Single Supervisory Mechanism

A Practitioner's Guide

Bearbeitet von
Dr. Klaus Lackhoff

1. Auflage 2017. Buch. XV, 264 S. In Leinen
ISBN 978 3 406 68033 5
Format (B x L): 16,0 x 24,0 cm

are, therefore, neither on a consolidated basis nor on a stand-alone basis supervised by the ECB.[598] A stand-alone bank that carries out for **example** only consumer finance and does not accept repayable funds from the public is, therefore, not supervised by the ECB even if it would be significant.

Financial Holdings and Mixed Financial Holdings[599] can be subject to direct ECB supervision as far as a prudential supervision in particular in line with Articles 119 et seq. CRD IV is established. **601**

Branches established within a participating Member State by a credit institution established in a non-participating Member State can be subject to supervision by the ECB if they are significant. With a view to the rather limited prudential supervisory powers of the host supervisor[600] it can be questioned whether the ECB should supervise these branches. This makes only sense if the ECB uses thoroughly its investigative powers with regard to such branches. Branches and cross-border services by credit institutions from a Member State of the European Economic Area (**EEA**) have to be treated like branches and cross-border services from non-participating Member States. **602**

Branches established in participating Member States by credit institutions from third countries (like Switzerland or the US; **Third Country Branches**) are not subject to supervision by the ECB but remain subject to supervision by national competent authorities.[601] To limit this exception only to the taking up of the activities (i. e. authorisation) but not to their on-going supervision would not be possible as the underlying reason is that Member States should be free in determining whether and how such third country branches are supervised. **603**

2. Established in a participating Member State

In order to be subject to the ECB's supervision a supervised entity must be established in a participating Member State. **Participating Member States** are (i) the **Euro area Member States** and (ii) any other EU Member State, if any, which entered into a close corporation pursuant to Article 7 SSMR (**other participating Member States**). **604**

However, a significant difference between the supervision of credit institutions established in Euro area Member States and credit institutions established in other participating Member States exists. The ECB cannot issue legal acts with a direct effect on significant credit institutions established in other participating Member States, Article 7 (1), (2) and (4) SSMR. In the case of a close cooperation, the binding effect of legal acts of the ECB for credit institutions in other participating Member States can only be achieved by the national competent authorities issuing binding decisions to the relevant significant credit institution upon specific instruction by the ECB. In case of legislative acts of the ECB the relevant Member State has to ensure that equivalent provisions are binding for the credit institutions established in a participating non-Euro area Member State. **605**

---

[598] This can result in confusion as for example the term credit institution (*Kreditinstitut*) is used in Germany in a broader sense. Credit institutions as defined by the SSMR are *Einlagenkreditinstitute* (depositing credit institutions) in the meaning of the former German Banking Act (KWG) and *CRR-Institute* in the meaning of the current KWG after implementation of the CRD IV package.

[599] Article 4 (1) No. 20 and 21 CRR.

[600] In particular since the home supervisor is also competent for the liquidity supervision, Article 412 et seq., Article 460 CRR.

[601] Recital 28 and Article 6 (4) SSMR.

3. Significance is determined for a group at the highest level of consolidation based on the prudential perimeter of consolidation

606 **a) Determination on individual basis.** If a credit institution (i) does not belong to a group or (ii) if it belongs to a group but the prudential perimeter of consolidation does not include any other entity, than its significance is determined on an **individual basis**. This means that in such a situation the (i) size criterion, (ii) the relevance for the economy criterion, (iii) the cross-border activities criterion and (iv) the one of the three most significant credit institutions criterion is determined on individual basis. The prudential perimeter of consolidation includes based on Article 18 CRR credit institutions, financial holding companies, mixed financial holding companies, investment firms, financial institutions and ancillary service undertakings.

607 Assume that a French manufacturer M has as Cypriot subsidiary (S) which is a credit institution and holds the shares of a small manufacturer (m1) in Asia. In this case the above mentioned significance criteria are determined on an individual basis for S although S is part of a group whose prudential perimeter includes no undertaking except S. If S, however, in addition to m1 would have another subsidiary falling within the prudential perimeter of consolidation a supervised group would exist.

