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The Single Supervisory Mechanism: legal fragilities and possible solutions

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Abstract

This paper analyses the principal legal challenges posed by the current Banking Union apparatus. It focuses on the legal basis for Banking Union, the powers of the various agencies and regulators and the problems that arise from their interaction, and the difficult relationship between Euro-area and the internal market. It outlines legislative changes to address the problems of the SSM framework.

Keywords: Banking Union, Single Supervisory Mechanism, European Banking Authority, EMU

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Introduction

The Banking Union is the result of 'unavoidable legal contortions and political compromises'.¹ The forthcoming evolution of EMU is geared towards completing the Banking Union (BU) with a Single deposit insurance/EDIS.² However, the first two pillars, namely the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), are not entirely sound from a legal perspective. Indeed, such ambitious measures would require changes in the current legal framework. Sections 1 to 3 of this paper explain the principal legal challenges to the framework, while section 4 explains what would be required to ensure a sounder legal footing for these measures.

1. The legal bases for the BU framework questioned

One of the core problems is the lack of a suitable provision within the Treaties that empowers the EU legislator to create the elements of Banking Union. The wording of the Treaty provisions puts some limits in terms of the components and scope of the policies adopted (its substance), sometimes together with the instruments that could be used to implement the policies (the form of the acts). Indeed, the legal bases used so far to adopt

¹ N. Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (2014) 51 Common Market Law Review 1609.

² European Deposit Insurance Scheme, Five Presidents' Report, 'Completing Europe's Economic and Monetary Union', 22 June 2015.

the legislation establishing the BU were highly controversial, notably because they were interpreted in a broad manner. From a legal perspective, the respect of legal bases is fundamental and constitutes the primary step to ensure the soundness of the decision-making.

More precisely, the decision-making process at the foundation of the BU raised some issues. The new regulations framing the BU are based on specific provisions in the Treaties. This choice is essential insofar as it affects which institutions are taking part into the decision-making process (especially the involvement of the European Parliament, hereinafter EP) and determines the voting systems of the decision-making creating the new mechanisms (unanimity, qualified majority vote). As a consequence, the bargaining powers of the various parties could differ and influence the substance of the legislation adopted.

Regarding the SSM, the European Parliament was not involved in the decision-making process under the Treaty provision used,³ as the Council acted by means of regulations. Under this procedure, the European Central Bank (ECB hereinafter) and the EP are only consulted. However, the amendment to another piece of legislation concerning the European Banking Authority (EBA Regulation⁴) realised by the EP and the Council rebalanced the scheme somewhat, giving the opportunity to the EP to influence the regulatory framework put in place by the SSM.

On another ground, the SSM's legal basis provides for the conferral of 'specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings' (art. 127(6) TFEU). This word '*specific*' suggests that the powers conferred on the ECB by the SSM Regulation are too broad within the actual boundaries of the Treaties, exceeding the competences provided for in this paragraph.⁵ [Indeed, authors pinpointed the extensive interpretation of this article used to establish the SSM, already when the SSM was](#)

³ The article 127(6) of the Treaty on the Functioning of the European Union (TFEU) provides : '*The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank (...).*' (emphasis added).

⁴ Article 114 TFEU is its legal basis. It is a provision for the establishment and the functioning of the Internal Market, providing for an ordinary legislative procedure.

⁵ 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 (*SSM Regulation*), (OJ L 287, 29.10.2013, p. 63).

discussed by the legislators and drafted by the European Commission.⁶ In a narrow reading, does the adoption of the SSM represent only *specific* supervisory tasks conferred on the ECB and the National Competent Authorities? In this sense, the adjective specific is distinguished from *general* supervisory tasks (which could cover Banking Supervision as a whole). On the contrary, a wider reading of the Treaty Article has been suggested: that it is invitation to the legislator to enumerate supervisory tasks within a regulation, in a wider reading of this paragraph.⁷ This draws some support from Article 4 of the SSM Regulation, which provides for the 'tasks conferred on the ECB'. In any case, a 'convincing alternative or complementary legal basis' to the article used as a legal basis for the SSM was not available at the time of its adoption,⁸ and this required some imaginative interpretation of the existing rules. But it also makes the case for Treaty change to facilitate better focussed legislation (see section 4 infra.)

