

SINGLE SUPERVISORY MECHANISM – THE ACADEMIC VIEW

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Focus: Wealth Management**

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A.

Introduction & Caveats

SSM – AN AMBITIOUS PROJECT

- Extraordinary Situation – Extraordinary Solutions
- Role Models
 - Set-up of Securities & Exchange Commission after Great Financial Crisis (1933 pp.)?
 - EU Kom – Competition Department?

Challenges – Experiments – Try and Error



Rule of Law

PERSPECTIVE: SOUNDNESS OF SSM FRAMEWORK?

■ **Theoretical Underpinning**

- „Crisis make bad law“
- „Crash-then-law-cycle“
- „Quack Governance“



SSM?

After a crisis regulators are accused of doing too much, or the wrong things, due to political expectations, the failure of incumbent wisdom, and the regulators' striving for survival.

CAVEATS

- **On the matter**
 - No data
 - No experience
 - Too much ground to cover
- **On the presenter**
 - No public law expert
 - No practitioner
 - Outside view

Focus

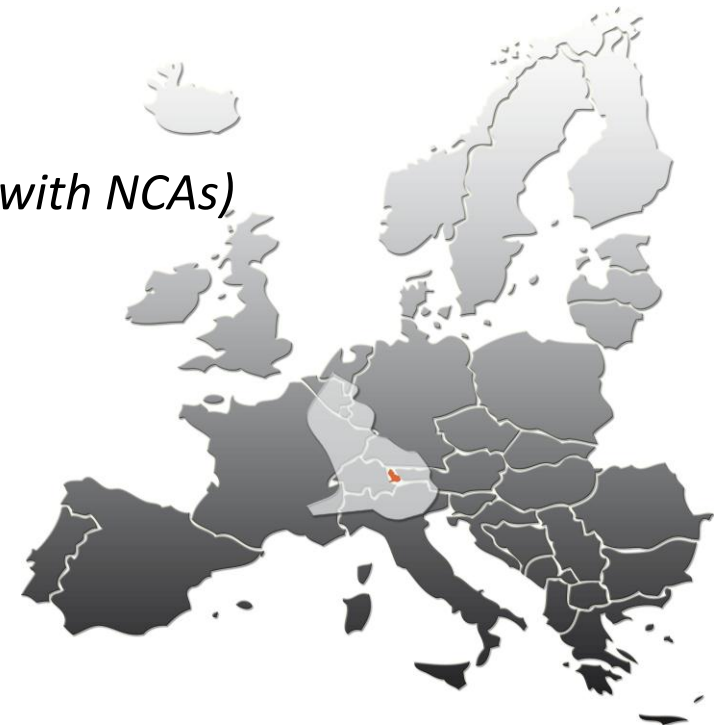
General Concept

ECB ↔ NCAs

Role of Courts

SINGLE SUPERVISORY MECHANISM – THE ACADEMIC VIEW

- A. *Introduction & Caveats*
- B. *General Concept*
- C. *Cooperation & Coordination (in particular with NCAs)*
- D. *ECB and the Courts*
- E. *Conclusion*



B.

General Concept



MINIMAL OVERVIEW

1) Cure of a perceived defect of the EMU

- Single Currency \Leftrightarrow Joint Liability
- Close Fiscal Integration

Joint Risks \Leftrightarrow Joint Supervision

National
Bail-Out
Decisions

European Banking
Union

Pan-
European
Financing
(ESM etc.)

2) Watching the Watchers

- Stimulus by Regulation \Leftrightarrow Regulatory Arbitrage
- Importing Profits \Leftrightarrow Exporting Risks
- „Gamble on other MS‘ balance sheet“

Harmonized (Neutral) Supervision

3) Cross-Border Banking

- Risks ↔ Regulation ↔ Supervision
- Efficient Grip on international banking conglomerates
- „One regulatory balance-sheet“

„Regulatory look-through approach “

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European Banking Union

European Banking Union

Common Supervision
(SMM)

Lender of Last Resort
(ELA)

Prudential Regulation

Single Resolution
Mechanism

Joint Deposit
Guarantee Schemes



DOES IT MAKE SENSE? – THE CRITIQUE

- The more the crisis is overcome, the more NCAs, national politics etc. will seek to regain ground
- Hasty political process
- Three main motives show in differing intensity
- Interest of MS not always aligned

Monetary Supervision: Independence, Reputation?

