recital 60 and Article 13(2) SSM Regulation.

[Insert answer]

Question 10

[Insert answer]

Question 11

[Insert answer]

Question 12

[Insert answer]

Question 13

Measures adopted in Estonia for implementing Banking Union primarily constitute amendments to the Credit Institutions Act (Krediiasutuste seadus), the Financial Supervision Authority Act (Finantsinspektsiooni seadus), the Guarantee Fund Act (Tagatisfondi seadus) as well as the Financial Crisis Prevention and Resolution Act (Finantskriisi ennetamise ja lahendamise seadus).

[Insert answer]

Question 14

[Insert answer]

Question 15

[Insert answer]

Question 16

The SSM Regulation institutes the ECB as *de jure* supreme overseer while *de facto* NCAs are relied on to do the supervisory work. In that sense, the rules allocating competences are clear. Credit institutions are categorised as ‘significant’ or ‘less significant’ and the ECB directly supervises significant banks, whereas the NCAs are in charge of supervising less significant banks.

Article 6(4) SSM Regulation has the following criteria to deem a financial institution *significant*:

- 1) the total value of its assets exceeds EUR 30 billion; or
- 2) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20%, unless the total value of its assets is below EUR 5 billion; or
- 3) the competent NCA considers the bank significant; or
- 4) upon the ECB decision if a bank has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities; or
- 5) if the institution is a recipient of EFSF or ESM public financial assistance; or
- 6) the institution belongs to the participating Member State's three largest banks.

However, the authorisation of credit institutions and the assessment of notifications of acquisitions and disposals of qualified holdings are conferred on the ECB regardless of an applicant's or target's significance.²¹ Against this background, it should be mentioned that some banks have challenged the decision to deem them significant,²² in an attempt to remain fully under national supervision.

The NCAs provide auxiliary assistance²³, continue supervising banking institutions under national law, supervise payment systems, monitor compliance with the money-laundering prohibitions and consumer protection,²⁴ etc.

Article 6(5) SSM Regulation vests powers with the ECB to assume at any time on its own initiative the competence to directly supervise less significant banks.

Question 17

According to Article 18(1) SSM Regulation the ECB may impose administrative pecuniary penalties where credit institutions, financial holding companies, or mixed financial holding companies intentionally or negligently have breached the requirements under relevant directly applicable acts of Union law. The wording „*intentionally or negligently*“ indicates penal law terminology. At the same time, CRD IV does not use such wording.

Instead, Article 70 of the CRD IV provides that when determining the type of administrative penalties or other administrative measures and the level of administrative pecuniary penalties, the competent authorities shall take into account

²¹ Articles 4(1)(a) and (c) and 6(6), 14 and 15 SSM Regulation.

²² See, for example, Case T-122/15 Landeskreditbank Baden-Württemberg v ECB.

²³ Article 5(4) SSM Regulation.

²⁴ Recital 28 of the SSM Regulation.

all relevant circumstances, which are very similar to the mitigating or aggravating circumstances for executing Penal Law.²⁵

Question 18

[Insert answer]

Question 19

The separation between the supervisory powers of the ECB and its monetary policy function is dependent on the implementation of Article 25 SSM Regulation.²⁶

However, the separation cannot be absolute because under the TFEU and the Statute the Governing Council is mandated as the ultimate decision-making body of the ECB. It is obviously not an ideal solution; however no better alternative is currently available.

As a result, the ECB Governing Council is holding separate SSM meetings alongside those on monetary policy issues while maintaining the same composition.

Question 20

[Insert answer]

Question 21

Member States outside the euro area have the option to become a member of the Banking Union by entering into the close cooperation with the ECB in accordance with the SSM Regulation and subsequently join the SSM and SRM.

With regard to non-participating Member States, the supervision will remain exercised in accordance with the regulatory rules set in the CRD IV, CRR and BRRD. With regard to cross-border institutions, the ECB could be involved in the supervision, either as a home supervisor or a host supervisor in colleges of supervisors.

²⁵ Kairjak, M. Karistus- ja haldusõiguse piiride hägustumine Euroopa Liidu finantsturgude õiguse uues sanktsioonisüsteemis (title in English: Blurring of the Lines Between Penal Power and Administrative Law in the New Sanction System of the European Union Financial Markets Law), *Juridica* 2015/ 5, p 356.

²⁶ See also recitals 65 and 73 of the SSM Regulation.

If a resolution affects banks established only in participating Member States, the resolution process under the SRM will apply, whereas if a resolution affects banks established only in non-participating Member States, the resolution process under the BRRD will apply.

Question 22

N/A [Insert answer]

Question 23

Bearing in mind that the SRM will be operational from 1 January 2016, it is rather cumbersome to outline the main strengths and weaknesses before the SRM has actually become operational.