The setting-up of the SRM⁹ was debated as well because the Internal Market provision on which the SRM Regulation is based was not seen as supporting the obligation on Member States to mutualise resolution funds. Finally, part of the functioning of the Single Resolution Fund (SRF) is regulated outside the Treaties by the adoption of an international agreement signed by 26 Member States,¹⁰ meaning that the EP was put aside from the decision-making process and the Community method was circumvented. As a consequence, it raised concerns of legitimacy in the negotiations¹¹ and democratic participation in Treaty-making. Both the European Parliament and the national parliaments should be involved as stakeholders in an 'optimal design' of the EMU more generally.¹² However, the situation in the case of the SRF's establishment was the result of a lack of an adequate legal basis available within the Treaty framework to allow the transfer of the contributions collected by the National Resolution Authorities to the Fund and the mutualisation of the financial resources from the national compartments.

⁶ See for instance R. Goyal et al., 'A Banking Union for the Euro Area', (2013) IMF Staff Discussion Note, SDN/13/01, 31 .

⁷ J. Faull, Former Director General, Financial Stability, Financial Services, Capital Markets Union – European Commission, 'The law of the Banking Union', College of Europe, Bruges, 12-13 March 2015.

⁸ B. Wolfers, T. Volland, 'Level the playing field: The new supervision of credit institutions by the European Central Bank', (2014) 51 Common Market Law Review, Issue 5, pp.1463–1495.

⁹ Under article 114 TFEU.

¹⁰ Sweden and the UK did not sign. Agreement on the transfer and mutualisation of contributions to the Single Resolution fund, EF 121, ECOFIN 342 [2014] OJ 8457/14.

¹¹ In the end, the EP was invited by the Council to participate in the negotiations.

¹² As discussed with participants to the Workshop on the 11th December 2015.

On the other hand, having recourse to this device to set up the SRF added further complexity to the legal background of the BU. What Professor Moloney refers to as 'institutional pragmatism' results also from the political compromise found under pressure from Germany.¹³ From a legal perspective, the constraints are due to the principle of conferral and the obligation to be in conformity with Member States budgetary sovereignty. Furthermore, the Single Resolution Board (SRB) implemented to monitor the resolution pillar had to cope with constitutional limitations as an EU agency. In legal terms, this agency has to comply with the *Meroni* doctrine.¹⁴ This doctrine stands for the proposition that only limited the powers may be delegated from the EU institutions to an EU agency. This delegation may only take place if the agency has clearly defined executive powers (not discretionary powers) and is subject to the supervision of the Commission. In practical terms, it means that the Commission checks the SRB's power to determine if the SRF need to be called upon to financially assist any ailing banks¹⁵. The consequence is that the decision is then not that of an independent regulator but of a political organ, which may make suboptimal decisions.

2. The powers of the various agencies/actors created and their relations

The SSM is shaped with a multi-layered governance structure and a sensitive division of responsibilities. A sketch of the administrative bodies involved is proposed through a simplified analytical framework to explain the different divergence risks in the current supervisory scheme, jeopardizing its effectiveness. These risks rely on a resurgence of home bias and the expression of national discretion by some supervisory authorities, which were supposed to be thwarted by the SSM.

2.1. Risks of divergence affecting the effectiveness of the operational supervision

Firstly, the risks lie in divergent interpretations at a vertical level, between the ECB and the National Competent Authorities (NCAs hereinafter). Especially for the less significant credit institutions,¹⁶ there are risks of divergences in the implementation and interpretation of the same supervisory measure among the different NCAs. The Five Presidents' Report highlighted the remaining margin for national discretions 'notably for the quality and

¹³ Moloney, above n.1

¹⁴ Case 9/56 *Meroni v High Authority* [1957-58] ECR 133.

¹⁵ Article 19, SRM Regulation.

