

1. The European Banking Union and its impact on legal disciplines: a short introduction

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The economic and financial crisis has had a great impact on regulation and prudential supervision of credit institutions in Europe. The creation of a single currency and the conferral of exclusive monetary tasks to the European Central Bank (ECB) in the Economic and Monetary Union (EMU) did not correspond to the creation of a centralised level of supranational regulation and supervision of the banking sector. After the outbreak of the financial crisis in Europe, the European Banking Union (EBU) is an unprecedented reform of institutional and substantive rules on banking regulation and supervision.² The EBU project has had a considerable impact on the understanding of existing legal disciplines in banking and financial frameworks as it has created a supranational institutional and substantive framework on banking supervision and resolution.

The EBU was triggered by the deepening of the financial crisis in 2012 when systemic problems arose both in the banking system and in fiscal and economic sustainability of sovereigns.³ In particular, the euro area has shown that the costs of public bank rescues and the vicious circle between the banking

¹ The views expressed in this chapter are purely personal and they are in no way intended to represent those of the ECB or its SB Secretariat.

² On the EBU from a legal perspective see, among others, Danny Busch and Guido Ferrarini, *European Banking Union* (Oxford University Press 2015); Niamh Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (2014) 51 *CMLRev*, 1069–1670; Kern Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) 40 *European Law Review*, 145–187; Juan Castañeda, David Mayes and Geoffrey Wood, *European Banking Union. Prospects and Challenges* (Routledge 2015); Luis Hinojosa-Martinez and Jose Maria Beneyto, *European Banking Union: The New Regime* (Kluwer 2015).

³ Rishi Goyal *et al.*, *A Banking Union for the euro area*, SDN/13/01 2013, 7.

system and sovereigns led to a euro area sovereign debt crisis.⁴ The main reasons for the establishment of the EBU may be summarised as follows: the need to reduce the fiscal cost of bank bailouts; the need to achieve a higher level of supervisory convergence and integration in the internal market; and the need to break the vicious circle between the financial risks in the bank and sovereign sectors.

This extraordinary regulatory development as a political move to further European integration has changed completely the legal, supervisory and economic framework for the regulation and supervision of credit institutions in Europe. The Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) constitute the two structural pillars of the EBU and they give rise to new (unprecedented) perspectives in the law at all levels. The purpose of this edited collection is therefore to explore in depth the various areas in which the EBU has impacted the existing legal framework and to analyse to what extent the EBU has created a new paradigm to the interpretation and application of the law. The creation of the two pillars of the EBU has reshaped the traditional understanding of established legal disciplines and this has only recently come to the attention of policy-makers, practitioners and academics. The law disciplines that are more directly relevant are EU, institutional, administrative, commercial, human rights and banking law. However, there are also indirectly impacted areas of the law that affect or are affected by the creation of the EBU, such as civil law, international law or data protection, and the list may be much longer. The new EBU rules invite scholarly reflections on their impact on traditional legal disciplines and suggest new ways of interpreting, applying and rely on existing legal disciplines. At present, there is still no critical reconstruction of the impact of the EBU on established legal disciplines and this collection intends to fill this gap in the literature.

The structure of this collection is based on the EBU framework as a (currently) dual pillar system of supervision and resolution of credit institutions at the supranational EU level. The book chapters are grouped in a systematic way, in three main parts. The first part looks at the relationship of the EBU with the law at a general level and comprises a general analysis of the EBU from the perspective of law fields such as institutional and administrative law. The second part examines the SSM as the first pillar of the EBU and focusses on particular aspects having relevance from a legal perspective in the SSM context. The third part examines the SRM as the second pillar of the EBU and looks at some critical features in the context of the SRM and European banking resolution law more generally. The contributions have been prepared by academics, practitioners and officials. The collection aims at providing a variable

⁴ Moloney *supra* note 2, 1622.

geometry to the question of the role of the law in the EBU. The contributions state the law broadly as of end of 2018.

