ECEFIL
European Center of Economic and Financial Law
ΕΥΡΩΠΑΪΚΟ ΚΕΝΤΡΟ ΟΙΚΟΝΟΜΙΚΟΥ ΚΑΙ ΧΡΗΜΑΤΟΟΙΚΟΝΟΜΙΚΟΥ ΔΙΚΑΙΟΥ

WORKING PAPER SERIES
No 2015/12

MACRO-PRUDENTIAL TASKS IN THE FRAMEWORK OF THE SINGLE SUPERVISORY MECHANISM (SSM): AN ANALYSIS OF ARTICLE 5 OF THE SSM REGULATION

by Professor Christos Vl. Gortsos

March 2015

WORKING PAPER SERIES
No 12 / March 2015

MACRO-PRUDENTIAL TASKS IN THE FRAMEWORK OF THE SINGLE SUPERVISORY MECHANISM (SSM): AN ANALYSIS OF ARTICLE 5 OF THE SSM REGULATION

Christos Vl. Gortsos
Professor of International Economic Law, Panteion University of Athens,
Visiting Professor, Europa-Institut, Universität des Saarlandes

Address
Panteion University of Social and Political Sciences
Department of International and European Studies
136 Sygrou Ave.
GR-17671, Athens
Greece

Internet
http://www.ecefil.eu

Contact
info@ecefil.eu

Coordinator, Design
ECEFIL, Dr. Ziakou Sophia

Macro-prudential tasks in the framework of the Single Supervisory Mechanism (SSM): an analysis of Article 5 of the SSM Regulation

Christos Vl. Gortsos*

March 2015

Abstract

The aim of this paper is to provide an analysis of the macro-prudential tasks assigned to the ECB within the context of the 'Single Supervisory Mechanism', which is a major building block of the European Banking Union. It is structured in two (2) sections. Section 1 provides a general overview of the specific supervisory tasks conferred upon the ECB in relation to credit institutions and other supervised entities incorporated in participating Member States, as well as those concerning branches in participating Member States by credit institutions incorporated in non-participating Member States. Section 2 outlines, in particular, the specific macro-prudential tasks conferred upon the ECB under the provisions laid down in Article 5 of the Council Regulation (EU) No 1024/2013, which constitutes the main legal source of the 'Single Supervisory Mechanism' (known as the 'SSM Regulation').

Christos Gortsos is Professor of International Economic Law at Panteion University of Athens, as well as visiting Professor and has teaching assignments at the Law School of Athens, the University of Piraeus, the Europa Institute of the University of Saarland and the European Institute of the University of Zürich. He is teaching and writing in international and European monetary and financial law, as well as economic analysis of law. Since 2005, he is a member of the Monetary Committee of the International Law Association (MoComILA), since 2010 member of the Management Committee of ECEFIL, and since 2012 member of the European Group of Public Law (EGPL), and since 2013 member of the Academic Board of the Hellenic Foundation for European and Foreign Policy (ELIAMEP). Apart from his academic career, Professor Gortsos, member of the Athens Bar Association, is since July 2000 the Secretary General of the Hellenic Bank Association.

* The author wishes to thank Christina Livada, Phoebus Athanassiou, Vassilis Panagiotidis, Nikos Maragopoulos, Dimitris Vovolinis and Gerry Kounadis for useful comments and suggestions. Any errors or omissions are his sole responsibility.

TABLE OF CONTENTS

Abbreviations ……………………………………………………………………………8

1. General overview ……………………………………………………………………9

1.1 The SSM Regulation ………………………………………………………………....9

1.2 Specific supervisory tasks in relation to credit institutions and other supervised entities incorporated in participating Member States …………………………………..10

1.3 Specific supervisory tasks concerning branches in participating Member States by credit institutions incorporated in non-participating Member States………………..13

2. The specific macro-prudential tasks under Article 5 of the SSM Regulation …..14

2.1 The framework…………………………………………………………………....14

2.2 Use of macro-prudential tools by national authorities ……………………………...18

2.3 Use of macro-prudential tools by the ECB……………………………………………20

2.4 Adoption of Decisions for the purpose of carrying out the tasks referred to in article 5……………………………………………………………………………..21

Secondary sources ……………………………………………………………………..23

Abbreviations

BRRD:	Bank Recovery and Resolution Directive
CRD IV:	Capital Requirements Directive
CRR:	Capital Requirements Regulation
EBA:	European Banking Authority
ECB:	European Central Bank
ESCB:	European System of Central Banks
ESFS:	European System of Financial Supervision
ESRB:	European Systemic Risk Board
EU:	European Union
FSB:	Financial Stability Board
G-SIIs:	Global Systemically Important Institutions
NCA:	National Competent Authority
O-SIIs:	Other Systemically Important Institutions
SIFIs:	Systemically Important Financial Institutions
SSM:	Single Supervisory Mechanism
TFEU:	Treaty on the Functioning of the European Union

1. General overview

1.1 The SSM Regulation

(a) The **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" (hereinafter the **'SSM Regulation'**)[1] is the main legal source of the Single Supervisory Mechanism (hereinafter the **'SSM'**). It was adopted by the ECOFIN Council in October 2013 within 14 months from the submission of the European Commission's proposal. The adoption of this Regulation is a major leap towards the creation of the European Banking Union (hereinafter the **'EBU'**).[2]

On the basis of **Article 6** of the SSM Regulation, the ECB adopted on 16 April 2014 **Regulation (EU) No 468/2014** "establishing the framework for cooperation within the SSM between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation)" **(ECB/2014/17)**[3] (hereinafter the **'ECB Framework Regulation'**). Its subject matter and purpose is to lay down rules on several aspects, including a framework to organise the practical arrangements concerning cooperation within the SSM.