¹⁶ The credit institutions which are not systemic, in conformity with the definition under art. 6, SSM Regulation.

composition of banks' capital'.¹⁷ What is more, the ECB could not intervene quickly enough due to insufficient visibility from the NCAs or in other words, because of asymmetries of information.¹⁸ For instance, the riskiness of certain banks portfolios could be unobservable by the central supervisor, the ECB.

Adopting a principal-agents analysis, the ECB acts as the supranational agency responsible for the effective and consistent functioning of the SSM¹⁹ and its oversight relies on information collected by 'local supervisors'²⁰ (in particular for indirect supervision). The question arises about what types of incentives or control mechanisms exist to ensure that the agents – the NCAs – behave in conformity with the will of the principal – the ECB.²¹ In the current framework, the incentives are not sufficient to overcome national bias, NCAs keeping the possibility to develop their own preferences diverging from those of the ECB. Indeed, a 'zone of discretion' is remaining within the NCAs' supervisory actions insofar as both *ex ante* and *ex post* control mechanisms are not entirely effective in aligning their actions with the ECB's supervisory directions.²²

Some mechanisms for intervening *ex ante* cover the SSM's supervisory manual, the Common supervisory procedure²³, and the NCAs' notification of their supervisory procedures and decisions.²⁴ Their effectiveness in ensuring a single approach is questionable especially for the first one – being mainly soft law – and for the third mechanism, which is partially at the NCAs' discretion. Furthermore, *ex post* control mechanisms rely on the intervention of external actors (EBA identifying breaches of EU Law by NCAs, *infra* Section 2.3. or National parliaments requesting public hearings from NCAs, article 21(3), SSM Regulation). Finally, the

¹⁷ Five Presidents' Report, 'Completing Europe's Economic and Monetary Union', 22 June 2015, p.11.

¹⁸ Special thanks to Matic Petricek (EUI Economics department) for his insightful comments on this part, discussed during the 11th December 2015 Workshop '*Legal Institutional Dimensions of EMU : Economists and Legal Scholars in Discussion*' (EUI, Florence).

¹⁹ Art. 6(1) SSM Regulation.

²⁰ E. Carletti, G. Dell'Ariccia, and R. Marquez, 'Supervisory Incentives in a Banking Union' (2015), *Working Paper Bocconi University*, March 4, 2015, pp.1-2.

²¹ In line with the theory of agency, the coordination between the ECB-NCAs and the SRB-NRAs could entail delegation risks within respectively the SSM and the SRM.

²² J. Gren, 'Institutional design of supranational banking supervision in the Single Supervisory Mechanism: a view from a principal-agent perspective', (2014), European Consortium for Political Research – Salamanca, 10-15 April 2014.

²³ Part V, SSM Framework Regulation.

²⁴ Part VII, Title 1, SSM Framework Regulation.

reporting duty on NCAs' own initiative²⁵ could be misused and the ECB could remain uninformed of some NCAs' supervisory procedures.

However, specific mechanisms bring back efficient incentives on the NCAs' conduct, such as the threat that the ECB will take over the supervision from the NCAs and intervene directly²⁶, constituting a 'discipline device for local supervisors'.²⁷ However it remains to be seen how credible a threat this instrument will become.

Secondly, at a horizontal level, there could be risks of divergences between the NCAs themselves, in particular when there is a need to transpose a measure in each Member State (the transposition takes place in each legal system of the MS participating in the BU, from an EU directive). Specifically, a risk of regulatory arbitrage rests on the indirect supervision assumed by the NCAs. The possible inconsistencies between NCAs' supervisory actions (*infra*) could entail a leeway for banks: they could choose to be headquartered where the NCAs' supervision is the most opportune for them.