- Pricing vs. Financial Stability?
- Reputational Fallout from Banking Failure?

Prudential Supervision: Gain of Independence

National Parliaments / Interests

Large Institutions

C.

*Cooperation & Coordination
(in particular with NCAs)*

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A Primer on Interfaces

**SSM builds on inter-agency cooperation.
Multiple agencies and institutions involved.**

THE ECB'S CROSS-AGENCY NETWORK

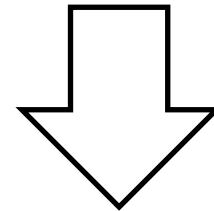


**SSM builds on inter-agency cooperation.
Multiple parties involved**

**Interfaces access point for national / the agents'
interest ↔ barriers to efficiency**



ECB AND THE EUROPEAN PARLIAMENT



11.

ECB & THE COMMISSION



ECB ↔ COMMISSION

- Prudential Reg: Legislative ↔ Implementing Body
- Monetary Reg: (-)



ECB & NCAs



EUROPEAN CENTRAL BANK

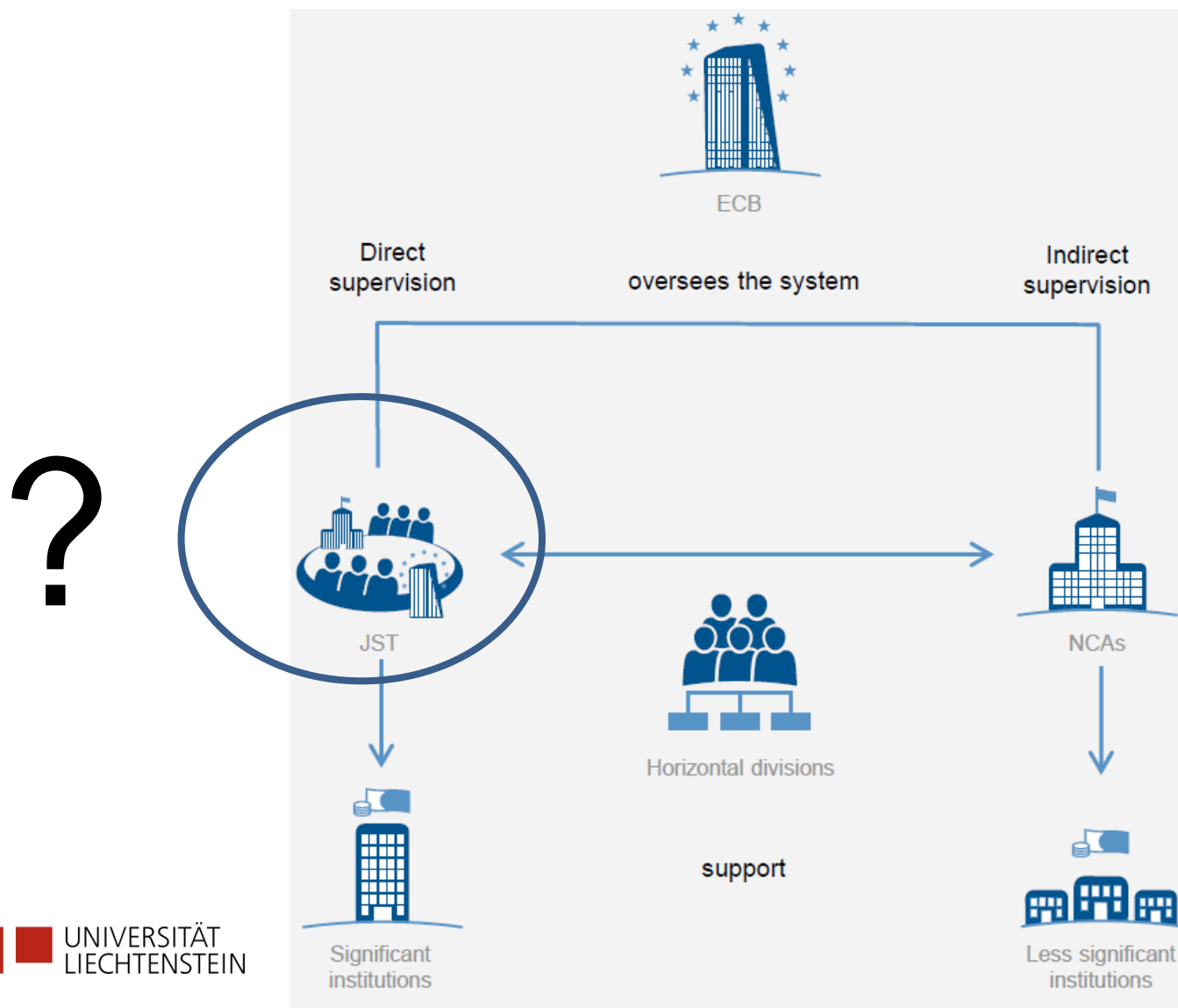
EUROSYSTEM



BaFin

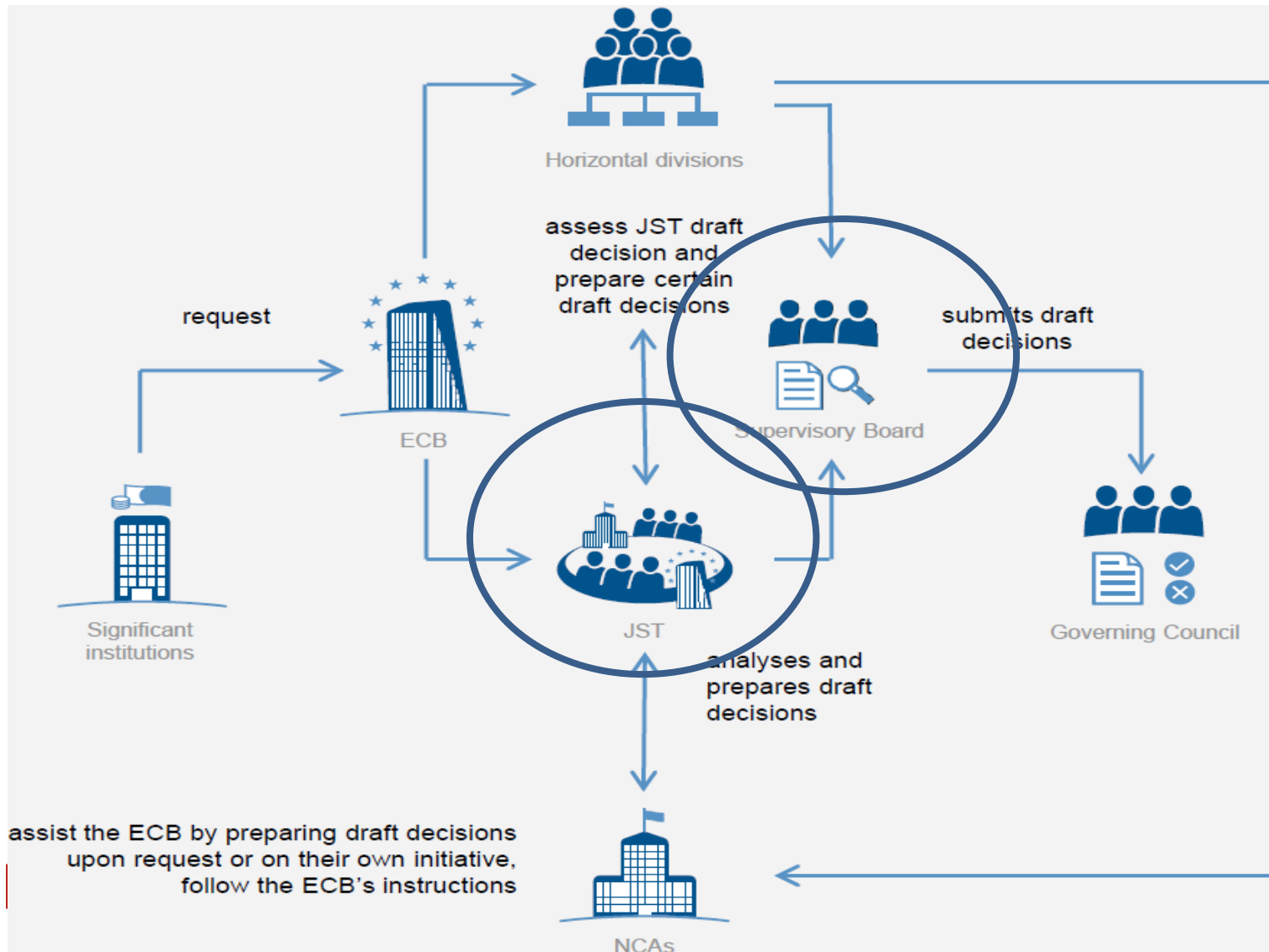
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The distribution of tasks within the SSM