With this objective in mind, this Introduction therefore briefly presents a summary and overview of each chapter and looks at the key aspects and arguments analysed in each chapter.

Part I looks at the general EBU framework and the role of law. Chapter 2 by Gavin Barrett makes the case for the constitutional foundations of the EBU as the most important EU reform for European integration after the Maastricht Treaty. The author uses the story of *Cinderella* to demonstrate to what extent the EBU has shaped a unique reform project. The author argues that, as in a latter-day *Cinderella*, the EBU failed to make the original guest list when EMU formally began at Maastricht in 1992. Subsequently, however, the author submits that the EBU went on to have its status transformed, gaining star billing. The significance of this creation has impressed scholars and participants alike. The author submits that the future prospects of the EBU should be carefully considered, also in order to create a better relationship between the EBU and EMU. Due regard should be both to the need to update it and to remain in step with broader international developments as well as the need to align the EBU to parallel reform initiatives such as the European Capital Markets Union.

Chapter 3 by Alberto de Gregorio Merino adopts an institutional perspective to assess the EBU reforms. The author reconstructs the EBU as an unprecedented effort to create a new supranational institutional framework for banking supervision and resolution. In the author's view the main reasons behind the creation of the EBU were high tension in financial markets and the lack of harmonised and uniform rules to deal with ongoing prudential supervision and restructuring of ailing entities. The author critically examines, from an institutional perspective, the main institutional aspects stemming from the EBU. The author concludes that the EBU represents an unprecedented contribution to the establishment of the internal market and the establishment of the EMU, whose currency is the euro, and is still subject to review and improvements in future reforms.

Chapter 4 by Mario P. Chiti examines the EBU from an administrative law perspective. In the view of the author, the EBU is the most innovative development of European administrative law since the Single European Act of 1986. Accordingly, it reshapes all the main parts of administrative law: general principles, organisation, procedure and guarantees. Yet, the incompleteness of the EBU (in particular the missing 'third pillar') makes the model incoherent. Furthermore, according to the author, the first resolution experiences of the EBU have shown some tensions among the ECB, the Single Resolution Board (SRB) and the EU institutions as well as between the new European regulation and national rules, as shown by the first resolution experiences of the EBU. At

the same time, despite the inevitable problems of a system established in a very short time with unique features, the EBU fosters boldly the integration process.

Chapter 5 by Diane Fromage and Renato Ibrido concentrates on the accountability dimension of the EBU. This chapter analyses the democratic accountability mechanisms currently existing in the EBU and draws some initial conclusions based on the practice as it has developed thus far. Its focus is on the accountability dimension developed in the relationship with the Council and the European Parliament, as well as national parliaments, alongside the European Commission in the case of the SRB. This chapter then looks at whether the established accountability framework suffices to compensate for the additional transfer of competences to the EU level. Looking at the two EBU pillars, the argument of the chapter is that five years after the entry into force of the SSM Regulation, accountability has, so far, been mostly ensured at the European level by the European Parliament and the Council, whilst national parliaments have only marginally made use of the prerogatives conferred upon them. Similarly, in the SRM the European Parliament interacts regularly with the SRB, even if it does so less than it does with the ECB. Conversely, national parliaments have so far only very rarely interacted with the SRB.

Chapter 6 by Pierre Schammo assesses the impact of the UK decision to leave the EU on the EBU. According to the author, at the heart of the discussions on Brexit are issues about the future balance between the mobility and place-dependency of cross-border flows and networks. This chapter examines this issue against the background of the internal market and the EBU. At the time of writing, there is significant uncertainty about what (if anything) will substitute for mobility-enhancing arrangements and for traditional state-EU rescaling that has gone hand in hand with improvements in cross-border mobility. The chapter takes into account the current level of information and the current state of play of the political negotiations on Brexit.