Despite the Single rulebook and its ongoing development, a margin of discretion still exists in the implementation and interpretation of supervisory standards by the NCAs.²⁸ Thus, there is an inherent tension between reaching a centralised regulatory approach at the EU level and leaving room to National supervisory authorities for exercising domestic options,²⁹ discretions and practices.³⁰ For instance, the CRD IV package is said to include 80 options and national discretions left to Member States and competent authorities, creating risks of 'protectionist purposes or supervisory forbearance'.³¹

²⁵ Art. 97(4), SSM Framework Regulation. '4. In addition to the information requirements set out by the ECB in accordance with this Article, NCAs shall, **on their own initiative**, notify the ECB of any other NCA supervisory procedure which:

- (a) they consider material; or
- (b) may negatively affect the reputation of the SSM.'

²⁶ article 6 (5)(b) SSM Regulation.

²⁷ Carletti et al. Above n.16, p.4.

²⁸ A. Enria, Chairman of the European Banking Authority, 'The Single Rulebook in banking: is it 'single' enough?', Università di Padova, 28 September 2015.

²⁹ For instance, the options granted to Member States in the Regulations : Where the Union law is composed of Regulations and explicitly grants options for Member States, the ECB must apply also the national legislation exercising those options, Article 4(3), SSM Regulation.

³⁰ Enria, above n.28, p.1

³¹ Ibid, p.4-5.

Thirdly, the relations between the ECB and the EBA remain uncertain. There are some interactions in both directions, the ECB influencing the EBA, and *vice versa*. This raises an important issue regarding the principle of institutional balance. While the ECB has a non-voting representative in the EBA Board of Supervisors,³² the EBA is not a permanent observer in the ECB Supervisory Board.

Finally, this division of supervisory tasks within the mechanism (between ECB and NCAs and among NCAs) and outside thereof (EBA) is supplemented by Joint Supervisory Teams (JSTs), including staff from both the ECB and NCAs, which intervene in the day-to-day supervision of significant credit institutions. Thus, JSTs' action might overcome some risks by ensuring consistent and homogenous supervisory practices³³. Furthermore, they could reconcile the ECB's utility function with those of the NCAs, because local agencies have inherently different utility functions: they are less inclined to intervene in Banks than the central supervisor.³⁴ The JSTs could facilitate the exchange of information between 'the spokes and the hub'.³⁵

All these risks adversely contradict the objective given to the SSM to implement in a 'coherent and effective manner' Union's prudential supervision policy.³⁶ In addition, the issue of distribution of information and transparency is topical and was emphasised by Danièle Nouy as an 'essential tool to coordinate supervisory actions across banks in a harmonised and proportionate way'.³⁷

2.2. Regulatory functions of the agencies involved and legal instruments used

The ECB should not compromise the EBA's regulatory role³⁸ to prepare delegated or implementing acts for credit institutions to be adopted by the Commission.³⁹ However, there

³² Article 3 (2) SSM Regulation, and article 40(1), EBA Regulation as amended.

³³ Additional support and technical expertise from DG Micro-Prudential supervision IV (ECB) may be required by JSTs.

³⁴ As argued by Carletti et al. 2015 (above n.16, p.2), the NCAs as local supervisors bear greater risks in terms of reputational and fiscal costs, and are exposed to a higher degree of regulatory capture 'to which a central supervisor would not be subjected' (see also Agarwal Sumit, David Lucca, Amit Seru, and Francesco Trebbi, 'Inconsistent Regulators: Evidence from Banking', 2014, *Quarterly Journal of Economics*, Vol. 129(2), pp.889-938).

³⁵ Carletti et al. 2015, *Ibid.*, p.4. The authors mention the appointment of 'multi-country teams headed by SSM's officials'.

³⁶ Recital 12, SSM Regulation.

³⁷ SSM Priorities for 2016

³⁸ Recital 32, SSM Regulation.

is a risk of overlaps as the regulations adopted by the ECB might cover more than only its supervisory mandate.⁴⁰ Indeed, the ECB might provide some binding indications to the regulator in its supervision. Therefore, the ECB could trample upon the EBA's powers and functions concerning the participating Member States (Euro area Member States for now). Then, it could become a 'competing standard-setter' through its instructions and guidelines, likely to attain 'quasi-regulatory colour.'⁴¹ Some authors predict a split between the EBA maintaining its prerogatives for the non-euro area Member States and the ECB, becoming the main regulator of banks in the euro area.⁴² In the short-run, operational supervision could be conducted in this framework (with soft law – guidelines or handbooks – ensuring cooperation between the institutions) but in the long term, the ideal outcome would be that non-euro Member States join the BU, allowing for a real and functional distinction between the ECB as mainly a supervisor and the EBA as a regulator for the whole EU.⁴³ Otherwise, the split described could be endorsed in the framework, with the flaw of admitting 'two blocks' in banking supervision, at the cost of EU wide banking integration.