(b) Within this context and according to **Article 1, first sub-paragraph**, the SSM Regulation confers on the ECB specific tasks *"concerning policies relating to the prudential supervision of credit institutions"* (a phrase taken over *verbatim* from **Article 127, paragraph 6 TFEU**):[4]

- with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the EU and each Member State, which is the objective of the ECB under the SSM Regulation, and
- with a view to preventing regulatory arbitrage, fully taking into account and caring for the unity and integrity of the internal market (a duty with which it was assigned) based on equal treatment of credit institutions.

In this respect, **recitals 30 and 18** of the SSM Regulation provide the following:

"The ECB should carry out the tasks conferred on it with a view to ensuring the safety and soundness of credit institutions and the stability of the financial system of the Union as well as of individual participating Member States and the unity and integrity of the internal market, thereby ensuring also the protection of depositors and improving the functioning of the internal market, in accordance with the single rulebook for financial services in the Union. In particular the ECB should duly take into account the principles of equality and non-discrimination."

"The exercise of the ECB's tasks should contribute in particular to ensure that credit institutions fully internalise all costs caused by their activities so as to avoid moral hazard and the excessive risk taking arising from it. It should take full account of the relevant macroeconomic conditions in Member States, in particular the stability of the supply of credit and facilitation of productive activities for the economy at large."

[1] OJ L 287, 29.10.2013, pp. 63-89.

[2] On the other legal acts which constitute the sources of the EBU, see **Gortsos (2014)**, pp. 4-28.

[3] OJ L 141, 14.5.2014, pp. 1-50.

[4] For a consolidated version of the Treaty on the Functioning of the European Union (TFEU), see OJ C 326, 26.10.2012, pp 47-390.

(c) Obviously, this ECB objective is different from the primary objective of the European System of Central Banks ('ESCB') under the TFEU, i.e. maintaining price stability (**TFEU, Article 127, paragraph 1, first sentence**, *inter alia*).[5] The eventuality of conflicts of interest arising from concurrently pursuing these two objectives was the reason behind the introduction of 'Chinese walls' separating the monetary and supervisory functions of the ECB under **Article 25** of the SSM Regulation.

(d) The new EU institutional architecture for banking prudential supervision within the context of the EBU is based on four (4) main elements:

- conferring specific tasks *on the ECB* for the micro-prudential supervision of certain types of financial firms, in transfer from national competent (supervisory) authorities, *and* establishing a 'Single Supervisory Mechanism' in relation to the *exercise* of the specific tasks conferred on the ECB,

- specifying the financial firms, mainly credit institutions, with regard to which these specific tasks should be conferred on the ECB,

- incorporating the Single Supervisory Mechanism in the European System of Financial Supervision, without, in principle, touching upon the current tasks of the EBA and the other components of the ESFS, and

- creating 'Chinese walls' within the ECB in order to ensure the effective separation of its monetary policy and other tasks from its (new) supervisory tasks.[6]

1.2 Specific supervisory tasks in relation to credit institutions and other supervised entities incorporated in participating Member States

(a) The SSM Regulation confers on the ECB an extensive range of 'specific tasks' in relation to credit institutions and other supervised entities incorporated in participating Member States,[7] covering principal areas of micro-prudential supervision.

---

[5] On Article 127, paragraph 1 (*ex* Article 105, paragraph 1 TEC), see indicatively **Smits (1997)**, pp. 184-187, and **Louis (2009)**, pp. 150-151.

It is worth mentioning that reference to this primary objective is also made in other seven (7) provisions of the EU Treaties:

- in **Article 3, paragraph 3 TEU**, as well as

- in **Articles 119, paragraphs 2 and 3, 219, paragraphs 1 (twice) and 2**, and **282, paragraph 2 TFEU**.

[6] For a detailed presentation of the SSM Regulation, see **Binder (2013)**, **Ferrarini and Chiarella (2013)**, **Verhelst (2013)**, **Brescia Morra (2014)**, **Dietz (2014)**, **Masciandaro and Nieto (2014)**, **Wymeersch (2014)**, and **Gortsos (2015)**.

