

## **SOME REMARKS ON THE FUNCTIONING AND THE FUTURE PROSPECTS OF THE EUROPEAN BANKING UNION**

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### **1. Introduction**

The writing of the current article serves a two-fold purpose: *firstly*, to briefly introduce the history and the institutional framework of the *European Banking Union* (hereafter: EBU) created within the new supervisory framework of the *Economic and Monetary Union* (hereafter: EMU)<sup>1</sup> and to evaluate its functioning based on the reports of various EU institutions – e.g., the *European Court of Auditors* (hereafter: ECA) and the *European Central Bank* (hereafter: ECB) – and the case-law of the *Court of Justice of the European Union* (hereafter: CJEU). *Secondly*, to introduce the future prospects and possible policy options for the further development of the EMU. In doing so, the author introduces both pro and contra arguments in order to facilitate the drawing of thorough conclusions.

### **2. A superficial overlook of the institutional answers to the crisis: the creation of a system of supervision and banking union**

The Ecofin Council of October 2007 acknowledged – though not *expressis verbis* – that the then shaping crisis of the US finance sector could possibly affect the single market. In conjunction with this, scholars,<sup>2</sup> think tanks<sup>3</sup> and the expert group

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<sup>1</sup> The author of the current article already elaborated the topic in his earlier writings, therefore dispenses with introducing this process in details again. For details see: György MARINKÁS: How not to build a Monetary Union? – The structural weaknesses of the EMU in the light of the 2008 crisis and the institutional reforms for their correction. Marcell SZABÓ–Petra Lea LÁNCOS–Réka VARGA (eds.): *Hungarian Yearbook of International Law and European Law*. Vol. 2018 (Year of publication: 2019), pp. 437–471.; György MARINKÁS: Institutional Answers to the 2008 Crisis in the US and the EU: A Comparative Study. *European Integration Studies*, Vol. 14, No. 1 (2018), pp. 55–65.

<sup>2</sup> *Dennis Kelleher* and his fellow co-authors wrote – though regarding the situation in the US and not in the EU –, that strong and prospering market economies need strict and consequent regulation. As *Marek Dabrowski* argued in conjunction with this, weak and recessing markets on the other hand need prompt and firm intervention of public authorities in order to avoid the total collapse of the financial system. – D. M. KELLEHER et al.: The Dodd-Frank Act is Working and Will Protect the American People If It Is Not Killed before Fully Implemented. *North Carolina Banking Institute*, Vol. 20 (2016), pp. 145–147.; *Marek DABROWSKI*: The Global Financial Crisis. Lessons for European Integration. *CASE Network Studies & Analyses*, No. 384/2009, pp. 17–18.

chaired by *Jacques de Larosière*<sup>4</sup> already suggested back in 2008/2009 that the EU should create some sort of community level supervisory system. Legislators and regulators of the EU was lagging behind,<sup>5</sup> however; it was not until 2011<sup>6</sup> when the EU – as a belated response to the crisis and in order to eliminate any possible threats, which could jeopardize the stability of the financial systems of the EMU –, established the *European System of Financial Supervision* (ESFS).

The change in the ECB's director seat in 2011 gave an impetus for the already ongoing policy changes: while *Jean-Claude Trichet* insisted that the restrictive dispositions of the TFEU – namely the 'no bailout',<sup>7</sup> no default<sup>8</sup> assumptions – shall be kept under all circumstances, the new president *Mario Draghi* made his 'whatever it takes' speech in 2012 giving the green light to the *Outright Market Transactions*<sup>9</sup> (hereafter: OMT) and other reforms, which saved the Eurozone. However Draghi was praised for this revolutionary step – and not without a reason –, it is worth mentioning that despite the consistent denial of the *Banca D'Italia* – the Italian Central Bank –, it is probable that he played a serious role in the *forging* of Italian and Greek

<sup>3</sup> CEPS: *Concrete Steps Towards More Integrated Financial Oversight. The EU's Policy Response to the Crisis*. Rapporteur: Karel Lannoo, Brussels, 2008, p. 59.

<sup>4</sup> The High-Level Group on Financial Supervision in the EU: *De Larosière Report*, 25/02/2009, Brussels. – Online available at: [http://ec.europa.eu/economy\\_finance/publications/pages/publication14527\\_en.pdf](http://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf) (11/11/2019).

<sup>5</sup> As *advocate general Gerard Hogan* wrote in his opinion in the *Landeskreditbank Baden-Württemberg v. ECB* case: '[...] legislators and regulators have struggled to come to terms with the enormity of this banking crisis and to understand how, in the face of what had previously seemed to be a perfectly adequate system of regulation, that system ultimately failed when it was put to the test in those dark days of 2008 onwards.' – C-450/17 P – *Landeskreditbank Baden-Württemberg v. ECB*, opinion of *advocate general Gerard Hogan*, 5 December 2018, para. 2.

<sup>6</sup> To be more precise in 2010 – before establishing the ESFS – the Council – as a transitional solution – called the *European Financial Stabilisation Mechanism* (EFSM) into being. The aim of the creation of the EFSM was to grant credit to the member states, which struggle with problems. The *European Stability Mechanism* (ESM) started to function in 2012. The aim of its creation was to provide the EU with a lender of last resort (LLR), which – in case of necessity – could grant credits to the member states and financial institutions facing crisis. – Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12/5/2010, p. 1–4); Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No. 407/2010 establishing a European financial stabilisation mechanism (OJ L 210, 7. 8. 2015, p. 1–2); ESM Treaty – Treaty Establishing the ESM (signed on 2 February 2012, entry into force: 27 September 2017); See also: [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/european-financial-stabilisation-mechanism-efsm\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/european-financial-stabilisation-mechanism-efsm_en) (11/11/2019) and <https://www.esm.europa.eu/financial-assistance> (11/11/2019).

<sup>7</sup> Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26. 10. 2012, pp. 47–390, Article 125.