A related legal issue relates to the application of directives by the ECB in its supervisory tasks. Indeed, the ECB must apply all relevant Union law, and where the law is composed of directives, the national legislation transposing those directives (reaching to at least 19 different national laws).⁴⁴ From a policy perspective it would be advantageous in ensuring uniformity in the supervisory scheme, but from a legal perspective it is not clear how the ECB as a supervisor could use directives and their transposition to adopt a decision. Finally, if a decision is contested by a supervised entity, the challenge goes through an Administrative Board of Review⁴⁵ (ABoR, established by the ECB). The ABoR examines the conformity of the decisions with the SSM Regulation and adopts an Opinion. As a result of the Opinion, the

³⁹ Draft Binding Technical Standards (BTS) developed by the EBA and adopted by the Commission, in compliance with Meroni doctrine.

⁴⁰ under article 132 TFEU.

⁴¹ This is noted by Moloney, above, n.1

⁴² See for example G. Lo Schiavo, 'From national banking supervision to a centralized model of prudential supervision in Europe ? The stability function of the Single Supervisory Mechanism', (2014) 21 Maastricht Journal 110

⁴³ Enria (above n.24) calls for an 'attribution of regulatory tasks to the EBA, together with its role on supervisory convergence and cooperation', as 'an essential pillar of an institutional set-up in which supervision is not centralised for the whole EU, which remains a multi-currency area'.

⁴⁴ Article 4(3), SSM Regulation.

⁴⁵ Internal administrative review regulated by Article 24, SSM Regulation. A request to the ABoR does not affect the right to bring proceedings before the CJEU (art. 24(11)). See also [Decision of the ECB concerning the establishment of an Administrative Board of Review and its Operating Rules \(ECB/2014/16\)](#).

Supervisory Board might have to submit a new draft decision to the Governing Council, abrogating the initial decision.

2.3. Principle of institutional balance

The EBA has power over the ECB as well. For instance, the EBA could give instructions to NCAs in case of a breach of Union Law,⁴⁶ in an emergency situation,⁴⁷ and in the context of cross-border conflicts between national supervisory authorities.⁴⁸ The EBA's decisions 'prevail over any previous decision adopted by the competent authorities on the same matter'.⁴⁹ This raises a 'constitutional conundrum': the ECB is an institution of EU primary law (Treaties), whereas the EBA has been established by secondary law (Regulations). How could the ECB be subject to the EBA? Is it clearly a hierarchical relationship in practice?⁵⁰

As a conclusion on the institutional interactions between the SSM and the EBA, adjustments of the EBA's decision-making were adopted with the aim to protect the Member States' NCAs currently not participating in the BU from being outvoted by a participating Member States majority within the EBA Board of Supervisors (indeed the Member States within the BU could form a coalition in the EBA decision voting process to defend their interests as euro area Member States). The shift has been towards a double-majority voting system. Indeed, the EBA Board of supervisors decides on the basis of a qualified majority which includes a simple majority of Member States participating in the SSM and a simple majority of non-participating Member States.

3. Euro-area – Internal Market asymmetries

A new structure – the Supervisory Board – has been established within the ECB. The institutional analysis proved that there is a *de facto* division between euro Member States (mandatory membership) and non-euro Member States (currently outside the SSM). This entails risks of marginalisation, misrepresentation and disintegration.

First of all, the Governing Council (whose membership is reserved to the Central Banks of the Euro area) is formally responsible for the decision-making, while the Supervisory Board

⁴⁶ Article 17, EBA Regulation.

⁴⁷ Article 18, EBA regulation, in particular (4).