[7] 'Participating Member States' are defined (**SSM Regulation, Article 2, point (1)**) as meaning both:

- the Member States whose currency is the euro (in the ECB Framework Regulation also called 'euro area participating Member States'), *and*

- the Member States with a derogation which have established a close cooperation in accordance with **Article 7** of the SSM Regulation (in the **ECB Framework Regulation (Article 2, point (15)**) defined as 'participating Member States in close cooperation'), also referred to as 'non-euro area participating Member States'.

According to **recital 15**:

"Specific supervisory tasks which are crucial to ensure a coherent and effective implementation of the Union's policy relating to the prudential supervision of credit institutions should be conferred on the ECB, while other tasks should remain with national authorities. The ECB's tasks should include measures taken in pursuance of macroprudential stability, subject to specific arrangements reflecting the role of national authorities."

Particularly, the ECB is assigned tasks in relation to such supervised entities in accordance with the provisions of the following legal acts of the European Parliament and of the Council:

- Regulation (EU) No 575/2013 ('CRR'),[8]
- Directive 2013/36/EU ('CRD IV'),[9] and
- Directive 2014/59/EU ('BRRD')[10] and, more specifically, its provisions on recovery planning and early intervention measures (**Articles 5-9** and **27-30**, respectively).[11]

(b) With regard to this conferral of specific tasks upon the ECB, the SSM Regulation sets out the following general principles:

(i) When carrying out its tasks under the SSM Regulation, and without prejudice to the objective of ensuring the safety and soundness of credit institutions, the ECB must have full regard to:

- the different types, business models and sizes of credit institutions, as well as
- the systemic benefits of diversity in the banking industry of the EU.[12]

(ii) No action, proposal or policy of the ECB should, directly or indirectly, discriminate against any Member State or group of Member States as a venue for the provision of banking or financial services in any currency.[13]

'Non-participating Member States' are those which do not meet the above criteria ('non-euro area Member States' in the terminology of the **ECB Framework Regulation (Article 2, point (13)**).

[8] **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, pp. 1-337).

[9] **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, pp. 338-436).

[10] **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 (...)" (OJ L 173, 12.6.2014, pp. 190-348).

[11] These provisions constitute altogether the so-called 'crisis prevention' part of the BRRD.

[12] **SSM Regulation**, Article 1, third sub-paragraph, and **recital 17**. On the various banks' business models in the current EU financial system, see the study of **Ayadi, Arbak and de Groen (2012)**.

[13] *Ibid.*, Article 1, fourth sub-paragraph.

(iii) The provisions of the SSM Regulation are without prejudice to the responsibilities and related powers of the national competent authorities of participating Member States to carry out supervisory tasks not conferred on the ECB.[14] In this context, **recital 28** provides that supervisory tasks not conferred on the ECB remain with the national competent authorities. Those tasks include indicatively the power:

- to receive notifications from credit institutions in relation to the right of establishment and the freedom to provide services,
- to supervise bodies not covered by the definition of credit institutions under EU law but supervised as credit institutions under national law,
- to supervise credit institutions from third (non-EU) countries having established branches or providing cross-border services in the EU,
- to supervise payments services,[15]
- to carry out day-to-day verifications of credit institutions,
- to carry out, where applicable, depending on the national law of each Member State, the function of a competent authority over credit institutions in relation to:
  - ➢ markets in financial instruments,
  - ➢ the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and
  - ➢ consumer protection.

With regard to the last two aspects, however, ***recital 29*** *provides that the ECB must fully cooperate, as appropriate, with the national authorities which are competent to ensure a high level of consumer protection and combat money laundering.*

(d) Article 6 of the SSM Regulation established a 'two-tier system' with regard to the distribution of powers within the SSM, distinguishing between 'significant' and 'less significant' credit institutions, financial holding companies or mixed financial holding companies. The provisions of Article 6 of the SSM Regulation are further specified in the detailed provisions of **Articles 39-72** of the ECB Framework Regulation (Part IV).[16]

---

[14] *Ibid*., Article 1, fifth sub-paragraph.

[15] This does not appear to sit comfortably with one of the basic Eurosystem tasks under **Article 127(2), fourth indent, TFEU** and **Article 3.1, last indent of the Statute of the ESCB and of the ECB** namely, *"to promote the smooth operation of payment systems"*, in connection with which **Article 22 of the Statute**:

- gives to the ECB and the national central banks the competence to provide facilities, and
- grants to the ECB the power to make regulations *"to ensure efficient and sound clearing and payments systems with the Union and with other countries"*.

Thus, the SSM Regulation does not reflect the Eurosystem's responsibilities in the field of payment systems (which, admittedly, are not exclusive).

[16] See on this **Wymeersch (2014)**, pp. 28-32, and more analytically **Gortsos (2015)**, Section C, under 3.3.

(e) The specific tasks conferred on the ECB with regard to credit institutions and other supervised entities established in participating Member States are laid down in the following Article of the SSM Regulation:

- in **Article 4**, **paragraph 1**,[17] and
- in **Article 5** (see below, under 2).[18]

1.3 Specific supervisory tasks concerning branches in participating Member States by credit institutions incorporated in non-participating Member States

As regards credit institutions incorporated (and hence authorised) in non-participating Member States, which have established branches or provide cross-border services (without establishment) in a participating Member State in accordance with the provisions of **Articles 35-39 of the CRD IV**, the ECB must carry out the specific tasks conferred on it, if the national authorities are competent as *host Member State supervisors* in accordance with **Articles 40-46 of the CRD IV**.[19]

> The term 'host Member State' is defined in **point (44) of Article 4, paragraph 1 of the CRR** as meaning the Member State in which an institution has a branch or in which it provides services.