608 **b) Determination of significance at supervised group level.** If a **supervised group** does exist the determination of significance shall occur in principle[602] only on **consolidated basis, at the highest level of consolidation**, Article 6 (4) SSMR. This is important as the result of the significance assessment could be different if the significance is not only determined at the highest level of consolidation within the participating Member States.

609 Assume that a group of credit institutions consists of (i) a credit institution (A) in the participating Member State (**pMS**) a; (ii) its subsidiary B, a credit institution established in the pMS b, and (iii) B's subsidiary C in the pMS c. Assume further that the consolidated total value of assets of A is 25 billion Euro[603] and of B is 10 billion[604] and that the gross domestic product at market prices of pMS a is 1.000 billion Euro and of b is 45 billion Euro. If one looks at the highest level of consolidation neither the size nor the relevance for the economy of a pMS criterion is fulfilled. If the assessment would be carried out also at the level of parent institutions in a Member State, the relevance for the economy of a pMS criterion would be fulfilled as B exceeds this criterion for the pMS in which it is established.

610 A **supervised group** means pursuant to Article 2 (21) FR any of the following:

(a) a group whose parent undertaking is a credit institution or financial holding company that has its head office in a participating Member State;

(b) a group whose parent undertaking is a mixed financial holding company that has its head office in a participating Member State, provided that the coordinator of the financial conglomerate, within the meaning of the FICOD, is an authority competent for the supervision of credit institutions and is also the coordinator in its function as supervisor of credit institutions;

(c) supervised entities each having their head office in the same participating Member State provided that they are permanently affiliated to a central body which supervises them under the conditions laid down in Article 10 of Regulation (EU) No 575/2013 and which is established in the same participating Member State.

---

[602] The exception is the three most significant credit institutions criterion.
[603] Consolidation includes A, B, C, and D.
[604] Consolidation includes B, C, and D.

II. General concepts in connection with the determination of significance

While the first two limbs of the definition of supervised group relate to factual situations in which a group does exist, the third one (i. e. (c)) refers to an amalgamation where no group exists. It relates in particular to structures in the cooperative sector[605] where credit institutions are affiliated with a central body (which may be a credit institution but is not necessarily one) that is often owned by the affiliated credit institutions. It rightly defines such amalgamations as supervised groups as they are comparable to groups if the requirements of Article 10 CRR are fulfilled. **611**

The definition of supervised group of the FR[606] refers back to the definition of group which takes into account the definition of group in the FICOD[607] and defines **group** as a group of undertakings, of which at least one is a credit institution and which consists of a parent undertaking and its subsidiaries, or of undertakings linked to each other by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC, including any subgroup thereof. **612**

If the FR determined significance without a prudential filter based on this concept of group also small credit institutions, which are part of an industrial group would be significant because of the size of the industrial group. An example for such a case would be a car producer (A) with a consolidated balance sheet total of 100 billion Euros whose subsidiaries are (i) a number of car manufactures within the euro-area, and (ii) a credit institution (S) with a balance sheet total of 1 billion euros and head office in an Euro area Member State (iii) which itself has a subsidiary (S1) with 0.5 billion Euros balance sheet total in a third country. If the group relevant for determining the size threshold includes all the companies forming a "group" it would exceed the size threshold. If the relevant group consists only of S and S1, the supervised group, it does not. **613**

I.e., the definition of **supervised group** limits the definition of group by requiring that the parent undertaking is (i) a credit institution established in a participating member state, (ii) a financial holding company (**FHC**) established in a participating member state or (iii) a mixed financial holding company (**MFHC**) established in a participating member state but in the last case only provided that the coordinator of the financial conglomerate is an authority competent for the supervision of credit institutions and is also the coordinator in its function as supervisor of credit institutions. The latter case shall exclude the MFHC from being part of a supervised group in cases where the insurance part of the conglomerate prevails over the banking part. **614**

c) Determination of the prudential perimeter of consolidation. If a supervised group exists only the undertakings falling within the prudential perimeter of consolidation at the highest level of consolidation within the participating Member States shall be taken into account when determining the significance criteria of size, significance for the economy, cross border activities, and one of the three most significant credit institutions.[608] **615**