<sup>8</sup> *Ibid.* Article 9.

<sup>9</sup> See: Benoît CŒURÉ; *Outright Monetary Transactions. One Year On*. Berlin, 2 September 2013. Online available on: <https://www.ecb.europa.eu/press/key/date/2013/html/sp130902.en.html> (03/11/2019).

‘books’ to secure the Eurozone entry of these countries.<sup>10</sup> – A machination that had serious long-run effects: that is to say, the Eurozone came near to its end. *Tim Worstall* an economist of the *Adam Smith Institute* – and a stubborn euro-sceptic – believes that one of the main causes for keeping the Euro alive by the member states is that they cannot even estimate the costs of its possible wind up.<sup>11</sup>

In addition to the above mentioned, the European legislators created the EBU, which was proposed by several authors years before. The banking union is based on two pillars, namely the *Single Supervisory Mechanism*<sup>12</sup> (SSM) and the *Single Resolution Mechanism*<sup>13</sup> (SRM). As *Luigi Chiarella* pointed out,<sup>14</sup> the previous banking supervision and resolution framework – which was based on cooperation –, failed during the crisis, because domestic authorities were prone to either turn a blind eye, when it came to their ‘national champions’ or to be reluctant to use public money for bailouts. The work started with the European Commission’s *Roadmap towards a Banking Union*,<sup>15</sup> which outlined the current system, a combination of three methods,<sup>16</sup> forming a two-tier system consisting of the national and supranational levels. The domestic authorities and the ECB are obliged to cooperate in good faith

<sup>10</sup> See: Simon JOHNSON: Mario Draghi and Goldman Sachs, Again. *The Baseline Scenario*, 17 March, 2010. – Online available at: <https://baselinescenario.com/2010/03/17/mario-draghi-and-goldman-sachs-again/> (06/11/2019); James KWAK: Bank of Italy Defends Draghi. *The Baseline Scenario*, 19 February 2010. – Online available at: <https://baselinescenario.com/2010/02/19/bank-of-italy-defends-draghi/> (06/11/2019); Yves SMITH: Corruption, EuroStyle: ECB Chief Draghi Fudged Italy’s Books to Secure Eurozone Entry, Italy Stuck with Derivative Losses. *Naked Capitalism*, 26 June 2013. – Online available at: <https://www.nakedcapitalism.com/2013/06/corruption-eurostyle-mario-draghi-fudged-italys-books-to-secure-eurozone-entry-italy-stuck-with-derivative-losses.html> (06/11/2019).

<sup>11</sup> Tim WORSTALL: Both Krugman And Friedman Said The Euro Was A Stupid Idea: But They Did It Anyway, Didn’t They? *Forbes*, 6 July 2015. Online available at: <https://www.forbes.com/sites/timworstall/2015/07/06/both-krugman-and-friedman-said-the-euro-was-a-stupid-idea-but-the-y-did-it-anyway-didnt-they/#5a3b9f520e81> (10/11/2019); See also: Joseph E. STIGLITZ: Can the Euro be Saved? *Project Syndicate*, 05 May 2010. Online available at: <https://www.project-syndicate.org/commentary/can-the-euro-be-saved?barrier=accesspaylog> (10/11/2019).

<sup>12</sup> 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 (OJ L 287, 29/10/2013, pp. 63–89) (*SSM Regulation*).

<sup>13</sup> Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30/7/2014, pp. 1–90) (*SRM Regulation*).

<sup>14</sup> Luigi CHIARELLA: The Single Supervisory Mechanism: the Building Pillar of the European Banking Union. *University of Bologna Law Review*, Vol. 1 (2016), Issue 1, ISSN 2531-6133, pp. 34–90, pp. 41–46, p. 85.

<sup>15</sup> European Commission: *Communication from the Commission to the EP and the Council. A Roadmap towards a Banking Union*. Brussels, 12/9/2012, COM(2012) 510 final.

<sup>16</sup> Namely a scheme based on (i) the *cooperation and coordination* between national authorities, or on a (ii) *lead home supervisor* – which means that the home authority has supervisory powers over the whole cross-border group – or on a (iii) *supranational authority*. The current structure of the SSM is the combination of three methods.

and share powers.<sup>17</sup> The exact rules on this cooperation were refined in the case-law of the CJEU – as the author will introduce it in the second chapter.

The SRM – the second pillar of the banking union – covers the same scope as the SSM: that is to say, financial institutions that fall under the SSM are covered by the SRM too. The SRM Regulation established the framework for failing banks within the banking union.

However, the creation of such a system was a huge step forward – as a final obstacle to be tackled –; the newly established institutions had to withstand the supervision of the CJEU. Fortunately, they did well in this regard. In the *United Kingdom v. Parliament and Council* case<sup>18</sup> – also known as the ‘ESMA-case’,<sup>19</sup> the *Court of Justice* (hereafter: CJ) – in Zoltán Angyal’s words – delivered an amicable decision<sup>20</sup> for the EU in order to protect the authority of the ESMA. Similarly, in the *Gauweiler and Others* case,<sup>21</sup> the CJ was of the view that the so-called OMTs – in case they obey certain criteria – conform to the EU law.<sup>22</sup>

### 3. The practice and evaluation of the SSM and the SRM

#### 3.1. The SSM

##### 3.1.1. The main rules on the functioning of the SSM and the related case-law

While the *less significant credit institutions*<sup>23</sup> fall under the supervision of the national authorities, the significant ones<sup>24</sup> are under the direct supervision of the ECB.<sup>25</sup> – It has to be pointed out that *the notion of credit institution is a concept of the European Union Law*, which shall prevail.<sup>26</sup> – The ECB’s *Framework Regulation*<sup>27</sup> for the SSM – alongside with the *CJ’s case-law* – further refined the rules on

<sup>17</sup> SSM Regulation, Article 6(2).

<sup>18</sup> C-270/12, *United Kingdom v. Parliament and Council*, Judgment, 22 January 2014.