In this respect, the ECB Framework Regulation lays down the following clarifying rules:

(a) With regard to branches, **Article 14** makes the following distinction:

(i) The ECB exercises the powers of the competent authority of the host Member State only if a branch is *significant*.

(ii) If the branch is *less significant*, these powers are exercised by the national competent authority of the participating Member State where the branch is established.

(b) On the other hand, **Article 16** provides that the ECB must carry out the tasks of the competent authority of the host Member State in respect of *all credit institutions* incorporated in non-participating Member States, which exercise the freedom to provide services in participating Member States. If there are certain conditions under the national law of participating Member States in order for the freedom to provide services to be justified by the general good, national competent authorities must inform the ECB of these conditions.

The ECB Framework Regulation contains also specific procedural provisions on:

- the notification of the exercise of the right of establishment within the SSM by credit institutions established in non-participating Member States **(Article 13)**, and
- the notification of the exercise of the freedom to provide services within the SSM by such credit institutions **(Article 15)**.

[17] For an overview, see **Wymeersch (2014)**, pp. 37-39, and more analytically **Gortsos (2015)**, Section D, under 1.2.

[18] The scope of the tasks finally adopted is narrower than under the European Commission's initial proposal in September 2012.

[19] **SSM Regulation**, Article 4, paragraph 2.

2. The specific macro-prudential tasks under Article 5 of the SSM Regulation[20]

2.1 The framework

2.1.1 Macro-prudential policies in a nutshell[21]

(I) Content

The term 'financial macro-prudential policies' encompasses the set of (mainly preventive) policies adopted and implemented to limit the financial system's exposure to 'systemic risk' arising from factors not associated with individual financial firms or individual markets and structures of the financial system, but of a more general nature.[22] Macro-prudential policies seek to address the following two dimensions of systemic risk:[23]

(a) The first is the 'time dimension', namely the systemic risk's evolution through time. In this context, macro-prudential policies seek to strengthen the resilience of the financial system at times of economic downturn by limiting procyclicality, which can accentuate systemic risk because of the interactions developed either within the financial system or between the financial system and the real sector of the economy.[24]

The objective is to 'lean against the financial cycle',[25] bearing in mind that it has been proven historically that failures caused by credit expansion are generated on the upside of the economic cycle, but become apparent when the economic cycle is in a downturn.

(b) The second dimension is the 'cross-sectional dimension', namely allocation of risk in the financial system at any given point in time. In this case, macro-prudential policies are aimed at limiting systemic risk concentration, which could result from:

- either the concurrent exposure of multiple financial institutions to risks arising from similar exposures, or
- the interconnectedness of such institutions (and the contagion of problems among them), especially if they are systemically important financial institutions ('SIFIs').[26]

---

[20] This part of the paper is based on **Gortsos (2015)**, Section D, under 1.3.

[21] On this issue, which came to the forefront particularly in the wake of the recent (2007-2009) international financial crisis, see **Committee on the Global Financial System (2010)**, **Financial Stability Board, International Monetary Fund and Bank for International Settlements (2011)**, **Galati and Moessner (2011)**, section 5.1. and **Gortsos (2012)**, pp. 94-98.

[22] See **Financial Stability Board, International Monetary Fund and Bank for International Settlements (2011)**, section 2.

[23] See **Committee on the Global Financial System (2010)**, Annex 1, section 2, and **Financial Stability Board, International Monetary Fund and Bank for International Settlements (2011)**, section 2.

[24] For a detailed overview of contagion channels between the financial system and the real sector of the economy, see, in the secondary sources, **Basel Committee on Banking Supervision (2011)**, and **Galati and Moessner (2011)**, section 5.2.

[25] See **Committee on the Global Financial System (2010)**, section 2.1.

[26] Regarding the delineation of the definition of SIFIs, see **Huertas and Lastra (2011)**, pp. 255-258 (who use the term 'systemically significant financial institutions' or 'SSFIs'), and **Hofer (2014)**.

(II) Policy instruments

A mix of instruments are necessary in order to meet the objective of addressing these two (2) dimensions of systemic risk:

- macro-prudential oversight (under (a)), and
- macro-prudential regulations.

(a) First of all, institutions and procedures should be set up to ensure macro-prudential financial oversight, thus enabling the identification, measurement and assessment of systemic risk.[27] Macro-prudential oversight of the financial system by central banks is gradually becoming a common instrument for achieving financial stability. The objective of macro-prudential oversight is to limit the distress of the financial system as a whole in order to protect the overall economy against significant losses in real output.