The Single Resolution Mechanism would complement the SSM by making certain that failing banks are restructured or closed down swiftly. The SRM Regulation applies on a mandatory basis to all banks established in an SSM-participating Member State.²⁷ The SRB is responsible for the resolution of banks directly supervised by the ECB, while NRAs are responsible for all other banks.

The SRB has a range of oversight powers over NRAs²⁸ and investigative powers over SSM-supervised entities.²⁹

The ECB/SSM triggers the resolution process by notifying the SRB, the Commission and the relevant NRAs of its assessment that a bank is failing or likely to fail (alternatively the SRB itself will trigger).

The conditions for a resolution are the following:³⁰

- 1) institution is failing or likely to fail;
- 2) not meeting the authorisation requirements;
- 3) assets will be less than liabilities;
- 4) no foreseeable prospect of the bank paying its debts;
- 5) extraordinary public financial support is required;
- 6) no reasonable prospect that any alternative private sector measures or supervisory action would prevent the failure of the institution within a reasonable timeframe;

²⁷ Articles 2 and 4, SRM Regulation.

²⁸ Article 28 SRM Regulation.

²⁹ Articles 34 to 36 SRM Regulation.

³⁰ The previous adoption of an early intervention measure is not a condition for taking a resolution action.

7) resolution is necessary in the public interest.

The scheme may enter into force only if no reasoned objection has been expressed by the Council or the Commission within 24 hours.

Question 24

[Insert answer]

Question 25

[Insert answer]

Question 26

[Insert answer]

Question 27

[Insert answer]

Question 28

[Insert answer]

Question 29

[Insert answer]

Question 30

The Single Resolution Fund will be administered by the SRB and it has a target funding level of 1% of the covered deposits of banks in SSM-participating Member States.

Articles 67-79 SRM Regulation and an Intergovernmental Agreement regulate the functioning of the Single Resolution Fund. The Intergovernmental Agreement is required because the obligation to transfer the contributions raised at national level towards the Fund does not derive from the EU law.³¹ By this tool, the Member States

³¹ Recital 7 and Article 3(1) of the Intergovernmental Agreement.

commit transferring the contributions raised at national level in accordance with the BRRD and the SRM Regulation to the Fund.³²

However, by choosing this path the Member States undermined the Community method, which obviously upset the European Parliament,³³ opposing to the selection of the Intergovernmental Agreement as a regulatory measure.³⁴

Question 31

[Insert answer]

Question 32

[Insert answer]

Question 33

The enforcement of the single rulebook is complicated because of problems in sanctioning regime. The meaning of different definitions - *administrative penalties (CRD IV)*, *fines, periodic penalty payments (SSM)* is not clear. It is unclear whether the sanctioning regime of CRD IV and SSM Regulation are part of penal legislation or administrative legislation and whether is it possible to impose administrative penalties without deciding the on the question of guilt. According to the principles of Estonian law a person shall be punished for an unlawful act only if the person is guilty of the commission of the act. Further, high level of administrative fine - *in the case of a natural person, administrative pecuniary penalties of up to EUR 5 000 000* – is similar to pecuniary punishment for a criminal offence. The European Court of Human Rights has decided that a measure can be understood as criminal indictment in conformity of its content.³⁵

Question 34

The most important legal problem arising from BRRD is the issue of proportionality in weighing the requirements under the BRRD against the public interest and the

³² Article 1 of the Intergovernmental Agreement.

³³ See, for example, Press release - Economic and monetary affairs – 20-03-2014 - 11:12, <http://www.europarl.europa.eu/news/en/news-room/content/20140319IPR39310/>.

³⁴ European Parliament Committee on Economic and Monetary Affairs, Letter to the Greek Presidency of the EU, 15 January 2014, <http://www.europarl.europa.eu/document/activities/cont/201401/20140116ATT77594/20140116ATT77594EN.pdf>.

³⁵ ECHR 8.06.1976, 5101/71, 5354/72, 5102/71, 5370/72 (*Engel et al vs the Netherlands*). – [1976] ECHR 3, 5100/71, p 12, 80ff.

different needs and business models of credit institutions, including systemically not important institutions. It is important that the latter as well as investment firms have simplified obligations for contents and details of recovery and resolution plans.

The enforcement of the single rulebook is complicated because of problems in sanctioning regime, as explained in the answer to Q 33.

Question 35

Competent authorities, designated authorities, resolution authorities, relevant administrative authorities and DGSs should cooperate with each other and exercise their powers in accordance to CRD IV (specifically articles 50, 157) and to DGS Directive, Article 14(2) of which provides that depositors at branches set up by credit institutions in another Member State shall be repaid by a DGS in the host Member State on behalf of the DGS in the home Member State. It is important to put in practice effectively new directive of DGSs.