<sup>19</sup> European Securities and Markets Authority.

<sup>20</sup> Zoltán ANGYAL: Jogvita az európai értékpapír-piaci hatóság rendkívüli körülményekkel kapcsolatos beavatkozási hatásköréről. *Publicationes Universitatis Miskolcensis. Sectio Juridica et Politica*, Tomus XXXIII, 2015, pp. 129–143.

<sup>21</sup> C-62/14, *Gauweiler and Others*, Judgment, 16 June 2015.

<sup>22</sup> Ibid. para. 128; See also: P. A. VAN MALLEGHEM: Pringle A Paradigm Shift in the European Union Monetary Constitution. *German Law Journal*, Vol. 14 (2013), pp. 141–168.

<sup>23</sup> The SSM Regulation does not contain the definition of credit institutions, instead it refers to Article 4(1) of Regulation (EU) No. 575/2013 of the European Parliament and of the Council, which defines credit institutions as follows: credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.

<sup>24</sup> The delimitation is to be made as contained Article 6(4) of the SSM Regulation.

<sup>25</sup> The decisions of the ECB can directly affect individual credit institutions, which are subject to a two-fold system of review: an *internal administrative review* and an *external judicial review*. – CHIARELLA, p. 70.

<sup>26</sup> Ibid. p. 48.

<sup>27</sup> Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Cen-

cooperation, including: (i) the methodology for determining the quantitative criteria for classifying banks as significant or less significant; (ii) the exercise of powers; (iii) and the relations between domestic regulators and the ECB.

A crucial point of the regulation is the *separation of the ECB's functions as a central bank and as a financial supervisory authority*: while the Preamble records the general principles of this separation, Article 25 of the SSM Regulations contains the explicit rules.<sup>28</sup> Last, but not least, it is worth mentioning that, while – as a basic rule – the SSM applies to the member states of the Eurozone, it allows any EU member states to enter a ‘close cooperation scheme’.<sup>29</sup> As mentioned above, some of the definitions and procedural rules were refined by the CJ.

In its recent judgment – delivered on 9 May 2019 –, brought in the C-450/17 P *Landeskreditbank Baden-Württemberg v. ECB* case,<sup>30</sup> which started after an appeal was lodged against GC judgement in the T-122/15 case,<sup>31</sup> the CJ – interpreting the provisions of Council Regulation 1024/2013 (SSM Regulation) and Regulation 468/2014 – held that ‘the ECB is exclusively competent to carry out the tasks stated in that provision<sup>32</sup> in relation to all those institutions [...] The national competent authorities thus assist the ECB in carrying out the tasks conferred on it by Regulation No. 1024/2013, by a decentralised implementation of some of those tasks in relation to less significant credit institutions [...]’<sup>33</sup> The other parts of the judgment<sup>34</sup> – read in conjunction with the opinion of the advocate general<sup>35</sup> – made it clear that the SSM Regulation *assumes ex ante* that the direct ECB supervision is required and *the supervision of the national authorities are exceptional* and can prevail only in the case if particular circumstances existed under Paragraph 1 Article 70 of the said regulation.

In the C-52/17 *VTB Bank (Austria) AG v. Finanzmarktaufsichtsbehörde* the domestic court asked among others: whether [...] a supervisory procedure may be regarded as having been formally initiated, within the meaning of that provision, where a credit institution reports to the national supervisory authority [...] or where that authority has already adopted a decision in a parallel procedure concerning similar breaches. The court was of the view that a supervisory procedure cannot be regarded as having been formally initiated in the above mentioned case.<sup>36</sup>

In the C-219/17 *Berlusconi and Fininvest v. Banca d'Italia and IVASS* the CJ was of the view that Article 263 TFEU must be interpreted as precluding national

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tral Bank and national competent authorities and with national designated authorities (*SSM Framework Regulation*).

<sup>28</sup> SSM Regulation, Preamble Articles 65, 66, 73, 77, 85 and Article 25.

<sup>29</sup> SSM Regulation, Article 7.

<sup>30</sup> C-450/17 P, *Landeskreditbank Baden-Württemberg v. ECB*, Judgment, 8 May 2019.

<sup>31</sup> T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB*, Judgment, 16 May 2017.

<sup>32</sup> Namely Article 4 and 6 of the SSM Regulation.

<sup>33</sup> C-450/17 P, *Landeskreditbank Baden-Württemberg v. ECB*, Judgment, paras. 38, 41.

<sup>34</sup> *Ibid.*, paras. 31–33.

<sup>35</sup> C-450/17 P, *Landeskreditbank Baden-Württemberg v. ECB*, opinion (op. cit. 5), para. 36.

<sup>36</sup> C-52/17, *VTB Bank (Austria) AG v. Finanzmarktaufsichtsbehörde*, Judgment 19 December 2018, paras. 29–30, p. 61.

courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by competent national authorities in the procedure provided in [the related EU law].<sup>37</sup> – That is to say; *these decisions fall under the sole jurisdiction of the CJEU.*

In the C-594/16 *Buccioni v. Banca d'Italia* case, the CJ was of the view that the relevant EU law does not preclude the competent authorities of the Member States from disclosing confidential information. As the court stated it is for the competent authorities and courts to evaluate the interests of the parties.<sup>38</sup>

The General Court too, contributed to the clarification of some definitions and how the court shall interpret some of the provisions.

In the T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v. ECB*, the applicant contested the ECB's decision, in which it classified the applicant as significant, thus subject to its sole supervision. Similarly, in the T-712/15 *Crédit Mutuel Arkéa v. ECB* the applicant in its letter of 19 September 2014 contested the ECB's decision, in which the ECB claimed that it has the right to exercise the sole supervisory authority. In both cases, the GC rejected the applicant's pleas and upheld the ECB's decision.<sup>39</sup> – In the *Landeskreditbank*-case – as mentioned above – the appeal against the GC's judgement was recently decided by the CJ.

