Eur Bus Org Law Rev (2017) 18:391–399
DOI 10.1007/s40804-017-0075-1

EDITORIAL

Editorial

Stefan Grundmann[1] · Giorgio Monti[1] · Christy Ann Petit[1]

Published online: 14 October 2017

1 Introduction

The European Banking Union constitutes probably the most powerful full integration project of the last decade and has come about with enormous dynamism—with the fundamental legal measures being conceived only in 2012, adopted mostly still in 2012, and entering into force between 2014 and 2016. Paralleled only by competition law in the early phase of the European integration, and perhaps the European Monetary Union at the turn of the century, the European Banking Union combines uniform and very detailed EU substantive law and regulation with a genuine enforcement mechanism—i.e. individual administrative action—at the EU level. This has already been termed 'full integration'—both of legislation and of the executive branch. Others have spoken of a 'self-standing' European private and economic law which they see primarily in such areas of 'full integration'. The European Banking Union is complex—and arguably more complex than the other two paradigms of full integration—for at least three reasons. Firstly, the basis of its operation is formed only in part by the EU Treaties and in (larger) part by EU secondary legislation, contested in part, and not leaving complete freedom of design. Hence, it constitutes a somehow 'twisted' regime, standing on a somehow 'shaky' basis. Secondly, the

✉ Christy Ann Petit
Christy.Petit@EUI.eu

Stefan Grundmann
Stefan.Grundmann@EUI.eu

Giorgio Monti
Giorgio.Monti@EUI.eu

[1] European University Institute, Florence, Italy

European Banking Union consists of several pillars. While the discussions in the papers would probably have been more compact if the focus had been solely on the ongoing supervision by the European Central Bank (ECB, Frankfurt), the current supervision of banks as a going concern, within the Single Supervisory Mechanism (SSM), at least a second pillar could not possibly be left aside. It does seem to be so closely connected to the first pillar and so important also in the legal discussion and legal practice that it had to be included. This is the Single Resolution Mechanism (SRM), with the Single Resolution Board (SRB, Brussels) serving as the central agency/institution. Thirdly, the European Banking Union is complex because it by no means constitutes a fully centralized regime—probably much less than competition law was originally (today, of course, also more decentralized) and certainly much less than the European Monetary Union both of which were based on provisions in the Treaties. With respect to the SSM and the SRM, one can rather speak of a federalist model. And this is so not only because, as is well known, only the (now) 120 (most) systemically important financial institutions[1] are under the direct control of the ECB (SSM) and the SRB (SRM) respectively, but because in all aspects, there is always an interplay between centralized and decentralized decision-making. This Special Issue focuses more on the second and the third aspect mentioned, not so much on questions of unclear legal basis. It takes up the theme first exposed in a Special Issue published when the regime entered into force.[2] It now reports on the first few years, the filling up of experience and substance.

2 Overall Scheme and Purpose

The overall scheme and purpose of the Special Issue (and the workshop where the papers were presented)[3] is to share experience and to focus on what happened in the practice of the SSM and the SRM, i.e. in the core of the European Banking Union, in important Member States and at the central level in the first two or three years of existence. Therefore proposals still pending, namely with respect to a European Deposit Guarantee Scheme, were excluded—even if highly interesting. Conversely, focusing only on the SSM would not have been adequate—given the focus of the most recent developments and given the interdependencies between SSM and SRM. With the case of Deutsche Bank—subject to a threat of enormous fines imposed by the US Department of Justice (temporarily up to $14 billion, with a settlement of $3 billion)—or with the far-reaching Italian bank crisis, namely with Monte dei Paschi di Siena, concentrating on the SSM would almost have looked as if one turned a blind eye to the most pressing practical concerns of the first years of practice. While the SSM, with the Capital Requirements Directive IV (CRD IV) as its substantive law basis, can be seen in a certain tradition of banking supervision—despite the

[1] List of supervised entities as of 1 July 2017, available on https://www.bankingsupervision.europa.eu/.

[2] Grundmann and Binder (2015).

[3] 'The European Banking Union and its Instruments—Experience from the First Years of an Interplay with National Banking Supervision and Resolution', European University Institute, Florence, Italy, 11 October 2016.

many single tools which have been newly introduced there as well—the SRM, with the Banking Recovery and Resolution Directive (BRRD) as its substantive law basis, is certainly more innovative and revolutionary. In fact, the BRRD constitutes the only substantive law tool in the whole package introduced in and around 2012 which was conceived completely anew and from scratch after the crisis.