⁴⁸ Article 19(4), EBA Regulation.

⁴⁹ Article 19(5), EBA Regulation.

⁵⁰ See Moloney (above, n.1)

(comprising all the participating Member States' representatives) is in charge of the preparatory works (draft supervisory decisions). Even if there is a silent non-objection procedure, meaning that the decision is deemed adopted unless the Governing Council opposed to it within 10 working days,⁵¹ this differentiation of treatment is not acceptable politically. Indeed, it does not represent an incentive for non-euro Member States to join.

Secondly, the governance arrangement adopted to circumvent the fact that the current framework cannot permit the inclusion of the non-euro Member States within the ECB's Governing Council is not adequate either. The 'close cooperation agreement' provides for reduced memberships rights in the SSM, compared to the euro Member States. For instance, if a non-euro Member State disagrees with a decision from the Governing Council, the ECB could suspend or terminate the close cooperation agreement.⁵² This termination prevents any new close cooperation agreement during three years.

As a consequence of these two observations, the lack of incentives to join the BU for non-euro Member States is clear.

Thirdly, this split between Euro area Member states and non-participating countries might compromise the financial integration in the whole EU. This is at odds with the financial trilemma theorized by Schoemaker.⁵³ The theory brings out three elements – financial stability, financial integration and national financial policies – which are incompatible. Only two objectives out of the three can be pursued at the same time. Schoemaker's perspective in 2011 relied specifically on the locus of the production of financial stability as a public good. As Howarth and Quaglia have proposed, one may extend this analysis to banking supervision policies.⁵⁴ Thus, both the context of financial integration (with high cross-border banking in the EU) and the aim to conduct banking supervision require supranational level policies. This shows the discrepancy of the current position of non-participating Member States outside the Banking Union, as they are equally concerned by the financial integration and the necessity to supervise banks.

⁵¹ Article 26, SSM Regulation.

⁵² Article 26(8), SSM Regulation.

⁵³ D. Schoemaker, 'The Financial Trilemma', (2011), *Economic Letters*, Vol. 111, p. 57-58.

⁵⁴ D. Howarth and L. Quaglia, 'Internationalized Banking and National Preferences on European Central Bank Supervision' (2016), *West European Politics*, forthcoming, May 2016. 'Financial policies' could cover regulation, supervision, financial support and resolution.

However, besides this trilemma, the configuration of national banking systems must be taken into account, including the following criteria: the degree of banking system concentration, the degree of internationalization, the exposure to euro area periphery and the degree of foreign bank penetration. In this respect, Howarth and Quaglia studied seven national banking systems (Austria, Belgium, Finland, France, Germany, Luxembourg and The Netherlands) and their 'internationalization patterns'⁵⁵ to analyze national preferences expressed on the threshold for direct ECB supervision. Euro area Member States' preferences resulting from distinct national banking systems shaped the SSM's design and in particular the criteria to distinguish between 'significant' and 'less significant' credit institutions, respectively under ECB's and NCAs' supervision in the current legal framework (Article 6(4), SSM Regulation).

The study of non-euro area Member States' national preferences, depending on their 'internationalization patterns', may demonstrate if the actual SSM design is appealing for them⁵⁶ and if they would accept a supranational oversight. Actually, the factual evidence of stagnant⁵⁷ or lack of close cooperation agreements is not reassuring in that sense.

Another non euro Member State perspective worth considering is that of the UK. The country remains really concerned by preserving the integrity of the Financial Single Market as a whole in its economic interests and because of the importance of cross-border activities in financial services business. Its place as a global financial centre depends partially on its position as an entry point to the EU Market. That is why the UK insisted on the EBA's voting reform (*supra*). The UK is 'too big to be marginalised' but does keep watching over the Internal Market banking governance system, not being subsumed by the Banking Union.⁵⁸

4. Revisions: EU Secondary Law evolution; EU Primary Law evolution

⁵⁵ *Ibid.* 'Internationalization patterns' include both 'the international exposure of national banks' and 'the foreign bank presence in the banking system'. Howarth and Quaglia emphasize in particular the 'EU internationalization' of national banking systems.