In the T-133/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB* the applicant alleged that the ECB interpreted the concept of 'effective director incorrectly' The GC rejected all the four pleas in law of the applicant as ill-grounded and upheld the ECB's decision.<sup>40</sup>

In the T-733/16 *La Banque postale v. ECB*, T-745/16 *BPCE v. ECB*, T-751/16 *Confédération nationale du Crédit mutuel v. ECB*, T-757/16, *Société générale v. ECB*, T-758/16, *Crédit agricole SA v. ECB* and T-768/16, *BNP Paribas v. ECB* cases *the applicants asked for derogation, which was denied by the ECB.* In each case, the GC was of the view that the ECB did not provide suffice and firm proof for the necessity of denying the derogation. Thus the GC annulled the contested decisions in each case.<sup>41</sup>

<sup>37</sup> C-219/17, *Berlusconi and Fininvest v. Banca d'Italia and IVASS*, Judgment, 19 December 2018, para. 60.

<sup>38</sup> C-594/16, *Buccioni v. Banca d'Italia*, Judgment, 13 September 2018, para. 41.

<sup>39</sup> T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB*, Judgment, 16 May 2017, paras. 100, 112, 136, 142, 150; T-712/15, *Crédit Mutuel Arkéa v. ECB*, Judgment, 13 December 2017, paras. 108–109, 160–161, 212–214.

<sup>40</sup> T-133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*, Judgment 24 April 2018, paras. 33, 94, 103.

<sup>41</sup> T-751/16, *Confédération nationale du Crédit mutuel v. ECB*, Judgment, 13 July 2018, paras. 1–11, 23–24, 59, 118; T-745/16, *BPCE v. ECB*, Judgment, 13 July 2018, paras. 1–10, 19, 20–21, 58, 112; T-757/16, *Société générale v. ECB*, Judgment, 13 July 2018, paras. 1–10, 19, 58, 111; T-758/16, *Crédit agricole SA v. ECB*, Judgment, 13 July 2018, paras. 1–10, 2324, 83–87; T-768/16, *BNP Paribas v. ECB*, Judgment, 13 July 2018, paras. 1–10, 23, 24, 83–87.

### 3.1.2. The evaluation of the functioning of the SSM

Both the European Institutions – namely the European Commission<sup>42</sup> and the ECA<sup>43</sup> – and also the *German Federal Ministry of Finance*<sup>44</sup> valued the first three years of the SSM as a success in their reports, though indicated that there is still a room for further improvements. As an example, it was a common and crucial point in both reports that the ECB should put further emphasis on maintaining a strict separation between the ECB’s monetary policy functions and its supervisory tasks as demanded by the SSM Regulation. The *Bruegel*<sup>45</sup> in its 2016 report – while also hitting a positive tone – criticized the *black box nature*<sup>46</sup> of the SSM’s decision making procedure. The *Bruegel* – just like the ECA<sup>47</sup> – suggested the streamlining of the decision making procedure and the delegation of decision making.<sup>48</sup> The SSM related case-law of the GC – each of the judgments<sup>49</sup> delivered after the *Bruegel*’s report – supports these findings: the pleas in law presented by the financial institutions were mostly based on the insufficiency of the ECB’s reasoning. – Alongside with the incorrect interpretation of the EU-law and the excess of power. The latter is still a source of debates: having regarded the latest CJ judgments and scholar reviews on the SSM Regulation and its implementation, one can argue that a scheme like the SSM requires a clear accountability relationship also between the ECB and the *national competent authorities* (NCAs), something that is not fully fledged in the current legal framework as pointed out by *Karagianni and Scholten*.<sup>50</sup>

<sup>42</sup> European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation, COM(2017) 591 final, Brussels, 11. 10. 2017, pp. 18–19.

<sup>43</sup> ECA, Single Supervisory Mechanism – Good start but further improvements needed. *Special Report*, No. 29 (2016) Doi:10.2865/023587.

<sup>44</sup> Federal Ministry of Finance (Bundesministerium der Finanzen), The Single Supervisory Mechanism: Lessons learned after the first three years. January 2018, pp. 4–5 – Online available at: [https://www.bundesfinanzministerium.de/Content/EN/Downloads/2018-01-26-SSM.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesfinanzministerium.de/Content/EN/Downloads/2018-01-26-SSM.pdf?__blob=publicationFile&v=2) (11/11/2019).

<sup>45</sup> European think tank that specialises in economics.

<sup>46</sup> The lack of transparency was a key point of the Transparency International’s report too: B. BRAUN: Two sides of the same coin? Independence and Accountability of the European Central Bank. Transparency International EU, 2017 – Online available at: [https://transparency.eu/wp-content/uploads/2017/03/TI-EU\\_ECB\\_Report\\_DIGITAL.pdf](https://transparency.eu/wp-content/uploads/2017/03/TI-EU_ECB_Report_DIGITAL.pdf) (11/11/2019).

<sup>47</sup> ECA, Special Report No. 29, Recommendation 1.

<sup>48</sup> The *Bruegel* referred to the more transparent US system as an example to be followed. – *Bruegel*, European Banking Supervision: the First Eighteen Months D. SCHOENMAKER–N. VÉRON (eds.): *Bruegel Blueprint Series*, Vol. XXV (2016), pp. 4–6, ISBN: 978-9-07 8910-41-1.

<sup>49</sup> T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB*; T-712/15, *Crédit Mutuel Arkéa v. ECB*; T-133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*; T-733/16, *La Banque postale v. ECB*; T-745/16, *BPCE v. ECB*; T-751/16, *Confédération nationale du Crédit mutuel v. ECB*.

<sup>50</sup> Argyro KARAGIANNI–Miroslava SCHOLTEN: Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework. *Utrecht Journal of International and European Law*, Vol. 34 (2018), Issue 2, pp.185–194. Doi: <http://doi.org/10.5334/ujel.463>.