Therefore, all papers deal with SSM/CRD IV and/or with SRM/BRRD, and in good part also with both sets of regulatory regimes and their interplay—from current supervision via recovery to resolution (and insolvency), thus covering the whole timeline of prudential supervision on credit institutions. All papers are structured such that they discuss to a large extent, and sometimes even focus exclusively, on the following nine questions (communicated before the workshop took place)—some of which are certainly more relevant for the SSM context, others for the SRM context and some for both.

The *more SSM related* questions are probably the following: (A) The Banking Union has tended to focus on institution building and the challenges centralized supervision is likely to experience moving to a single approach to supervision of banks in the SSM. This triggered the one question which is perhaps most discussed: the one of knowing to what extent the existing legal regulatory framework under the Single Rulebook assists or even hinders centralized decision-making (a question relevant in the SRM context as well). (B) If one assesses the benefits of centralization, one core question may be whether centralization in the SSM tends to put too much weight on the risk assessment of the group and not enough on the risk assessment in subsidiaries. Does this create problems in countries where the share of foreign owned subsidiaries is high? (C) With respect to the application of the centralized regime, one core question is that of decision-making, namely whether the formation of mixed supervisory teams has proven to be a tool to have both a sufficiently high information basis on the local level of the banks supervised and robust enough a membership to avoid capture. Can the composition of such teams be enhanced? And finally, (D) with respect to substance, has the split of supervisory competences in the SSM—stability and market integrity with the ECB, codes of conduct and the like with the national authorities—created problems or can it be seen as a sensible scheme?

Conversely, other questions are *more SRM related*, namely the following ones: (A) The purpose of the SRM, as part of the Banking Union project, is to centralize resolution decision-making, but it installs a multi-faceted design of competences. Therefore, the core question is whether centralization of resolution leads to the setting of the right incentives and addresses agency problems in resolution. In addition, sub-questions of this question arise. For instance, to what extent does discretion remain with the national authorities? Also, what is the role of the Commission and the Council in SRM decision-making and how likely are they to succeed in fulfilling their mandate in the narrow opportunity for decision-making? (B) The second question looks beyond the SRM: what have been the main co-ordination challenges between the Resolution Fund, the Deposit Guarantee Fund and the European Stability Mechanism in terms of providing liquidity and assistance to a bank in distress? (C) The third and fourth questions turn around the most hotly disputed instrument in the BRRD and one of the core thresholds used. Recent experience of dealing with banks in distress by European authorities under the

BRRD would suggest the bail-in tool has not set the right incentives for dealing with banks in distress. To what extent should all classes of retail financial services be exempted from bail-in? (D) To what extent does Minimum Requirement for own funds and Eligible Liabilities (MREL) under the BRRD framework and the Total Loss Absorbing Capacity (TLAC) standard developed by the Financial Stability Board (FSB) give raise to a one-size-fits-all approach to resolution?

One last question would seem to be addressed to both regimes. This is whether it is (already) time for the EU Banking Union to better formulate a more formal policy framework and technical standards to clarify how it will work with non-participating Member States and third countries.

The papers of this Special Issue gather experience from the first years of the interplay with national banking supervision and resolution. Many are written from a particular national perspective—directed towards the common 'federalized' banking supervision system. Therefore behind the papers gathered here, the design in four panels is still palpable. First is the perspective of the Ins. Germany (Binder), France (Fernandez-Bollo), the Netherlands (Wissink) and also Italy, serve as prominent, richly nuanced and yet paradigmatic cases. All three reports are exemplary of the strong interplay between the national and the central level, namely the interplay and the strong cross-fertilization, and in parts also of complications in the decision-making process. Second, we move to the perspective of the Outs, among which the Brexit decision has certainly shifted the balance, giving the UK more weight (Brierley, a Polish paper unfortunately withdrawn), and has, thus, prompted even more of a comparison between divergent approaches. Finally, are the perspectives of countries strongly hit by the crisis, with Greece (Gortsos) and Cyprus (Yiatrou) covering broad ground—one with a strong practical insight into the mechanisms which worked during the crisis and the ways towards solutions, and one with a strong (albeit more theoretical) plea for a more holistic approach (one Spanish paper unfortunately withdrawn). Some cross-cutting papers transcend the national perspective: on the legal history of the Banking Union (Teixeira) and on decision-making, namely in the ECB, the administrative internal review existing within the SSM (Brescia Morra/Smits/Magliari) and the tension of the creation of a European Resolution Authority with the *Meroni* doctrine (Lintner). Even though they transcend the national perspective, they also quite substantially take up issues discussed in national papers which—as has been said—are all primarily directed towards the common system.