*At EU level, the **European Systemic Risk Board** was created to this effect and entered into operation on 1 January 2011 according to **Regulation (EU) No 1092/2010** of the European Parliament and of the Council,[28] while specific tasks have been conferred on the ECB by virtue of **Council Regulation (EU) No 1096/2010**.[29]*

***Hence, the SSM Regulation is not dealing with this aspect** (see also below **Table 2**).*

(b) Moreover, it is necessary to adopt macro-prudential regulations, which:

- are addressed to credit institutions and/or other financial firms, as well as money and capital markets, and
- are differentiated depending on the systemic risk dimension they are called upon to address.[30]

In particular, the policy instruments used in order to achieve the objective of addressing the systemic risk's time dimension, and notably the financial system's procyclicality issue, mainly include the following macro-prudential regulations:

(i) First of all, it is necessary to adopt rules imposing an obligation on banks to set various capital buffers and forward-looking provisions.[31]

*The first sub-category of these macro-prudential regulations (capital buffers) is the subject matter of **Article 5** of the SSM Regulation, as further specified in **Articles 101-105** of the ECB Framework Regulation (Part VIII).*

(ii) The second, ancillary measure, concerns the development of appropriate micro-prudential regulations, such as requiring banks to maintain leverage and liquidity ratios, thus making it possible to address the systemic risk's time dimension.

---

[27] See **Financial Stability Board, International Monetary Fund and Bank for International Settlements (2011)**, section 3.

[28] OJ L 331, 15.12.2010, pp. 1-11.

[29] OJ L 331, 15.12.2010, pp. 162-164.

[30] See **Committee on the Global Financial System (2010)**, section 3, and **Galati and Moessner (2011)**, section 4. For an overall review of how these measures were adopted, both at a national and international level, see **Financial Stability Board, International Monetary Fund and Bank for International Settlements (2011)**, pp. 5-9.

[31] See **Brunnermeier, Crockett, Goodhart, Persaud, and Shin (2009)**, chapter 4.

2.1.2 Definition of macro-prudential tools

Article 101 (paragraph 1) of the ECB Framework Regulation defines, for the purpose of the application of **Article 5** of the SSM Regulation, the term macro-prudential tools as meaning any of the following:

(a) The **capital buffers** within the meaning of **Articles 130-142 of the CRD IV**, and in particular:

(i) An **'institution-specific countercyclical capital buffer'**, meaning the own funds that an institution is required to maintain in accordance with Article 130.

(ii) A **'G-SII buffer'**, meaning the own funds that are required to be maintained in accordance with Article 131, paragraph 4. The identification methodology for global systemically important institutions (G-SIIs) is based on the factors listed in paragraph 2 of Article 131.

(iii) An **'O-SII buffer'**, meaning the own funds that may be required to be maintained in accordance with Article 131, paragraph 5. The systemic importance of other systemically important institutions (O-SIIs) is assessed on the basis of at least any of the factors listed in paragraph 3 of Article 131.

(iv) A **'systemic risk buffer'**, meaning the own funds that an institution is or may be required to maintain in accordance with Article 133.

(v) A **'combined buffer requirement'**, meaning the total Common Equity Tier 1 capital required to meet the requirement for the capital conservation buffer extended, as applicable, by any of the above buffers.[32]

(vi) **'Capital conservation buffers'**, meaning the own funds that an institution is required to maintain in accordance with Article 129, are excluded.

[32] **CRD IV**, Article 128.

TABLE 1 Capital buffers under the CRD IV					
	Capital conservation buffer	**Institution-specific countercyclical capital buffer**	**Global systemically important institutions buffer**	**Other systemically important institutions buffer**	**Systemic risk buffer**
Scope of application	On all institutions On an individual and consolidated basis	On all institutions On an individual and consolidated basis	On G-SIIs On a consolidated basis	On O-SIIs On an individual, sub-consolidated or consolidated basis	On all or a subset of institutions On an individual, sub-consolidated or consolidated basis
Size	2,5% CET1	0-2,5% CET1	1-2,5% CET1	0-2% CET1	2014 (1-3%) 2015 (1-5%, under conditions above 5%)
Timeline	2016-2019 (0,625-2,5%)	2016-2019 (0,625-2,5%)	2016	2016	
	NCAs may adopt shorter transitional period and implement these buffers as of 01/01/2014 [CRD IV 160(6)]				

(b) The measures for domestically authorised credit institutions, or a subset thereof, according to **Article 458 of the CRR**.

(1) Under this Article, if a national designated or competent authority identifies changes in the intensity of macro-prudential or systemic risk in the financial system with the potential to have serious negative effects on the financial system and the real economy, which that authority considers would be better addressed by means of stricter national measures, it must:

- notify accordingly the European Parliament, the Council, the European Commission, the ESRB and the EBA, and
- submit relevant quantitative or qualitative evidence of the factors listed in **paragraph 2**, including draft national measures for domestically authorised institutions, or a subset thereof, intended to mitigate changes in the intensity of risk.