### 3.2. The SRM

#### 3.2.1. The main rules on the functioning of the SRM and the related case-law

As mentioned in chapter one, the SRM covers the same scope as the SSM, and the SRM Regulation's purpose is to provide a framework for failing banks within the banking union. The resolution is managed by the *Single Resolution Board* (SRB), a new agency of the EU, established in 2015. The SRB cooperates with the *national resolution authorities*<sup>51</sup> (NRAs). The resolution procedure is financed through a single resolution fund, which is financed by the bank sector. The purpose of the SRM is to ensure an orderly resolution of failing banks with minimal costs for taxpayers and to the real economy.

The case-law of the General Court – even if eight out of nine cases<sup>52</sup> have been dismissed so far<sup>53</sup> as inadmissible because of various reasons<sup>54</sup> – shows that the *financial institutions do not evaluate the procedure of the SRB as transparent*: in their applications,<sup>55</sup> they frequently claim that (i) the SRB should have notified them on their decisions – not only the NRAs – and that (ii) the SRB should have disclosed more details on the grounds of its decision.

*As another conclusion, some procedural rules relating the functioning of the SRM are still to be clarified*: in the *ABLV Bank AS v. ECB* the GC held that ‘the contested acts are preparatory measures, which do not change the applicant’s legal status [...] in no way binding, but which constitutes the basis for the adoption by the SRB of resolution schemes or decisions establishing that resolution is not in the public interest’.<sup>56</sup> That is to say, the GC was of the view that these acts do not fall

<sup>51</sup> For details of the Hungarian regulation and domestic supervision system please see: Zoltán NAGY–Anett CSISZÁR: A hazai pénzügyi felügyeleti szabályozás a változások tükrében. *Publicationes Universitatis Miskolciensis*, Vol. XXXIV (2016), pp. 157–163.

<sup>52</sup> T-645/16, *Vorarlberger Landes- und Hypothekenbank v. SRB*, Order of the GC, 6 February 2017; T-661/16, *Credito Fondiario v. SRB*; Order of the GC, 19 November 2018; T-14/17, *Landesbank Baden-Württemberg v. SRB*, Order of the GC, 19 November 2018; T-42/17, *VR-Bank Rhein-Sieg v. SRB*, Order of the GC, 19 November 2018; T-494/17, *Iccrea Banca v. Commission and SRB*, Order of the GC, 19 November 2018; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, 18 September 2018; T-281/18, *ABLV Bank AS v. ECB*, Order of the GC, 6 May 2019, para. 49; T-283/18, *Bernis et al. v. ECB*, Order of the GC, 6 May 2019; T-158/18, *Scaloni and Figni v. Commission, EP, Council*, Order of the GC, 9 July 2019.

<sup>53</sup> 15 November 2019.

<sup>54</sup> T-661/16, *Credito Fondiario v. SRB*; order of the GC, paras. 49, 55; T-14/17, *Landesbank Baden-Württemberg v. SRB*, Order of the GC, paras. 33, 51; T-42/17, *VR-Bank Rhein-Sieg v. SRB*, Order of the GC, paras. 24, 51; T-494/17, *Iccrea Banca v. Commission and SRB*, Order of the GC, paras. 24–26, 69; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, Order of the GC, paras. 15, 23–27.

<sup>55</sup> T-661/16, *Credito Fondiario v. SRB*, Application, 19/09/2016; T-14/17, *Landesbank Baden-Württemberg v. SRB*, Application, 12/01/2017; T-42/17, *VR-Bank Rhein-Sieg v. SRB*, Application, 25. 01. 2017; T-494/17, *Iccrea Banca v. Commission and SRB*, Application, 28/07/2017; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, Application, 08/09/2017.

<sup>55</sup> 20 January 2019.

<sup>56</sup> T-281/18, *ABLV Bank AS v. ECB*, Order of the GC, 6 May 2019, para. 49.



under the revision procedure contained by Article 263 of the TFEU. In this regard GC dismissed the applicants' arguments, namely that 'a declaration that an entity is failing or is likely to fail is a functional equivalent to withdrawing that entity's licence, and, as such, must also be open to judicial review'.<sup>57</sup> In the *T-283/18 Bernis et al. v. ECB* case, the GC came to identical conclusions<sup>58</sup> under almost identical statement of facts.

In the *T-158/18 Scaloni and Figni v. Commission, EP, Council* case the GC had to deal with the question of jurisdiction over an alleged damage – which, based on the applicants' allegations –, was attributable to the Commission.<sup>59</sup> The GC was of the view that the application was 'noticeably inaccurate' and did not make it possible to state the nature of the Commission's failure and to establish a causal link between the unlawful act and the alleged damage. Thus the GC dismissed the application.<sup>60</sup>

As mentioned above, the only case, which was declared admissible so far, thus decided in its merits by the GC, was the *T-645/16 – Vorarlberger Landes- und Hypothekenbank v. SRB* case, in which the applicant alleged the breach of essential procedural requirements by (i) lack of (full) disclosure of the contested decision, (ii) inadequate statement of reasons for the contested decision. The Court was of the view that the applicant has failed to show that the implementation of the contested decision could result in serious and irreparable harm.<sup>61</sup>

### 3.2.2. The evaluation of the functioning of the SRM

Based on a 2018 special report<sup>62</sup> of the ECA, the first three years of the SRB's functioning showed a mixed picture.<sup>63</sup> e.g., its hesitation to order the liquidation of *Banca Popolare di Vicenza and Veneto Banca* only in 2017 instead of 2016 – when it should have been – cost the Italian taxpayers a significant amount as pointed out by *Nicolas Véron*,<sup>64</sup> an economist at the Bruegel. As *Martin Sandbu* noted – how-

<sup>57</sup> Ibid, para. 24.

<sup>58</sup> *T-283/18, Bernis et al. v. ECB*, Order of the GC, 6 May 2019, paras. 4–6, 17, 22–23, 36–41, 51.