3 Most Important Single Concepts on a More Technical Level

Banking Supervision is certainly an area where—besides guiding principles and the overall architecture—details with a certain level of technicality play an important role. This is also reflected in a good number of the papers. The most important single concepts on this more technical level are the following.

Starting with concepts in Banking Supervision, the *split of competences* already introduced may result in a parallelism in the exercise of certain supervisory powers, thus introducing overlap of decisions taken, as underlined by Binder. Even though

the ECB is responsible for the licensing of credit institutions, national competent authorities retain licensing competences for regulated activities that have not yet been harmonized. For instance, the German Banking Act provides for additional licensing requirements for banking activities. The resulting duplicative regime therefore creates particular challenges in scope and supervisory powers within the SSM. More generally speaking, there is an issue with *national supervisory powers* still existing solely under each of the national laws. The question then is whether and to what extent the ECB is enabled to exercise those national supervisory powers.[4]

In addition to some parallel national supervisory powers, *implementing national laws and the remaining* (*Member State*) *options and national discretions* (*ONDs*) granted under the CRD IV and the Capital Requirements Regulation (CRR) leave room for supervisory discretions and create an uneven playing field. The ONDs constitute legal instruments forming part of the Single Rulebook after all. As presented by Wissink, this might hinder centralized supervision and its effectiveness. Even though part of the ONDs granted to national competent authorities has been harmonized by the ECB,[5] some of those ONDs remaining within the competence of Member States' legislators can only be harmonized by the European legislator. Consequently, future challenges consist of harmonizing the *Single Rulebook* further and to cater for a more developed European administrative law.

With respect to ONDs, but of much more general and indeed of overarching importance, is the following peculiarity of the administrative organization of the SSM. These are the *Joint supervisory teams* (JSTs) as the core bodies in charge of ongoing supervision of Significant Institutions, composed of ECB and National Competent Authorities (NCAs) staff, which are examined by several papers. This institutional setting realigns local information advantage and control of national laws still applicable with centralized banking supervision policies (Binder). Then, the degree of NCAs involvement in those teams is questioned (Wissink). JSTs constitute a perfect illustration of the arrangements to allow for *active* close cooperation, the latter being described as a key engine of the Banking Union (Fernandez-Bollo). More generally, the JST setting represents the mixed administration of the ECB and the NCAs well, and, in a way, ensures unity of supervision, while maintaining parts of its diversity at the same time.

The split of supervisory competences has, however, created a new scheme resulting in a *complex matrix of competences* as presented by Teixeira, combining exclusive powers, decentralized powers, control and pre-emption powers, and

[4] See a recent speech by D. Nouy, Chair of the Supervisory Board. Nouy emphasizes the issue of national powers and raises the question in the following terms: '[…] is it just the national supervisors who can exercise these powers? In our view, the ECB should also be enabled to directly exercise them. This would take us still another step towards a level playing field and a truly European banking market'. See D. Nouy, 'Regulation and supervision in Europe—can many cooks make a good broth?', 15 May 2017, Frankfurt am Main, available at www.bankingsupervision.europa.eu.

[5] See the ECB Guide on options and discretions available in Union Law, consolidated version from November 2016 (available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ond_guide_consolidated.en.pdf).

parallel powers. In such a scheme, the unity of supervisory practices and implementation might be at risk unless further steps for harmonization are taken.