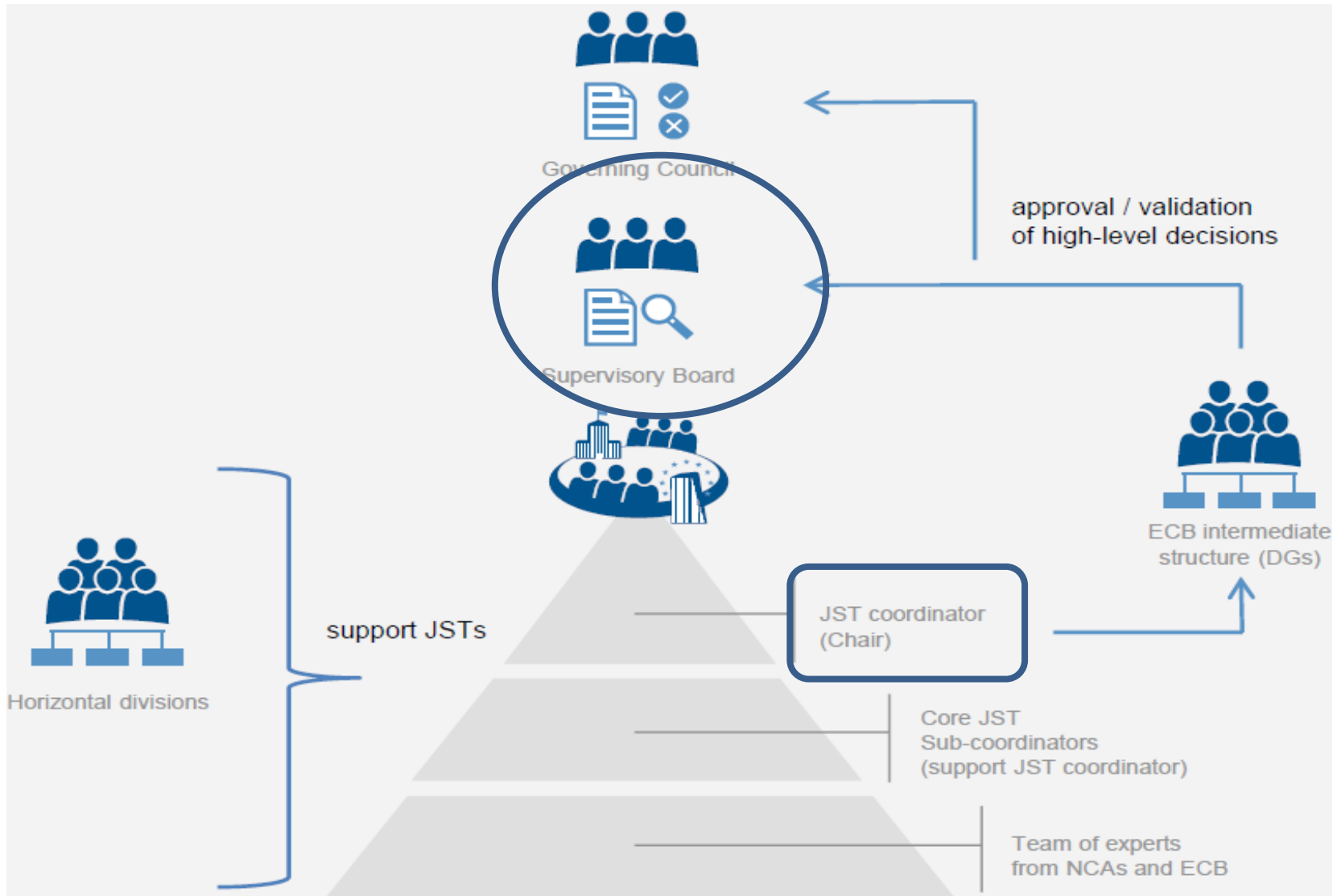
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General process for requests, notifications and applications