Paragraph 4 of this Article provides that the Council is empowered to adopt an implementing act (under Article 291 TFEU) to reject such draft national measures.[33]

(2) In terms of definitions:

(a) In **point (30) of Article 3, paragraph 1 of the CRD IV** the term 'systemically important institution' is defined as meaning an EU parent institution, an EU parent financial holding company, an EU parent mixed financial holding company or an institution the failure or malfunction of which could lead to systemic risk.

(b) In **point (8) of Article 128 of the CRD IV** the term 'domestically authorised institution' is defined as meaning an institution that has been authorised in the Member State for which a particular designated authority is responsible for setting the countercyclical buffer rate.

(c) Any other measures adopted by national competent or designated authorities aimed at addressing systemic or macro-prudential risks provided for, and subject to the procedures set out, in the CRR and the CRD IV in the cases specifically set out therein, such as:

- higher real estate risk weights and stricter lending criteria,[34] and
- higher minimum exposure-weighted average loss given defaults.[35]

2.1.3 General clause

According to the ECB Framework Regulation,[36] the macro-prudential procedures referred to in **Article 5, paragraphs 1 and 2** of the SSM Regulation do not constitute ECB or national competent authorities' 'supervisory procedures' within the meaning of the ECB Framework Regulation.[37] Accordingly, **Articles 25-32** of the ECB Framework Regulation do not apply to them. This is without prejudice to **Article 22** of the SSM Regulation on the due process for adopting supervisory decisions addressed to individual supervised entities.

2.2 Use of macro-prudential tools by national authorities

2.2.1 Substantive provisions

(a) The national competent or designated authorities of participating Member States must apply requirements for capital buffers to be held by credit institutions, at the relevant level, according to the provisions of relevant European banking law, in addition to the own funds requirements referred to in **Article 4 (paragraph 1, point (d))**. This applies whenever appropriate or deemed required and without prejudice to **paragraph 2 of Article 5**,[38] and includes:

---

[33] From an institutional point of view, it is worth pointing out that this is a rare case where implementing acts are adopted by the Council rather than the Commission.

[34] **CRR**, Article 124.

[35] *Ibid.*, Article 164.

[36] **ECB Framework Regulation**, Article 101, paragraph 2.

[37] *Ibid.*, Articles 25-32.

[38] See just below, under 2.3.

- countercyclical buffer rates, and
- any other measures aimed at addressing systemic or macro-prudential risks provided for, and subject to the procedures set out **in the CRR and in the CRD IV** in the cases specifically set out therein.[39]

(b) In addition, the national competent or 'designated authorities' of participating Member States retain their power to apply macro-prudential tools not provided for in relevant acts of European banking law (in particular in the **CRR** and the **CRD IV**), such as:

- loan-to-value ratios,
- loan-to-income ratios,
- debt-service-to-income ratios, and
- loan-to-deposits limits.[40]

The ECB is not allowed to apply such measures.

As 'national designated authorities' are defined in the SSM Regulation those within the meaning of European banking law (**Article 2, point (7)**). In particular:

(1) According to **Article 458 of the CRR** on macro-prudential or systemic risk identified at the level of a Member State, Member States must designate the authority in charge of the application of this Article. This authority is the competent or the designated authority.

(2) In **point (8) of Article 128 of the CRD IV** on the definition of buffers, a 'domestically authorised institution' is defined as meaning an institution that has been authorised in the Member State for which a particular 'designated authority' is responsible for setting the countercyclical buffer rate.

2.2.2 Procedural provisions

(a) Article 5 (paragraph 1, second to fourth sentences) of the SSM Regulation and **Article 104** of the ECB Framework Regulation lay down, in this respect, the following procedural conditions:

(i) Ten (10) working days prior to taking such a Decision, the concerned authority must duly notify the ECB.

In this respect, **recital 24, first and second sentences**, of the SSM Regulation states the following:

"Additional capital buffers, including a capital conservation buffer, a countercyclical capital buffer to ensure that credit institutions accumulate, during periods of economic growth, a sufficient capital base to absorb losses in stressed periods, global and other systemic institution buffers, and other measures aimed at addressing systemic or macroprudential risk, are key prudential tools. In order to ensure full coordination, where national competent authorities or national designated authorities impose such measures, the ECB should be duly notified.

[39] **SSM Regulation**, Article 5, paragraph 1, first sentence.

[40] *Ibid*., Article 1, sixth sub-paragraph.

(ii) This notwithstanding, if a national competent or designated authority intends to make use of a macro-prudential tool, it must inform the ECB, as early as possible, of its identification:

- of a macro-prudential or systemic risk for the financial system, and
- where possible, of the details of the intended tool.

(iii) If the ECB objects to the intended measure of a national competent or designated authority, it must state its reasons for doing so in writing within five (5) working days after the day of receipt of the notification of intent. The national competent or designated authority must duly consider the ECB's reasons prior to proceeding with the Decision as appropriate.