⁵⁶ There is an opportunity for further research in this sense, prolonging the analytical framework used for the seven countries aforementioned, and testing Howarth and Quaglia's hypothesis (*ibid.*): 'The greater the reach of internationalization into the national banking system, the greater the support for direct ECB supervision of a larger number of smaller euro area banks'.

⁵⁷ Bulgaria and Romania are in discussions with the ECB. One of the reasons for Romania is the domination of the domestic banking system by euro area banks. Moreover, elimination of jurisdictional arbitrage and creation of a more competitive market are expected. (M. Isarescu, Governor of the National Bank of Romania, Speech in Rome, 10 July 2014).

⁵⁸ See Moloney, above n.1

During the crisis, broad interpretation of the Treaty provisions saved the decision-makers from paralysis. Current legal challenges could be resolved with different techniques, from short term to long term.

At the level of secondary legislation, one could advocate for greater harmonisation by adopting directly applicable EU regulations rather than directives.⁵⁹ Additionally, this framework could include legal obligations for information exchange, cooperation, and prior consultation between all relevant players. For instance, a role for the cross-representation in the respective governance structures is a relevant evolution and could overcome the imbalanced relationships between the ECB and the EBA.

In the long run, the establishment of an explicit financial stability objective for the EU under the Treaties could be inserted in Article 3 of the Treaty on European Union, after paragraph 4 providing for the Economic and Monetary Union. It would enhance the financial stability powers assigned to EU institutions and bodies within the whole EU, guaranteeing the inclusiveness of the non-participating Member States' authorities 'so that actions from national and supranational entities are consistent'.⁶⁰ A revision of the ECB's mandate could reflect the specificities of its tasks, by inserting a chapter on financial policy or even on Banking Union within the Title VIII on EMU in the TFEU⁶¹ and by including other related provisions in the ECB Statute. Regarding the SSM, it would allow autonomous governance arrangements to rebalance the institutional representation between euro Member States and non-euro Member States. Supervisory decision-making powers would no longer rely upon the Governing Council as the ultimate decision-making body. The ultimate step proposed by some authors is the entire transfer of exclusive responsibilities for supervision at the EU level. It is worth noting that the imperfect place of the non-euro Member States is expressly recognised in the legislation itself, which indicates expected evolution:⁶² 'Article 127(6) TFEU could be amended (...) to eliminate some of the legal constraints it currently

⁵⁹ Seen as one of the solution to avoid a 'multi-tiered legal articulation of the Single Rulebook' and ' further reflections at the political level, in particular with a view to increasing the adoption of Regulations and restricting the enactment of Directives to the very specific areas where maximum harmonization is not yet possible'. Enria, above, n.24, p.6.

⁶⁰ IMF Country Report, 'European Union: Financial System Stability Assessment', (2013) No. 13/75, IMF, §30, p.22.

⁶¹ By inserting an additional Chapter after the Monetary policy.

⁶² A Report is said to be published by December 31, 2016 to assess the opportunities of further developing the SSM, including at the level of primary law.

places on the design of the SSM',⁶³ and especially going beyond the model of 'close cooperation' granting equal rights in the ECB's decision-making for the non-euro participating Member States,⁶⁴ saying implicitly that the actual institutional arrangement leading to unequal representation is unsatisfactory.⁶⁵

The joining of non-euro Member States to the SSM will evidently create the conditions for further integration in the BU, as part of the EMU. However, without any revision of the Treaties, they will still face institutional representational risks. Indeed, the lack of representation in the ECB Governing Council entails a risk of loss of sovereignty.

In sum, there is a case to be made in favour of legislative amendments since the various regulators are unlikely to be able to overcome weak institutional design by pragmatic, incremental solutions.

⁶³ Recital 85, SSM Regulation.

⁶⁴ Article 32(n), SSM Regulation.

⁶⁵ Governance arrangements concerning the composition and the voting arrangements in the Supervisory Board and its relation with the Governing Council is to be evaluated as well, article 32(g), SSM Regulation.