As regards the resolution side, some key concepts were discussed. Among those, was the very important concern of *ending* '*too-big-to-fail*' (TBTF), as brought forward by Brierley. The intrinsically linked question of a resolvability of large banks (or so called 'G-SIBs', Globally Systematically Important Banks) to end TBTF requires looking at adequate levels of *TLAC* and its European equivalent, i.e. *MREL*. Equivalent as concepts, MREL is, however, wider in scope and less prescriptive than TLAC. For the 30 G-SIBs, which the FSB targeted,[6] TLAC (like the MREL) come in addition to the CRD IV and CRR requirements on own funds etc. This happens even though the instruments included in those convertible into equity in the crisis are often the same, and count against both the CRD IV and CRR threshold and the TLAC threshold. The latter, however, is calibrated in a more demanding way (reflecting the higher risk of G-SIBs of a too-big-to-fail) and is fixed at 16% of the resolution group's risk-weighted assets (RWAs) as of 1 January 2019, increasing to at least 18% from 1 January 2022. Depending on the size of the banks, the ability of EU banks to raise TLAC and MREL resources is different, particularly for smaller and medium-sized banks, which depend on deposits rather than debt issuances for funding. Through appropriate adjustment of the requirements, those smaller banks may be encouraged to raise MREL resources. In the UK, as part of transitional arrangements, there is notably the introduction of an interim MREL target taking effect from 2020 giving two additional years for those banks to meet their final MREL target. This discussion is very topical as the revision of MREL with the introduction of a common minimum level of the requirement, and the full implementation of TLAC are on the agenda of the Banking reforms package initiated by the Commission in November 2016.[7]

It should be noted that the *concept of resolution* itself remains discussed as such, in its justification and its application. The Italian and German examples developed by Binder show how resolution policies are still debated (as to the question of which exceptions should be allowed from bail-ins implementation and which use of Government Financial Stabilisation Tools is appropriate and still permitted). Similar concerns, yet in a more theoretical perspective, are raised for the Cypriot example by Yiatrou.

Regarding the SRM as an institution, the decision-making process relies on a complex institutional setting. The SRB is a specific Union agency with a specific structure, and is different from all other agencies in the Union.[8] The decision-making covers resolution planning and related resolution tools, involving National Resolution Authorities (NRAs), the European Commission and the Council of the European Union being empowered to exercise veto rights against resolution decisions. Lintner asks whether, contrary to what happened for the SRB, a direct autonomous empowerment as regards resolution decision-making would have been

[6] 2016 list of Global Systematically Important Banks (G-SIBs), as of 16 November 2016, available on http://www.fsb.org/.

[7] Legislative proposals of 23 November 2016, amending CRD IV, CRR, BRRD and SRM Regulation, http://europa.eu/rapid/press-release_IP-16-3731_en.htm.

[8] As provided for by recital 31 of the SRM Regulation.

possible for an agency or a body under the current EU institutional set-up. The answer to this question depends on how one sees the limits posed by the *Meroni* doctrine, it is interesting in any case to investigate into the reasons why efforts to create *a fully-fledged centralized resolution agency* have failed so far.

Finally, some attention has been given to the procedures installed for a review of decisions taken. Within the SSM institutional setting, a specific mechanism has been put in place to review the decisions taken by the ECB in its supervisory competence. Brescia Morra, Smits and Magliari examine the legal framework of this review mechanism provided by the Administrative Board of Review (ABoR) and its operations. In addition to the recent experiences examined, the comparative perspective of this administrative remedy with other review panels existing for the European Supervisory Authorities (ESAs) and within the SRM (for the SRB decisions) reveals key features of this review.[9] While the bodies used as a point of comparison have an adjudicative function and operate as quasi-judicial bodies, the ABoR carries out an internal administrative review of the ECB decisions in banking supervision. An ABoR review is optional. Therefore, the administrative and judicial challenges can be either alternative or cumulative. Furthermore, the admissibility requirements should be interpreted and applied in light of the CJEU case-law on the *locus standi* conditions for the action for annulment. However, comparing judicial standards of review and the one existing within the SSM internal administrative review, the ABoR's internal review is deemed to be confined to a limited standard of review when the ABoR looks at ECB decisions which involve a broad margin of discretion[10] or a complex economic assessment.[11]

4 Conclusions

If one can draw a few conclusions from the different papers and interventions, the following may seem particularly noteworthy.

Finding the right balance of supervision competences between the centre and national authorities raises the concerns for catering to regional characteristics, for instance in the German three-pillar banking system or the strong involvement of local business in the Italian banking system, while preserving the need for consistent supervisory approaches. The reach for an equilibrium between centralization and a sufficient degree of flexibility to accommodate differences between banking systems in the Member States is at stake. This concern was core already to the discussion of the legislative scheme to be enacted and it remains so now in the phase of practical application.

[9] Namely, ABoR's opinions are only notified to the entity concerned with the new decision adopted by the Governing Council, ABoR's proceedings and opinions are not published by principle, and its opinions cannot be directly challenged before the Court of Justice of the European Union (CJEU).