(b) In addition, the ECB is required to collect from national competent or designated authorities information regarding:

- the identity of the authorities designated for the macro-prudential tools referred to in **Article 101** of the ECB Framework Regulation, and
- the macro-prudential tools that these authorities can use.[41]

2.3 Use of macro-prudential tools by the ECB

2.3.1 Substantive provisions

(a) With regard to the use of macro-prudential tools by the ECB itself, **recital 24, third to fifth sentences** of the SSM Regulation states the following:

> *"(...) Where necessary the ECB should be able to apply higher requirements and more stringent measures, subject to close coordination with national authorities. The provisions in this Regulation on measures aimed at addressing systemic or macroprudential risk are without prejudice to any coordination procedures provided for in other acts of Union law. National competent authorities or national designated authorities and the ECB must act in respect of any coordination procedure provided for in such acts after having followed the procedures provided for in this Regulation."*

Based on this consideration, **Article 5** of the SSM Regulation lays down the following:

(i) Instead of the national competent or designated authority of the participating Member State, the ECB may, if deemed necessary, apply:

- higher requirements for capital buffers than those applied by the national authorities to be held by supervised entities at the relevant level in accordance with European banking law, in addition to own funds requirements referred to in **Article 4 (paragraph 1, point d),** including countercyclical buffer rates, subject to the conditions set out in **paragraphs 4 and 5** of Article 5, and
- more stringent measures aimed at addressing systemic or macro-prudential risks at the level of supervised entities, subject to the procedures set out in **the CRR and the CRD IV** in the cases specifically set out therein.[42]

(ii) Any national competent or designated authority may also propose to the ECB to use macro-prudential tools, in order to address the specific situation of the financial system and the economy in its Member State.[43]

---

[41] **ECB Framework Regulation**, Article 103.

[42] **SSM Regulation**, Article 5, paragraph 2.

(iii) When carrying out these tasks, the ECB must take into account the specific situation of the financial system, the economic situation and the economic cycle in individual Member States or parts thereof.[44]

(b) According to **Article 102** of the ECB Framework Regulation, the ECB is required to apply the macro-prudential tools:

- in accordance with that Regulation and with **Articles 5 (paragraph 2)** and **9 (paragraph 2)** of the SSM Regulation, and
- where the macro-prudential tools are provided for in a Directive, subject to implementation of that Directive into national law.

If a national designated authority has not set a buffer rate, this does not prevent the ECB from setting a buffer requirement in accordance with the ECB Framework Regulation and **Article 5, paragraph 2** of the SSM Regulation.

2.3.2 Procedural provisions

Article 5, paragraph 4 of the SSM Regulation and **Article 105** of the ECB Framework Regulation lay down in this respect procedural conditions, which, *mutatis mutandis*, are similar to those applying when national authorities make use of macro-prudential tools.[45]

2.4 Adoption of Decisions for the purpose of carrying out the tasks referred to in Article 5

Article 13h of the Rules of Procedure of the ECB lays down the following rules on the decision adoption procedure for the purpose of carrying out the tasks referred to in **Article 5** of the SSM Regulation (paragraphs 1-3, respectively):

(a) If a national competent or designated authority notifies the ECB of its intention to apply requirements for capital buffers or any other measure aimed at addressing systemic or macro-prudential risks, the notification, upon receipt by the Secretary of the Supervisory Board, must be transmitted to the Governing Council and the Supervisory Board without delay. Upon a proposal of the Supervisory Board (in all cases based on the initiative and taking into account the input of the relevant committee and of the relevant internal structure), the Governing Council must decide about the matter within three (3) working days.

If the Governing Council objects to the notified measure, it must explain its reasons in writing to the national competent or designated authority concerned within five (5) working days of the notification to the ECB.

(b) If the Governing Council, upon a Supervisory Board proposal, intends to apply higher requirements for capital buffers or more stringent measures aimed at addressing systemic or macro-prudential risks, it must notify its intention to the concerned national competent or designated authority at least ten (10) working days prior to taking such a Decision. If the national competent or designated authority concerned notifies the ECB in writing of its reasoned objection within five (5) working days of the receipt of the notification, this objection must be transmitted to the Governing Council and the Supervisory Board without delay.

---

[43] *Ibid*., Article 5, paragraph 3.

[44] *Ibid*., Article 5, paragraph 5.

[45] See just above, under 2.2.2.

The Governing Council must decide on the matter on the basis of the Supervisory Board's proposal. The Decision must be transmitted to the national competent or designated authority concerned.

(c) The Governing Council has the right to:

- endorse, object to or amend the proposal of the Supervisory Board, or
- request the Supervisory Board to submit such a proposal or to undertake a specific analysis thereof.

If the Supervisory Board submits no proposal addressing such requests, the Governing Council, taking into account the input of the relevant committee and of the relevant internal structure, may take a Decision in the absence of a proposal.