Question 36

[Insert answer]

Question 37

[Insert answer]

Question 38

[Insert answer]

Question 39

One would assume that under its supervisory role, the ECB will have rulemaking powers under Article 132 TFEU, although the SSM Regulation is not very clear on this.³⁶ The ECB is in charge of applying all relevant Union law, which under the SSM Regulation also includes national legislation transposing EU Directives, and in this context has the right to adopt guidelines and recommendations, take decisions subject to, and in compliance with Union law, and to adopt regulations necessary to organise

³⁶ Article 4(3) of the SSM Regulation does neither refer to Article 132(1) TFEU nor Article 34.1 of the Statute, while recital 32 of the SSM Regulation refers to Article 132 only in the context of adopting regulations.

and specify the modalities for carrying out its tasks.³⁷ Pursuant to Article 6(5) of the SSM Regulation the ECB may issue regulations, guidelines or instructions³⁸ to national supervisory authorities, and instructions to the national supervisory authorities of non-euro area Member States of close cooperation.³⁹ Decisions appear to be addressed towards credit institutions,⁴⁰ opinions are used in the context of addressing the close cooperation non-euro-area Member States, while the addressee of recommendations⁴¹ is not clear in the SSM Regulation. The text of the SSM Regulation also refers to instruments like ‘warning’,⁴² and ‘prior notification’⁴³ and it is not clear whether warnings and prior notifications constitute separate legal instruments or should they be issued in a form of a decision. There are also other occasions where the form of legal instrument to be used is unclear.⁴⁴

The first paragraph of Article 263 TFEU provides that the Court shall review the legality of [...] acts of [...] the European Central Bank, other than recommendations and opinions, [...] intended to produce legal effects vis-à-vis third parties.⁴⁵ The first paragraph of Article 263 TFEU referring to ‘acts’ appears to cover regulations, decisions, and directives, while leaving out recommendations and opinions; it has also been suggested that other acts can be reviewed provided that they have binding force or produce legal effects.⁴⁶

³⁷ Article 4(3) of the SSM Regulation.

³⁸ Article 6(5) of the SSM Regulation actually refers to ‘general instructions’ which is not repeated anywhere in the SSM Regulation.

³⁹ Article 7(1) of the SSM Regulation.

⁴⁰ Article 22 of the SSM Regulation.

⁴¹ Recommendations issued by the ECB are mentioned only in Recitals 34 and 60 and in Article 4(3) of the SSM Regulation, without revealing any instances where recommendations could be used.

⁴² Article 7(5) of the SSM Regulation.

⁴³ Article 12(1) of the SSM Regulation.

⁴⁴ See, for example, Articles 5(4) and 30 of the SSM Regulation.

⁴⁵ Also reflected in Recital 60 of the SSM Regulation.

⁴⁶ The Court of Justice has noted that action against an act of an institution intended to have legal effects is admissible irrespective of whether the act was adopted by the institution pursuant to Treaty provisions, see Case C-316/91 *European Parliament v Council of the European Union* [1994] ECR I-625, paragraph 9. An action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects, see Case 22/70 *Commission v Council* [1971] ECR 263, paragraph 42; joined cases C-181/91 and C-248/91 *European Parliament v Council of the European Communities and Commission of the European Communities* [1993] Page I-3685, paragraph 13; Case C-57/95 *French Republic v Commission of the European Communities* [1997] ECR I-1627, paragraphs 7 and 23. At the same time, acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court, see joined cases C-181/91 and C-248/91 *European Parliament v Council of the European Communities and Commission of the European Communities* [1993] Page I-3685, paragraph 12.

Under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them,⁴⁷ and against a regulatory act which is of direct concern to them and does not entail implementing measures. The Court has said that natural or legal persons may claim that a contested provision is of individual concern to them if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons.⁴⁸

While there is a case of a bank challenging the ECB's decision to deem them significant,⁴⁹ the real challenge for the Court of Justice appears to arise from Article 13(2) SSM Regulation, assessing the ECB's compliance with national law.

Question 40

[Insert answer]

Question 41

[Insert answer]

Question 42

[Insert answer]

⁴⁷ A lack of direct concern would result in inadmissibility; see Case T-259/10 Ax v Council.

⁴⁸ See Case 25/62 Plaumann v Commission [1963] ECR 95; Case C-309/89 Codorniu v Council [1994] ECR I-1853, paragraph 20.

⁴⁹ See Case T-122/15 Landeskreditbank Baden-Württemberg v ECB.