[10] According to recital 64 of the SSM Regulation, the scope of the review should pertain to the procedural and substantive conformity with (the SSM) regulation of such decisions while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions.

[11] As underlined by Brescia Morra, Smits and Magliari, it remains to be seen to what extent the CJEU would apply this limited standard of review towards complex economic assessment in cases involving the ECB in its supervisory competence.

As part of the variables to influence this equilibrium, the coordination between the ECB and the NCAs in daily supervisory work and supervisory decision-making process are supported by institutional mechanisms recalled throughout this Special Issue. The expertise of national authorities is enhanced, and essential in a unique *collegial* approach embodied by the SSM decision-making settings. National authorities' complementary role is key in the decision-making process, and operational through their participation in the JSTs. At the same time, some supervisory tasks remain under the national authorities' control requiring a proper articulation between a common unified supervisory approach and the local knowledge and know-how of the national realities.

The progress made since the crisis to deal with '*too-big-to-fail*' has been quite remarkable. As discussed by several papers, this concept requires the analysis of resolution regimes and strategies, and the identification and removal of barriers to resolvability. In this regard, a one-size-fits-all approach to resolution of different sorts of banks has its inherent limits. TLAC set on a firm-by-firm basis ensures that the preferred resolution strategy—either a bail-in, a partial transfer or a liquidation—may be carried out with possible adjustments of quantum and quality of MREL in light of the different types of resolution strategy.

The study of the countries which faced severe blows from the crisis gives a specific insight regarding the implementation of the Banking Union. It should be noted that the Greek banking system has been impacted differently by the international financial crisis and the euro area fiscal crisis. While the international financial crisis is considered as *recent* in time, the euro area fiscal crisis is still *current*.[12] The banking system was in a rather good state during the financial crisis, but deeply affected by the sovereign crisis. During the latter, the Greek banking system has been completely transformed with the resolution of fourteen credit institutions and, for the four systemically important ones, there were three recapitalisation rounds. In addition to the examination of the Banking Union's impact on the Greek banking system, the medium-term challenges have to be kept in mind—that is, the preservation of solvency and liquidity of credit institutions, and the necessity of a regulatory pause to safeguard legal certainty and efficiency and to avoid any 'regulatory failure' that would be caused by over-regulation. As for the Cypriot bank resolution story, commonly described as a success, Yiatrou points to the fact that general principles of resolution under the BRRD have been misapplied considerably. The costs of banking resolution were increased because of decisions taken in isolation (from banking supervision to early intervention, resolution, and liquidation). They should rather be examined *in concert* with the supervision side, to avoid any disenchantment. While this analysis is based on the Cypriot experience, it more generally may call for a more holistic approach of supervision and resolution working together to effectively manage future crises, at the minimum cost. This means to evaluate how supervisory decisions affect potential resolution costs, and

[12] Greece has been reported to fall back into recession for the first time in four-year time. See M. Kahn, 'Eurozone growth holds steady; Greece slumps back into recession', *The Financial Times*, 16 May 2017, https://www.ft.com/content/e52df1a7-719a-3074-92c1-fc5f97190ed2?mhq5j=e1.

how resolution planning should integrate the expected costs of resolution measures in the long run.

A centralized resolution agency could be better placed to allow for such a holistic approach. Whether the *Meroni* doctrine can be re-read or even be replaced in this setting remains an open question. This might then lead to the SRB as a fully autonomous resolution agency with a centralized decision-making power and without Commission and Council veto rights—but with a need to duly preserve certain checks and balances still.

With the paper by Teixeira, this Special Issue also transcends the national perspective and depicts the legal history of the Banking Union, examining its core roots and its intertwining with the Single financial market. In this respect, the Banking Union can be seen as both *continuity* and *break* in the evolution of the Single financial market. Looking at legal and institutional evolution before the Banking Union's inception, it is a journey through different sorts of integration, namely integration through Harmonization, integration through Competition, integration through Governance, and (Dis)integration through Crisis. The four phases identified provide insight into alternate momentums of European integration and fragmentation, the tensions between competence expansion and national sovereignty safeguards, and the adaptations to Treaty legal boundaries. The different equilibria the EU went through may have deepened integration thanks to legal and institutional innovations, which were similarly experienced with the creation of the SSM and of the SRM.

Florence, May 2017

Reference

Grundmann S, Binder J-H (2015) Editorial. Eur Bus Org Law Rev 16:353–355 **(special issue)**