TABLE 2

A comparison: ECB (as a supervisory authority), EBA and ESRB

	ECB	**EBA**	**ESRB**
Objective	contribution to the safety and soundness of credit institutions and the stability of the financial system within the EU and each Member State (SSM Regulation, Article 1)	protection of the public interest by contributing to the stability of the financial system, for the EU economy, its citizens and businesses (EBA Regulation, Article 1, paragraph 5)	contribution to the prevention/mitigation of systemic risks to financial stability in the EU arising from developments within the financial system (ESRB Regulation, Article 3, paragraph 1)
Tasks	micro-prudential supervision of credit institutions (SSM Regulation, Articles 4 and 5)	various (EBA Regulation, Articles 8-9), but *not a supervisory authority*	macro-prudential oversight of the financial system (ESRB Regulation, Article 3, paragraph 1)

Secondary sources

Ayadi, R., Arbak, E. and W. De Groen (2012): *Regulation of European banks and business models: towards a new paradigm?*, Centre for European Policy Studies, Brussels

Basel Committee on Banking Supervision (2011): *The transmission channels between the financial and real sectors: a critical survey of the literature*, Working Paper No. 18, February

Binder, J.-H. (2013): Auf dem Weg zu einer europäischen Bankenunion? Erreichtes, Unerreichtes, offene Fragen, *Zeitschrift für Bankrecht and Bankwirtschaft*, 25. Jahrgang, Heft 5, S. 297-372

Brescia Morra, C. (2014): *From the Single Supervisory Mechanism to the Banking Union. The role of the ECB and the EBA*, Working paper No 2, Luiss Guido Carli School of European Political Economy, Luiss University Press, Italy

Brunnenmeier, M., Crockett, A., Goodhart, Ch. Persaud, A.D. and H. Shin (2009): *The Fundamental Principles of Financial Regulation*, Geneva Reports on the World Economy, no. 11, International Center for Monetary and Banking Studies (ICMB) – Centre for Economic Policy Research (CEPR)

Committee on the Global Financial System (2010): *Macroprudential Instruments and Frameworks: A Stocktaking of Issues and Experiences*, CGFS Papers, No. 38, May

Dietz, Th. (2014): *On the single supervisory mechanism*, Journal of Risk Management in Financial Institutions, Vol. 7, pp. 221-225

Financial Stability Board, International Monetary Fund and Bank for International Settlements (2011): *Macroprudential policy tools and frameworks*, February 14, available at: http://www.financialstabilityboard.org/publications/r_1103.pdf

Ferrarini, G. and L. Chiarella (2013): *Common Banking Supervision in the Eurozone: Strengths and Weaknesses*, European Corporate Governance Institute, Working Paper Series in Law No 223/2013, August

Galati, G. and R. Moessner (2011): *Macroprudential policy - a literature review*, BIS Working Papers No. 337, Monetary and Economic Department, Bank for International Settlements, February

Gortsos, Ch.V. (2015): *The legal aspects of the Single Supervisory Mechanism (SSM): the first pillar of the European Banking Union*, ECEFIL Working Papers, March (forthcoming)

Gortsos, Ch.V. (2014): *The new EU Directive (2014/49/EU) on deposit guarantee schemes: an element of the European Banking Union*, Nomiki Bibliothiki, Athens

Gortsos, Ch.V. (2012): *Fundamentals of Public International Financial Law: International Banking Law within the System of Public International Financial Law*, Schriften des Europa-Instituts der Universitäts des Saarlandes - Rechtswissenschaft, Nomos Verlag, Baden-Baden

Hofer, U. (2014): *Too Big to Fail and Structural Reforms: A comparative look at structural banking reforms in Switzerland and the UK and the underlying legal and economic background*, Schulthess Juristische Medien AG, Zürich

Huertas, T.F. and R.M. Lastra (2011): The perimeter issue: to what extent should *lex specialis* be extended to systemically significant financial institutions? An exit strategy from too big to fail, in Lastra, R.M. (2011, editor): *Cross-Border Bank Insolvency*, Ofxord University Press, Oxford – New York, pp. 250-280

Louis, J.-V. (2009): *L'Union européenne et sa monnaie*, in Commentaire J. Megret, 3e édition, Institut d' Etudes Européennes, Editions de l' Université de Bruxelles, Bruxelles

Masciandaro, D. and M. Nieto (2014): *Governance of the Single Supervisory Mechanism: Some Reflections*, BAFFI Center on International Markets, Money and Regulation Research Paper Series No. 2014-149, Bocconi University, Italy

Smits, R. (1997): *The European Central Bank - Institutional Aspects*, Kluwer Law International, The Hague

Verhelst, S. (2013): *Assessing the Single Supervisory Mechanism: Passing the point of no return for Europe's Banking Union*, Egmont Paper 58, Academia Press for Egmont – The Royal Institute for International Relations, Brussels

Wymeersch, Ed. (2014): *The single supervisory mechanism or "SSM", part one of the Banking Union,* Working Paper Research No 255, National Bank of Belgium, Brussels

ECEFIL

European Center of Economic and Financial Law

ΕΥΡΩΠΑΪΚΟ ΚΕΝΤΡΟ ΟΙΚΟΝΟΜΙΚΟΥ ΚΑΙ ΧΡΗΜΑΤΟΟΙΚΟΝΟΜΙΚΟΥ ΔΙΚΑΙΟΥ