The **prudential perimeter of consolidation** has to be distinguished from the accounting perimeter of consolidation. The prudential perimeter of consolidation includes only specific undertakings belonging to a group.[609] Based on Article 18 CRR these are credit institutions, financial holding companies, mixed financial holding companies, invest- **616**

---

[605] E. g. in France and Finland.

[606] Article 2 (5) FR.

[607] Article 4 (12) FICOD states, group shall mean a group of undertakings, which consists of a parent undertaking, its subsidiaries and the entities in which the parent undertaking or its subsidiaries hold a participation, as well as undertakings linked to each other by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC.

[608] Article 6 (4) 2nd sub-paragraph SSMR. For the "one of the three most significant credit institutions" criterion the highest level of consolidation is capped at the level of the relevant Member State.

[609] Article 2 (5) FR.

ment firms, financial institutions and potentially ancillary service undertakings. By stipulating that the significance assessment is carried out on the basis of the prudential perimeter of consolidation, the FR is linking the determination to the reporting under Article 99 CRR.[610] In fact the assessment shall be based in the case of size on the year end consolidated/individual prudential reporting. Only if this prudential reporting is not available as fall back accounting figures based on IFRS and, if not available, national GAAP, shall be used.[611]

617 The FR further specifies that only the undertakings belonging to a supervised group which have to be **consolidated for prudential purposes** have to be taken into account.[612] This follows from Article 53 (1) FR for the size criterion. This provision determines that for the purpose of determining size, the supervised group of consolidated undertakings shall consist of the undertakings which have to be consolidated for prudential purposes in accordance with Union law. Further, Article 53 (2) FR stipulates that the supervised group of consolidated undertakings shall include subsidiaries and branches in non-participating Member States and third countries. For the relevance for the economy criterion, and the one of the three most significant credit institutions criterion the same applies since the relevant provisions (Article 56, 65 (2) FR) refer back to Article 53 FR. For the cross-border activities criterion this is not spelled out but one can assume that also for this criterion in case of a group the prudential perimeter of consolidation is relevant in order to base the criteria on a comparable basis.[613]

618 **d) Determination at highest level of consolidation within participating Member States.** The **highest level of consolidation** is only within the SSM if the (not necessarily ultimate) parent undertaking of the supervised group is established in a participating Member State. The highest level of consolidation within a member state is reached where a credit institution, FHC or MFHC is the (intermediate or ultimate) parent undertaking for at least one credit institution in a participating Member State.

619 If for **example** a credit institution (P) which is established in a non-participating Member State holds three credit institutions directly as subsidiaries (S1 to S3), no supervised group with the highest level of consolidation within the participating Member States exists.[614] In such a case S1 to S3 have to be assessed on individual basis, Article 42 FR. All three subsidiaries might on such an individual basis be less significant with regard to size. The ECB can in such a case only become the supervisor for the three subsidiaries (provided that none of the four other criteria for significance is fulfilled) if the "repair tool" of Article 6 (5) lit. b) SSMR can be applied to such a case.

620 If the credit institution P that is established in a non-participating Member State (**npMS**) owns S4, a credit institution established in a participating Member State (**pMS**), and S4 has as subsidiary a credit institution (S5) in a npMS which in turn has as subsidiary a credit institution S6 in a pMS, the highest level of consolidation within the pMS is S4 and the perimeter of consolidation covers S4, S5 and S6.

621 Assume further that in the previous example S4 holds in addition 100 % of the shares of a financial institution which is established in a npMS or third country. This financial institution would fall within the perimeter of prudential consolidation and would therefore be taken into account.[615]

---

[610] Article 51 FR.
[611] Article 51 ((2) and (4) FR.
[612] This may be relevant with a view to Article 19 CRR.
[613] For the public financial assistance criterion the same should apply.
[614] Assuming that also no horizontal group of S1 to S3 exists, Article 22 (7) Directive 2013/34/EU.
[615] Article 53 (2) FR.