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Functioning of the Joint Supervisory Teams



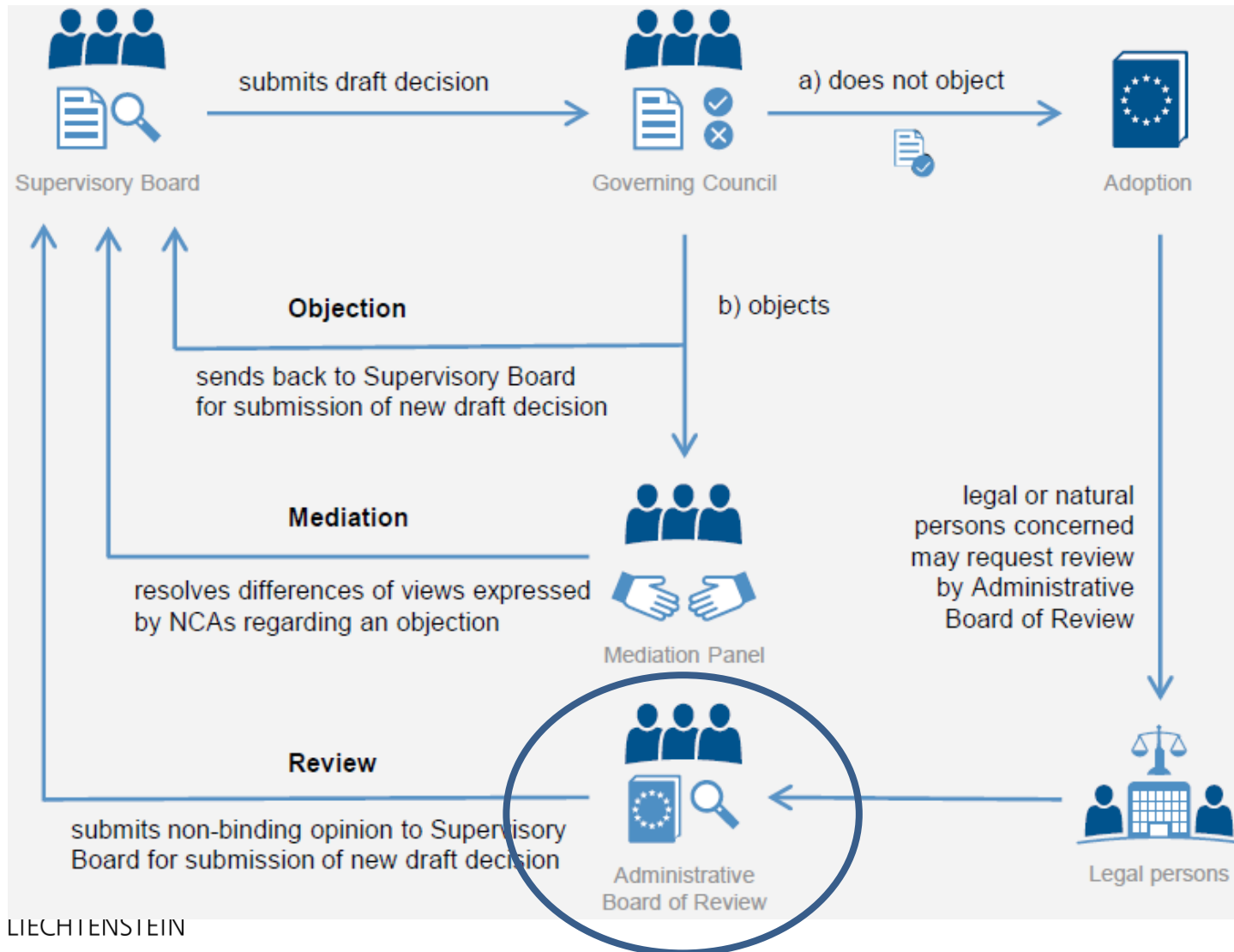
REASONS FOR CONCERN?