Part II examines the SSM and the role of law. Chapter 7 by Christy Ann Petit assesses in more detail key legal developments in the SSM. The author examines the decision-making governance of the ECB and how it has evolved with the creation of the SSM. According to the author, the Supervisory Board is nested in a semi-rigid institutional setting of the ECB, where different decision-making procedures steer the operations and strategies of the SSM. The legal framework of ECB decision-making and its legal nature are contextualised in EU secondary law and SSM law, including a comparison with the European Commission's decision-making procedures. The author's findings are that the SSM decision-making is geared towards ensuring efficiency in the ECB decision-making governance, in a context of inflation and diversity of supervisory decisions.

Chapter 8 by René Smits looks at some selected law-related aspects of the institutional and substantive dimensions of the SSM. According to the author,

among the institutional law issues around the EBU, transparency has a central place. The chapter examines the multi-dimensional level of applicable rules, some lack of transparency of inter-authority agreements (Memoranda of Understanding) and transparency of administrative and judicial review of the ECB's decisions when exercising its prudential powers. The argument submitted in the chapter is that there should be more openness and clarity in decision-making and documentation in the SSM. The author submits that more transparency is advocated, both in the functioning of the SSM and in the context of the wider, also cultural, challenges of European integration.

Chapter 9 by Kern Alexander examines three peculiar aspects of the SSM, i.e. the scope of prudential supervision, the cross-border dimension of rules applicable to credit institutions established in the SSM and the macroprudential policy of the ECB in the SSM. The chapter argues that the EU Treaties and the Capital Requirements Directive provide limited competence and tasks for the ECB to act as a bank supervisor, especially with regard to non-bank financial institutions that could cause systemic risks. Further, the author argues that the supervisory structure of cross-border activities of the SSM supervised entities depends heavily for its effectiveness on information exchange and cooperation between the National Competent Authorities (NCAs) and the ECB, but, in the author's view, there may be gaps and institutional obstacles that limit the ECB's effectiveness as a cross-border supervisor. The chapter then assesses the ECB macroprudential tasks in the SSM and its interaction with host country authorities.

Chapter 10 by Gianni Lo Schiavo looks at a specific question that has developed with the creation of the SSM: the ECB direct application of national law implementing EU law in the exercise of ECB supervisory tasks. This chapter intends to examine the novel topic of application of national law by the ECB and assess the scope, tasks and powers of the ECB in applying national law. The author examines the framework for application of national law and looks at the various ways in which the ECB applies national law. In particular, these consist in the application of national law directly and indirectly implementing EU directives and raise questions on the application of national procedural and substantive laws. Finally, the chapter proposes some policy reforms in order to address issues related to the application of national law by the ECB, with a view to ensuring a supranational exercise of banking supervision in the SSM.

Chapter 11 by Andrea Miglionico examines the controversial aspect of the SSM and more generally banking supervision's focus on Non-Performing Loans (NPLs). The previous system of banking supervision showed the fragility of the banking system and the lack of harmonised and single regulatory regime to address credit risk in the monitoring and review of loan practices of credit institutions. In the author's view, the deterioration of NPLs in the balance sheet of credit institutions represents a real concern for the supervisory

authorities and constitutes a challenge for regulators and market actors. The chapter examines to what extent the new supervisory toolkit implemented in the EBU intends to address the classification of asset quality and to establish common practices to resolve NPLs. Furthermore, the author argues that the intricate structure of the preventive measures to reduce the risk of lending defines a new landscape in the prudential treatment of NPLs.

Part III looks at the SRM and the role of law. Chapter 12 by Simon Gleeson moves the analysis of the collection to the second pillar of the EBU and assesses some critical aspects of the SRM. The author critically assesses the full set of resolution powers created in the Bank Resolution and Recovery Directive (BRRD), including the power to bail in debt and to write down capital instruments without compensation. According to the author, the resolution and its tools remain an exceptional remedy. Most recent bank failures have been dealt with through national Member State insolvency regimes, based on the assumption that the banks concerned were not deemed systemic and were not subject to the European resolution regime. Furthermore, the author submits that the use of the Single Resolution Fund (SRF) as supranational resolution financing is still subject to significant restrictions, and it remains to be seen how it can be used in practice.