<sup>59</sup> *T-158/18, Scaloni and Figni v. Commission, EP, Council*, Order of the GC, 9 July 2019, paras. 20–22.

<sup>60</sup> Ibid, paras. 37–40, 50.

<sup>61</sup> *T-645/16, Vorarlberger Landes- und Hypothekenbank v SRB*, Order of the GC, 6 February 2017, para. 42; see also: Application (07/09/2016) to the GC in the *T-645/16* case.

<sup>62</sup> ECA, Special report No. 23/2017: Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go, p. 68.

<sup>63</sup> The agency was understaffed and resolution planning was not completed within the deadline. On the other hand, these shortcomings were associated with the period of starting, which could be tackled in the future. – Ibid. paras. 34, 55–56, 60, 63, 64–68, 103, 114, 125, 141.

<sup>64</sup> Véron NICOLAS: *Bad News and Good News for the Single Resolution Board*. Bruegel, 15 January 2018. Online available at: <http://bruegel.org/2018/01/bad-news-and-good-news-for-the-single-resolution-board/> (11/11/2019).

ever, not in connection with the above mentioned case – that the ECB started to use its recent empowerment half-hearted.<sup>65</sup>

Even the latest reports show that ‘the SRB’s trajectory is still at a very early stage.’<sup>66</sup> In accordance with this, the European Commission stated<sup>67</sup> that ‘it is premature to design and adopt legislative proposals at this stage’. While the reports made on behalf of the EU institutions or by them, seemed to hit a cautious tone, some academics concluded<sup>68</sup> that the member states of the EBU had recognised prevalence of the ECB’s rights. In their view, the SRM regulation leaves no room for national resolution tools.

#### 4. Future prospects

Regarding the future prospects, the literature is rather heterogeneous: it is portrayed either dark or thriving. *Joseph Stiglitz* – who predicted the fall of the EMU,<sup>69</sup> when the current crisis broke out – is still very sceptical regarding its chances to survive.<sup>70</sup> He argues that *the only way out is putting an end to the policy of austerity*: if the European policymakers were to put emphasis on growth instead of austerity, the chances of the EMU not to fall apart would grow. – The historic moment has arrived as the Franco-German tandem seems to be revived.<sup>71</sup> – On the other hand: in his view, it is still an open question whether it would ever retrieve its prosperity experienced in the first ten years of its existence.<sup>72</sup> One should not wonder that the member states, which have not strived to access earlier – because evaluating monetary sovereignty higher than the advantages of the common currency –, are less

<sup>65</sup> Martin SANDBU: *Europe’s Orphan. The Future of the Euro and the Politics of Debt*. Princeton University Press, Princeton NJ, 2015, p. 336, p. 313.

<sup>66</sup> Nicolas VÉRON: Taking stock of the Single Resolution Board. Banking Union Scrutiny. *In-depth Analysis Requested by the ECON committee*. March 2019, p. 21.

<sup>67</sup> European Commission, *The Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)*, Brussels, 30. 4. 2019, p. 12.

<sup>68</sup> Danny BUSCH–Mirik RIJN–Marije LOUISSE: *How Single is the Single Resolution Mechanism?* European Banking Institute Working Paper Series 2019 – No. 30 – Available at SSRN: <https://ssrn.com/abstract=3309189> or <http://dx.doi.org/10.2139/ssrn.3309189> (12/11/2019).

<sup>69</sup> STIGLITZ 2010.

<sup>70</sup> Joseph E STIGLITZ: *Can the euro be saved? An analysis of the future of the currency union*, Rome, May 2014 – Online available at: [https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2014\\_Rome\\_euro\\_ppt.pdf](https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2014_Rome_euro_ppt.pdf) (11/11/2019).

<sup>71</sup> The inauguration of *Emmanuel Macron* indicated the beginning of a new era, where France strives to become the equal partner of Germany again, which – since economic miracle of the 2000s – became the quasi singlehanded leader of the EMU. Sebastian PŁÓCIENNIK: Recovery of the Eurozone and a New Dynamic in European Integration: Implications for Member States outside the Monetary Union. *The Polish Quarterly of International Affairs*, 26/2017, pp. 7–21, pp. 15–16.

<sup>72</sup> J. E. STIGLITZ: *The Euro. How a Common Currency Threatens the Future of Europe*. 1<sup>st</sup> ed., W. W. Norton & Company, New York, 2016, p. 448, Part IV/9–10, ISBN-10: 039325402X.

keen on adherence.<sup>73</sup> Moreover, in a recent article, *György Matolcsy* – the governor of the *Central Bank of Hungary* – sharing this scepticism, argues<sup>74</sup> that the introduction of the common currency was the result of a ‘harmful dogma’; namely that the euro was the ‘necessary’ or ‘normal’ next step towards a unified Europe. In his view, neither of the two allegations were true. He argues that the introduction of the common currency was the outcome of some political considerations at the end of the 80s and the beginning of the 90s. He furthermore argues that the Eurozone still lacks most of the necessary pillars of a successful global currency e.g. a greater budget, a common finance minister and a ministry. He concludes that due to these shortcomings, the whole Eurozone should be wound up. – In his words: ‘the time has come to wake up from this a harmful and fruitless dream.’ Most interestingly, while he only mentions the negative aspects of the Euro in his writing – and dispenses with the positive ones –, he seems to be less critical when it comes to a possible common – and digital – Eurasian currency.<sup>75</sup> As a reply to the thoughts of the governor – and most probably as a measure aimed at calming the markets and the public opinion –, *Mihály Varga*, the current finance minister of Hungary stated that Euro-project is not hopeless and that Hungary will comply with her obligations arising from EU-membership, namely the introduction of the Euro.