Another issue is whether the above determination of highest level of consolidation should be followed also if the "relevance for the economy" criterion is applied and a financial holding company (FHC) would be placed at the highest level of consolidation. The reason is that the gross domestic product at market prices[616] in the country where the FHC is established and the gross domestic product (GDP) of the country where the credit institution is located may differ substantially. Assume for **example** that a FHC is established in Malta and has as subsidiary a credit institution located in Italy compared to the case of a FHC established in Italy owning a credit institution in Malta. In line with the wording of Article 6 (4) SSMR in both cases the highest level of consolidation should be at the FHC so that the gross domestic product at market prices of the country where the FHC is established is relevant for determining the "relevance for the economy" criterion.[617] If one would not follow this approach one has to stipulate how to determine in case of a FHC with more than one credit institution as subsidiary (sister undertakings) the country whose gross domestic product is relevant. In such a case one could apply the principles laid down in Article 113 CRD IV. **622**

e) Joint ventures. Joint ventures (JV) which are supervised entities raise specific issues with regard to significance decision. Such an joint venture may come into existence if for example a manufacturer and a bank set up a credit institution specifically focussed on the financing of the sale of goods of the manufacturer or if two credit institutions set up a joint venture to target a specific market segment. **623**

The common feature of JV is that two or more persons or entities set them up to pursue a common interest and control them jointly. Accordingly, IFRS 11[618] defines a JV as a joint arrangement whereby the parties that have **joint control** of the arrangement have rights to the net assets of the arrangement. Joint control in turn is defined as "[t]he contractually agreed sharing of control of an arrangement, which exists only when decisions about the relevant activities require the unanimous consent of the parties sharing control". The requirement for unanimous consent means that any party with joint control of the arrangement can prevent any of the other parties, or a group of parties, from making unilateral decisions about the relevant activities without its consent (IFRS11:B9g). **624**

The CRR does not include a definition of JV although Article 18 (4) CRR which provides for proportional consolidation refers to JVs when using the expression "institutions managed by an undertaking included in the consolidation together with one or more undertakings not included in the consolidation"; the term "managed together" is also not defined. **625**

A JV is from an accounting perspective not a subsidiary of any joint venture partner as they have only joint control. The question for the significance assessment and in connection with further supervisory issues (like the question whether a JV is part of the group of connected clients[619] of a joint venture partner) is whether this accounting perspective applies also in the supervisory context or whether a prudential view can be applied. The CRR[620] seems to follow at first sight the accounting view. But the **626**

---

[616] Article 56 FR.

[617] If one follows this approach, establishing a FHC can be a way to ensure supervision by the ECB or by the NCA.

[618] IFRS 11 Joint Arrangements outlines the accounting by entities that jointly control an arrangement. Joint control involves the contractually agreed sharing of control and arrangements subject to joint control are classified as either a JV (representing a share of net assets and equity accounted) or a joint operation (representing rights to assets and obligations for liabilities, accounted for accordingly).

[619] Article 4 (1) no. 39 CRR.

[620] Article 4 (1) no. 15 (parent undertaking), no. 16 (subsidiary), no. 37 (control).

Accounting Directive[621] – to which the CRR provisions refer – refers in its Article 22 (2)[622] in addition to dominant influence to control. Mentioning these two concepts next to each other makes only sense if their content is different so that control may cover **joint** control. The consequence would be that a joint venture is treated as if it is a subsidiary. In case that two credit institutions are the joint venture partners the JV would be part of both groups and taken into account in the consolidated supervision of both groups by the relevant competent authority. The JV would on a regular basis be proportionally consolidated with both joint venture partners. If one joint venture partner is a significant supervised entity, the individual supervision of the JV would have to be carried out by the ECB. If both joint venture partners are significant supervised entities, the individual supervision of the JV (which is a credit institution) should be assigned to one of the JSTs.