Chapter 13 by Michael Schillig moves the analysis to the institutional dimensions of resolution and normal insolvency proceedings in the EBU. The author submits that the EU framework for dealing with failing banks constitutes a complex trifurcated system: a bank that does not meet the conditions for resolution under BRRD/SRM may be subject to the applicable national corporate insolvency law, which may entail the granting of State aid subject to Commission approval. The author argues that the operation of these parallel subsystems, with their different substantive entitlements and loss allocation cascades, invites potentially wrong decisions, resulting in undesirable distributional outcomes, contrary to the overall system goal of limiting taxpayers' loss exposure to a minimum and tackling the 'too-big-to-fail' problem.

Chapter 14 by Paolo Fucile examines the SRM and banking resolution from the perspective of the protection of human rights. The chapter analyses the relationship between the resolution framework and the Charter of Fundamental Rights of the European Union (CFREU). The author provides a critical review of the relevant provisions in the SRM and BRRD legislative text and recitals as well as a more detailed analysis of the interplay between the provisions granting resolution authorities, the power to bail in liabilities and the fundamental right to property recognised in Article 17 CFREU. In this respect, the author critically analyses the recent decision of the Court of Justice of the European Union (CJEU) in the *Kotnik* case (C-526/14) and provides an assessment of points of contact and differences between the stance taken by the Court and

the provisions of BRRD and the SRM Regulation from the human rights perspective.

Lastly, Chapter 15 by Napoleon Xanthoulis looks at the unfinished agenda on the European resolution framework by examining two key aspects in the current political review of reforms that would support the SRM: the establishment of the European Monetary Fund as an EU institution that would integrate the European Stability Mechanism (ESM) in the EU legal framework and Emergency Liquidity Assistance (ELA) as a particular framework to grant liquidity assistance to solvent but illiquid credit institutions. In the author's view, despite being a first attempt to mutualise risks across the euro area's financial institutions, the SRF is not yet based on a reliable fiscal backstop to the EBU. The author submits that the SRF may be practically dependent on the ESM or its successor. Furthermore, the author looks at the different approach between centralisation of supervisory tasks in the SSM and the decentralised national-based ELA provision model.

This collection intends to provide high-level reflections on the impact of the creation of the EBU on established legal disciplines. It looks at various multi-dimensional perspectives and reflects on the current regime of the EBU. Without drawing a conclusion (as the EBU is still an ongoing political and regulatory process, which ideally is not yet concluded), this collection intends to examine critical aspects of the EBU and provide some tentative answers on the current state of EBU work and reform seven years after the first political milestone for the creation of a supranational system of banking supervision and resolution.⁵ The focus of this collection is on the reciprocal impact of the EBU and existing legal disciplines.

The editor is aware, though, that the EBU is an unfinished project. Some adjustments and political reforms may further integrate the EBU. In particular, the proposed European Deposit Insurance Scheme (EDIS), sovereign bonds supervisory treatment as well as the proposed changes to the perimeter of credit institutions or the impact of Brexit on EU banking law may substantially change the EBU framework in future.⁶ The main initiatives aim to find the appropriate regulatory balance between risk reduction and risk sharing.⁷ However, the outcome of some political negotiations is yet uncertain (the Capital Requirements and Capital Requirements Directive will soon be amended with non-revolutionary changes), but it remains unclear what other reforms will be considered priorities and adopted in future after the upcoming

⁵ Euro Area Summit Statement, 29 June 2012.

⁶ European Commission, Banking Union: Overview of progress in achieving risk reduction measures available at https://ec.europa.eu/info/publications/180606-report-banking-union-risk-reduction-measures_en (accessed 20 January 2019).

⁷ *Ibid.*

European parliamentary elections in 2019. Furthermore, it would run counter to the spirit of this collection if the developments achieved so far were not analysed in detail and assessment of the existing two EBU pillars were not taken into account. That is the main reason why the collection concentrates on the existing two EBU pillars and does not contain extensive analysis of the proposals on the table to complete the EBU.

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