*István Dobozi* – a former lead economist of the *World Bank* – while agrees with some of Matolcsy’s statements and conclusions in his response, holds that the governor misdiagnosed the reason for the failure. In Dobozi’s view, the latter one is not to be found in the lack of a common state or a common fiscal ministry: instead, it is attributable to *the failure of the internally fixed-exchange regime of the Eurozone* – which has not succeeded in eliminating the exchange rate risk – and to the *lack of fiscal co-ordination*.

While some appear to bury the Euro already – with an ill-concealed joy –, others argue that the fall of the EMU would jeopardise the future of the integration. In

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<sup>73</sup> Sebastian Płóciennik argues that there are three main reasons for this reluctance: (i) the EMU was on the margin of disintegration for years; (ii) they [the non-members of the EMU] fear that losing their monetary sovereignty would impose them to a possible asymmetric shock; and last (iii) so far they did not have to fear of being marginalized by two-speed integration as the UK gave serious weight to the non-euro platform. The Brexit will change the game however: both the platform’s economic and political weight will shrink. – PŁÓCIENNIK 2017, pp. 8–10, 13–14; For a more detailed analysis on the effects of Brexit please see: Lilla Nóra KISS: General Issues of Post-Brexit EU Law (December 2017). *European Studies*, Vol. 4/2017, Available at SSRN: <https://ssrn.com/abstract=3196102>.

<sup>74</sup> György MATOLCSY: We need to admit the euro was a mistake. *Financial Times*, 3 November 2019 – Online available at: <https://www.ft.com/content/35b27568-f734-11e9-bbe1-4db3476c5ff0> (03/11/2019).

<sup>75</sup> See: *Adózóna.hu* (31/10/2019), Matolcsy: Jön az eurázsiai digitális közös pénz. – Online available at: [https://adozona.hu/altalanos/Matolcsy\\_jon\\_az\\_eurazsiai\\_digitalis\\_kozos\\_p\\_6DPJY3](https://adozona.hu/altalanos/Matolcsy_jon_az_eurazsiai_digitalis_kozos_p_6DPJY3) (03/11/2019); See also: *Political Capital* (30/10/2019), Orbán-Putin meeting: lots of symbolism, no major development. Online available at: [https://politicalcapital.hu/hireink.php?article\\_read=1&article\\_id=2465](https://politicalcapital.hu/hireink.php?article_read=1&article_id=2465) (03/11/2019).

Angela Merkel's words: 'If the Euro falls, Europe falls.'<sup>76</sup> Annamária Artner and Péter Róna also share this view.<sup>77</sup> There are more optimistic authors; however; Fred Bergsten argues that the EMU and the EU will emerge even stronger once the crisis is over. He based his point of view on the history of the European project, which already survived several gross crises during its half-century long history.<sup>78</sup>

The survival of the Eurozone depends on the future path of the integration selected by the member states: based on the 2017 White Paper of the European Commission,<sup>79</sup> there are five scenarios. Two out of the five – namely scenarios No. 3: 'Those who want more do more' and No. 5; 'Doing much more together' – suggest closer cooperation and would practically result in the creation of a 'two- or multi-tier' integration structure. While there is a visible demand for such solutions in the political and academic debates, János Martonyi – the former foreign minister of Hungary – identifies any 'two- or multi-tier integration structure' as a threat. He argues<sup>80</sup> that there is not a single geographical, political or cultural borderline, which would legitimize and make an integration built on different levels functional. While he acknowledges that some of the recent developments – e.g., the banking union – was necessary, he warns that a situation, where the Eurozone would mean the European Union itself – a union within the union – shall be avoided. After the Brexit, however, when the 19 Eurozone countries will make up for more than 85% of the total GDP of the European Union, the realization of such a scenario shall be taken into account as a probable threat.

Last but not least, it has to be mentioned that the ECB has a new president in the person of Christine Lagarde,<sup>81</sup> which can be evaluated as a new possibility to leave behind some caveats of Draghi's legacy, e.g., the negative interest rates, which induced serious tensions between the ECB and the Deutsche Bundesbank – the central bank of the Federal Republic of Germany –, since these dry up the savings of the German citizens.<sup>82</sup> – It has to be noted that in the recent time, other gov-

<sup>76</sup> As Angela Merkel stated: 'If the Euro falls, Europe falls.' See: Peter SPIEGEL: If the euro falls, Europe falls. *Financial Times*, 15 May 2014. Online available at: <https://www.ft.com/content/b4e2e140-d9c3-11e3-920f-00144feabdc0> (01/11/19).

<sup>77</sup> Annamária ARTNER–Péter RÓNA: Eurosz(k)epszis: Az optimális valutaövezet elmélete és az euró gyakorlata. *Közgazdaság*, 2012/1., pp. 83–102, p. 100.

<sup>78</sup> Fred BERGSTEN: Why the Euro Will Survive: Completing the Continent's Half-Built House. *Foreign Affairs*, Vol. 91, Issue 5, 2012, pp. 16–22.

<sup>79</sup> European Commission: White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025. COM(2017) 2025 of 1 March 2017.

<sup>80</sup> JÁNOS MARTONYI: Differentiation or Disintegration. In: Marcel SZABÓ–Petra Lea LÁNCOS–Réka VARGA (eds.): *Hungarian Yearbook of International and European Law 2018*, Eleven Publishing, The Hague, 2019, pp. 3–18, p. 18.

<sup>81</sup> European Council Press Release (18/10/2019) Christine Lagarde appointed President of the European Central Bank. Online available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/10/18/christine-lagarde-appointed-president-of-the-european-central-bank/> (06/11/2019).