4. All members of a group are either significant or less significant

627 The FR ensures that all supervised entities belonging to a group are either significant or less significant credit institutions so that all supervised entities are either significant or less significant. This is achieved by Article 40 (2) FR.

628 This article determines, first, that each supervised entity forming part of a group that **at the highest level of consolidation** fulfils the (i) size criterion, (ii) the economic importance criterion, or the (iii) the cross-border activities criterion is deemed to be significant. Second, the same applies for each supervised entity forming part of a supervised group of which one entity has received direct public financial assistance. Third, if one of the supervised entities forming part of a supervised group is one of the three most significant credit institutions in a pMS the entire group is significant.

629 If for **example** the parent undertaking P is established in the pMS A and does not fulfil on a consolidated basis any significance criterion, P is nevertheless significant if its subsidiary S in the pMS B is in terms of size one of the three most significant credit institutions in B or has applied for or received public financial assistance.

5. Stability of the status as significant supervised entity – the three years rule

630 In order to avoid that the competence for the supervision of credit institution changes within a short time frame more than once the FR introduced a "stability rule" which is also referred to as the "three years rule".[623] According to this rule

1. credit institutions that are significant because of the application of (i) the size criterion, (ii) the economic importance criterion, or (iii) the cross-border activities criterion[624] may be classified as less significant only if none of these criteria is met for three consecutive years;
2. credit institutions that are significant because of the public financial assistance criterion may be determined no longer significant, only three years after (i) the repayment of the public assistance if it was granted, and (ii) only three years after the termination of the public assistance if it was only applied for or promised; and

[621] Directive 2013/34/EU of the European Parliament and the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182/19, 29.6.2013, which replaced Directive 83/349/EEC.

[622] Article 22 (2) Directive 2013/34/EU equals Article 1(2) Directive 83/349/EEC, see previous footnote.

[623] Article 47 FR.

[624] The five criteria are the (i) size criterion, (ii) the economic importance criterion, (iii) the cross-border activities criterion, (iv) the public financial assistance criterion, and (v) the one of the three most significant credit institutions criterion.

3. credit institutions that are significant because of the "one of the three most significant credit institutions" criterion may be classified as less significant only if they have for three consecutive years not been one of the three most significant credit institutions.

This rule only stabilises supervised entities being significant. Vice versa a less significant credit institution may be classified as significant at any time within one of the regular or ad-hoc reviews.[625] **631**

From this three years rule an **exception** may be made in cases of exceptional circumstances because of an **exceptional substantial change** (Article 52 (3), 57 (1), (2), 59 (3), 63 (3), and 66 (5) FR) like a merger or sale of a business division. The underlying concept is that a structural change that immediately affects the compliance with the significance conditions may result in an immediate change in significance as no reason to ignore such structural change exists. A further case requiring a deviation from the three year rule is that the authorisation as credit institution ends. While the ECB has discretion when applying Article 52 (3) FR as it is only obligatory that it decides about its application, it may want to use it in order to avoid unintended "contagion risks" if for example a credit institution that is only significant because of being part of a significant group is sold to a less significant credit institution and the new group is less significant. **632**

Assume that S1, a credit institution, is currently the subsidiary of the credit institution P. Assume further that S1 is significant only because it is part of the supervised group of P which fulfils the size criterion. If S1 is now sold to the less significant credit institution C a group consisting of C and S1 comes into being of which one element (S1) is under the three year rule still deemed to be a significant credit institution. If C does not want to rely on a restrictive interpretation[626] of the rule that all members of a supervised group are significant if one member is significant (Article 40 FR), C would be interested in S1 receiving a significance and take over decision at least closely to the transfer determining that S1 is no longer significant. **633**