Relative Institutional Capacity ↔ Reputation

- **Independent JST** ↔ Dependence on NCAs
- **Banking Expertise** ↔ Independence
- Role of NCAs in Supervisory Board

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Non-objection procedure



REASONS FOR CONCERN? – ARB'S INDEPENDENCE

Neutral or National Interests?

Court Substitute or Political Institutions
⇒ Law or (Political) Leverage?

IV.

ECB & THE ESA's (EBA; ESMA; EIOPA)



ECB & THE ESAs

- ESAs jurisdiction over all prudential supervisors
- Dominance of Euro-Zone?
- Two-speed integration?
- Influence of participating (non-EURO) “observing” countries
 - Supervisory Board \Leftrightarrow GC
- Impact on non-participating MS?

V.

INTERMEDIATE RESULTS

ECB: A TIGER ON A LEASH?

- Very close net of inter-agency relations
- Multiple agencies ↔ agents ↔ agency conflicts

D.

ECB and the Courts



WHICH LAWS GOVERN THE ECB'S ACTIVITIES?

LAW GOVERNING ECB ACTIVITIES

European Law

- CRR
- MiFIR

Implemented European Law

- CRD IV => KWG
- MIFID => WpHG

MS Autonomy

- GroMiKV
- WpHG
(discretion)

„LAW“ GOVERNING THE ECB ACTIVITIES

- National Supervisory Practice („BaFin Circulars“)
- National Best Practice Standards
- National Customs
- ...

Single Rule Book not so Single!



WHICH JUDICATURE BIND THE ECB?

JUDICATURE

- In particular w.r.t. laws within MS autonomy
- Common law jurisdiction (Ireland):
“stare decisis et non quieta movere”
 - precedents bind English courts
 - court decisions ⇔ binding law (case law)
- Consequences for ECB:
 - Bound by case law?
 - Which case law?
 - In which cases?
 - What to do if precedents differ among MS?



WHICH COURTS RULE UPON THE ECB'S ACTIVITIES?

WHERE TO APPEAL?



?

Bundesverwaltungsgericht



Sanctions?

WHERE TO APPEAL?

European Court of Justice



European General Court



E.

Conclusion and Thesis

THESES

1) The SSM is an ambitious project designed to overcome national protectionism for national banking champions. Whether it succeeds strongly depends on the ECB's ability to hire talented staff and overcome national tendencies within its organisation.

2) The built-in conflict of interest between ECB and NCAs is the core issue of the SSM. To the same extent that the ECB's staff gains expertise and reputation we may expect the NCA's reputation, expertise and importance (!) to shrink. In light of this the strong influence of NCAs in the Supervisory Board is a reason for concern.

3) Both the NCAs and the supervised entities as sources of talent create concerns. The ECB should continue to train its own staff. In light of the built-in conflict of interest, the ARB's independence is crucial. Three ARB members should be selected from expert judges and academics. An ARB mandate is not a job for retirees.

4) While the Supervisory Board is the SSM's head, the JSTs constitute the nucleus to the SSM's success. While jurisdictional independence is likely beneficial, a number of procedures (rotation, language rules etc.) may reduce the JST leaders' expertise and increase her dependency on the NCAs. Due to the built-in conflict of interest, if it comes push to shove, **expertise is more important than independence.**

For Europe's future I wish the SSM & the ECB all the best!

Thank you!



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