<sup>82</sup> Paul CARREL: Count Draghila is sucking our accounts dry', says Germany's Bild. *Reuters*, 13 September 2019. Online available: <https://www.reuters.com/article/us-ecb-policy-germany/count-draghila-is-sucking-our-accounts-dry-says-germanys-bild-idUSKCN1VY0MN> (06/11/2019).

ernors, too, expressed their concerns.<sup>83</sup> – Another and even greater problems are that, while the negative interest rates proved to be effective during the darkest years of the latest crisis, as a result of their long-term application ‘the monetary policy is almost out of ammunition’ as *Olivier Blanchard* – a former chief economist at the IMF – stated.<sup>84</sup> That is to say; the ECB is left without effective tools in case of a new crisis.<sup>85</sup> The latter one seems to be a rather probable possibility, even Draghi indicated it as a serious threat during his last press conference as the president of the ECB.<sup>86</sup> Regarding the first question – namely, the tension with the Deutsche Bundesbank –, Lagarde seemed to steady down the nerves and induce a return to normalcy: the German government’s decision to nominate *Isabel Schnabel* for the succession of ECB Executive Board member *Sabine Lautenschläger* indicated conciliatory attitude on the German side.<sup>87</sup> In sharp contrast with this however; Lagarde received sharp criticism from *Jens Weidmann*, the governor of the Deutsche Bundesbank, even before she had the opportunity to sit into the presidential chair. Weidmann expressed his concerns<sup>88</sup> regarding Lagarde’s plans to make environmental considerations part of the ECB’s decision making process and policies e.g. favouring the purchase of the so called green bonds. – Not to mention that Lagarde – just like Draghi – has some shady spots in her past,<sup>89</sup> which could induce further attacks against the newly inaugurated president of the ECB.

## 5. Summary and conclusions

The purpose of the article was to examine the institutional reforms of the EU – which sought to remedy the innate structural weaknesses of the EMU – and their functioning in practice. Although the EMU remained asymmetrical – that is to say the fiscal policy remained in the hand of the member states – a proper system of supervision have been created in the form of the ESFS and the EBU consisting of

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<sup>83</sup> Matt CLINCH: European Central Bank members voice concern over its negative rate policy. *CNBC*, 18 October 2019. Online available at: <https://www.cnn.com/2019/10/18/ecb-members-voice-concern-over-its-negative-rate-policy.html> (06/11/2019).

<sup>84</sup> Martin ARNOLD: What will Christine Lagarde’s ECB look like? *Financial Times*, 27 October 2019. Online available at: <https://www.ft.com/content/1683ea12-f4f7-11e9-a79c-bc9acae3b654> (06/11/2019).

<sup>85</sup> Reza MOGHADAM: The ECB must make negative interest rate policy effective. *Financial Times*, 24 July 2019. Online available at: <https://www.ft.com/content/2eca3b2a-ac8c-11e9-b3e2-4fd846f48f5> (06/11/2019).

<sup>86</sup> Press Conference, Frankfurt am Main, 24 October 2019. Online available at: <https://www.ecb.europa.eu/press/pressconf/2019/html/ecb.is191024~78a5550bc1.en.html> (06/11/2019).

<sup>87</sup> Carsten BRZESKI: ECB: The Good German. *ING Snaps*, 22 October 2019. Online available at: [https://think.ing.com/snaps/ecb-the-good-german/?utm\\_campaign=October-22\\_ecb-the-good-german&utm\\_medium=email&utm\\_source=emailing\\_snap](https://think.ing.com/snaps/ecb-the-good-german/?utm_campaign=October-22_ecb-the-good-german&utm_medium=email&utm_source=emailing_snap) (06/11/2019).

<sup>88</sup> Martin ARNOLD–Olaf STORBECK: Weidmann opposes using monetary policy to fight climate change. *Financial Times*, 29 October 2019. Online available at: <https://www.ft.com/content/60d9832c-fa3f-11e9-a354-36acbbb0d9b6> (06/11/2019).

<sup>89</sup> BBC (20/12/2016), Christine Lagarde: IMF Chief Convicted over Payout. Online available at: <https://www.bbc.com/news/world-europe-38369822> (06/11/2019).

the SSM and the SRM. The ECB gained authority to supervise the functioning of the EMU: amongst others, it became empowered in 2014 to liquidate the so called ‘ill enterprises’ within the SRM. – It has to be noted that the latter opportunity is not used properly by the ECB as some authors argue. – Nevertheless, these systems endured the difficulties of practice and the supervision of the CJEU. What is more, the CJEU showed a willingness to protect the achievements of the reforms as it is clear from judgment delivered in the ESMA and Gauweiler-cases.

Regarding the future prospects of the EU, the author of the current article introduced both optimistic and pessimistic opinions. This very chapter provides space for the author to express his own opinion regarding future prospects: the author argues that instead of winding-up the EMU – as some authors suggested –, the EMU members shall strive to achieve closer cooperation and the non-members shall strive to access to the EMU. The author does not understand why shall the builders pull down everything they built so far and go home instead of finishing the ‘half-built<sup>90</sup> house’? Similarly, he does not understand what hinders us from reaching a closer cooperation e.g. to create a greater budget and a common finance ministry? If one accepts that the European integration is built on the *spill-over effects* of the *ever-closer union*, any step back will induce unforeseen consequences. Here should be the thoughts of Worstall brought to our minds, namely that the costs of a possible winding up cannot even be estimated. – Even if the Eurosceptic Worstall used it as an argument against the EMU.

Summarizing the above mentioned, the author of the current article argues that the maintaining of the common currency – or its introduction in case of the non-EMU states – is the only workable way even despite the well-known drawbacks of the EMU. In conjunction with these thoughts, the author also firmly believes – in accordance with Martonyi’s thoughts – that a two- or multi-tier integration would be detrimental for the future of the integration. Furthermore, the author thinks that we – Hungarians – are already lagging behind in preventing this scenario with or omission, namely that we haven’t accessed so far and do not really strive to access to the EMU.

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<sup>90</sup> The expression borrowed from Bergsten (2012); See also: Miklós KIRÁLY: From the Treaty of Rome to the Rome Declaration. Scenarios for the European Union’s Future. In: Marcel SZABÓ–Petra Lea LÁNCOS–Réka VARGA (eds.): *Hungarian Yearbook of International and European Law 2018*. Eleven Publishing, The Hague, 2019, pp. 19–30.