6. Order of the application of the significance criteria

If possible, the significance criteria are applied on group level at the highest level of consolidation[627] based on the prudential perimeter of consolidation. Moreover, they are applied in a specific order, Article 6 (4) SSMR, Article 43 (7) FR. According to this provision the order of the criteria is (i) size, (ii) importance for the economy of the Union or any participating Member State, (iii) significance of cross-border activities, (iv) request for or receipt of public financial assistance directly from the ESM, and (v) the fact that a supervised entity is one of the three most significant credit institutions in a participating Member State. **634**

7. Determining the significance status and the begin/end of direct supervision

A supervised entity or supervised group is legally only significant if an ECB supervisory decision (**significance decision**) stipulates that it is.[628] I.e. complying with the significance criteria does not result itself in a supervised entity or group being significant. The same applies if a supervised entity shall become less significant.[629] Consequently, the significance status depends on a corresponding significance decision determining the status (**status decision**). **635**

---

[625] Article 43 FR.

[626] I.e. that such a case is not covered by Article 40 FR (which should be possible).

[627] With regard to the one of the three most significant credit institutions the highest level of consolidation is not the highest level of consolidation within the pMS but in the relevant Member State.

[628] Article 39 (1) FR.

[629] Article 39 (2) FR.

636 Further, the FR differentiates between the decision determining the status of a supervised entity as significant/less significant and the decision determining as of when either the ECB or an NCA takes over the supervision (**take-over decision**), Article 45 (1) 2 FR. If a supervised entity becomes significant or again less significant, the direct supervision by the new supervisor (ECB or NCA respectively) starts only at the date determined in the take-over decision. The take-over decision shall be notified a certain time prior to the actual take-over of supervision to the relevant credit institution. In principle, it shall be notified to the supervised entity at least one month prior to the date on which the ECB will assume supervision, Article 45 (1) 3 FR.[630] If the ECB assumes the direct supervision because of a request for or a receipt of direct public assistance from the ESM, the notification of the take-over decision shall occur at least one week prior to the date upon which the ECB assumes the supervision, Article 45 (2) FR.[631] Consequently, it can for example happen in a transition period that the ECB supervises a former significant credit institution which is now (already) classified as less significant unless the date upon which the classification as less significant becomes effective and the date of the take-over of supervision are aligned.

III. The criteria for determining the status as significant or less significant supervised entity

637 The SSMR provides for five alternative criteria based on which a supervised entity can acquire the status of being significant. In addition, the SSMR provides for two corrective concepts ("repair-tools"): (i) particular circumstances can justify the treatment of a credit institution which fulfils the criteria of significance as being less significant; and (ii) Article 6 (5) (b) SSMR allows the ECB to assume supervisory tasks also in respect of a less significant credit institution.

1. The criterion of size

638 A credit institution is considered significant if the total value of its assets exceeds 30 billion euros.[632] Whether this criterion is fulfilled has to be checked on the level of the supervised group if such a group does exist.[633] If a credit institution is not part of a group or only part of a group with no prudential perimeter of consolidation[634] the size criterion has to be checked on a stand-alone basis.

639 In case of a group the size criterion shall be determined based on the perimeter of prudential consolidation[635] on the highest level of consolidation within the participating

[630] This requirement is intended to give time to prepare for the takeover of supervision of an existing significant decision. It does not make sense if the significant supervised entity comes newly into being (assume credit institutions A and B are merged into a new entity (C, a credit institution)). In such a case a teleological reduction also taking into account the concept expressed in Article 52 FR results in no waiting period applying.

[631] Although this is not provided for in the FR the notification period of Article 45 (2) FR does not apply if a significant credit institution is created newly (for example by merging two credit institutions into a new third entity). This follows from the fact that the notification requirement shall provide to the credit institution and the NCA to prepare for the change of the supervisor. If no supervision existed (e. g. if a credit institution is created by a merger) this is not necessary, rather it is necessary that the competent authority can supervise the credit institution as of day 1.

[632] Article 50 FR.

[633] Article 51 (1) FR.

[634] Assume credit institution I is a subsidiary of a car manufacturer to whose group except for I only car manufacturers belong.

[635] Article 53 (1) FR.