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The Banking Union and the decisions of the CJEU

Towards a complete legal order?

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BANKING UNION

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Towards a complete legal order?

Abstract

Since the inception of the Banking Union numerous decisions of the CJEU have been issued. The purpose of this paper is to assess the impact of some of the key decisions on the legal framework established 10 years ago, showing how they have been instrumental in supporting a centralised and integrated model of banking supervision at the EU level. In that context, the SSM could represent an example of a truly integrated EU legislative system, with a proper institutional balance.

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LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
AG	Advocate General
BRRD	Bank Recovery and Resolution Directive (Directive 2014/59/EU)
BU	Banking Union
CJEU	Court of Justice of the European Union
CRD	Capital Requirements Directive (Directive 2013/36/EU)
CRR	Capital Requirements Regulation (Regulation (EU) No 575/2013)
ECB	European Central Bank
Framework Regulation	Regulation (EU) No 468/2014
NCA	National Competent Authorities
NRA	National Resolution Authorities
SRB	Single Resolution Board
SRM	Single Resolution Mechanism
SRMR	Regulation (EU) No 806/2014
SSM	Single Supervisory Mechanism
SSMR	SSM Regulation (Regulation (EU) No 1024/2013)
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background[1]

The BU, established in the aftermath of the global financial and sovereign debt crises, aims to centralise banking supervision and ensure financial stability across the EU. Its creation represented a fundamental shift in the oversight of the EU's financial system, which previously rested primarily with national authorities. The SSM, which places the ECB at the centre of supervision, and the SRM, designed to manage failing banks, form the key pillars of this system. Over the past decade, several pivotal decisions by the CJEU have helped define the legal framework governing this new order.

This paper assesses the impact of CJEU decisions on the BU, specifically focusing on the SSM. It discusses how these rulings have strengthened the ECB's supervisory role, addressed issues of sovereignty and the application of national laws, and reshaped the relationship between EU institutions and Member States in banking supervision, with repercussions that extend beyond the realm of financial law and touch upon the institutional architecture of the EU.

Aim and findings

In examining the key rulings that have influenced the evolution of the BU, with particular regard to the institutional balance and centralisation within the system, the paper reaches the following key findings:

(i) The ECB and NCAs: Landmark cases such as *Landeskreditbank and Berlusconi I* demonstrate how the CJEU has progressively centralised supervisory powers within the ECB. These decisions have not only strengthened the ECB's powers over significant and less significant financial institutions, but also interpreted the institutional architecture of the SSM. Indeed, the Court reads the relationship between the ECB and the national competent authorities (NCAs) as not being governed by the traditional principle of subsidiarity. According to the Court, the SSMR establishes an original EU institutional system of powers and responsibilities in which NCAs act as decentralised entities, within a set up that falls under the ECB’s ultimate role and responsibility;

(ii) The resolution process: the paper assesses an important aspect of the SRM, particularly in light of the *Banco Popular* cases, and examines how the CJEU's decisions have refined the resolution process and addressed the delicate balance between EU Institutions and agencies. It observes how the evolving *Meroni* doctrine plays a considerable role that impacts on the review of administrative acts of the SRB and finds that, while there are still potential issues to be addressed, the Court’s jurisprudence is highly attentive to the fundamental principles enshrined in the Treaties. Indeed, the Court's decision in the Banco Popular case stated that the exercise of resolution powers under the SRMR falls within the scope of the EU's resolution policy, which can only be defined by the EU institutions: on the one hand, this decision limits the SRB's discretionary powers (with a kind of reversal of the *Short selling* case), but on the other hand it seems to aim at strengthening the centralisation of the SRM at EU level;

(iii) Limits to the application of national laws: the study discusses the issues arising from the highly controversial mechanism introduced by Article 4(3) SSMR, which requires the ECB to directly apply national laws transposing EU directives when exercising supervisory tasks. The shift towards more autonomous interpretations of national laws by EU Institutions, as well as a trend towards ensuring the supremacy of EU law over national legislations in the most recent case-law of the General Court are highlighted, even though there remain open questions yet to be addressed by the Court of Justice; and

[1] The authors would like to thank Thomaz Braga de Arruda for his valuable research assistance

(iv) ECB discretion and judicial review: finally, the paper delves into the extent of discretion afforded to the ECB under the BU and how the CJEU's "limited standard of review" has ensured that the ECB's decisions are subjected to robust judicial scrutiny, ensuring compliance with fundamental principles of EU law, such as proportionality, legal certainty, and good administration.

The study concludes that the BU, though still evolving, has become a more integrated and resilient system over the past decade, with the CJEU playing a crucial role in its legal consolidation. The ongoing centralisation of supervisory powers in the hands of the ECB and the development of a uniform system of rules represent significant strides towards achieving a complete legal order, although limited to a specific sector. The success of the BU's institutional and legal architecture, and particularly of the SSM, is seen as a model to be reproduced in other areas of EU governance.

1. FOREWORD

The European Banking Union ("BU") established in the wake of the global financial crisis and the subsequent sovereign debt crisis in the euro area, represents a distinctive model of centralisation and cooperation between European and national authorities with the aim of safeguarding the stability of the financial system[2]. The project consists of a major institutional development in the EU, as before its implementation and entry into operation – gradually, from 2014 -, the authorisation and supervision of credit institutions in Europe was an exclusive competence of national competent authorities ("NCAs")[3].

The establishment of the BU relies upon three main pillars: (i) the Single Supervisory Mechanism ("SSM")[4], established by Regulation 1024/2013 of 15 October 2013 and effective since 4 November 2014 ("SSM Regulation"), whose purpose is primarily aimed at "*ensuring the safety and soundness of credit institutions and the stability of the financial system of the Union as well as of individual participating Member States and the unity and integrity of the internal market*'[5]; (ii) the Single Resolution Mechanism ("SRM"), for unviable credit institutions[6] and which comprises the Single Resolution Fund ("SRF") to

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[2] For positions for and against the creation of the BU, see, *ex multis*, Beck, T. (2012), 'Banking Union for Europe: Risks and Challenges', in Beck, T. (ed.), Banking Union for Europe. Risks and Challenges, Centre for Economic Policy Research, London; Bofinger et al. (2012), From the internal market to a banking union: a proposal by the German Council of Economic Experts, Vox; Carmassi, J., di Noia, C. and Micossi, S. (2012), 'Banking Union: A federal model for the European Union with prompt corrective action', CEPS Policy Brief, No 282; Schoenmaker, D. (2012), 'Banking Union: Where we're going wrong', in Beck, T. (ed.), Banking Union for Europe: Risks and Challenges, cit.; Sibert, A. (2012), Banking Union and a Single Bank Supervisory Mechanism, Directorate-General for Internal Policies, Monetary Dialogue, European Parliament; Wyplosz, Ch. (2012), 'Banking Union as a crisis management tool', in Beck, T. (ed.), Banking Union for Europe: Risks and Challenges, cit.; Herring, R.J. (2013), 'The Danger of Building a Banking Union on a One-Legged Stool', in Allen, F., Carletti, E. and Gray, J. (eds.), Political, Fiscal and Banking Union in the Eurozone?; FIC Press.

[3] On the overall functioning of the BU, see, among others, Binder, J.-H. (2016), 'The European Banking Union: Rationale and Key Policy Issues' in Binder, J.-H. and Gorstos., Ch.V. (eds.), Banking Union. A Compendium, Hart, Oxford – Nomos, Baden-Baden; Alexander, K. (2015), 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism', European Law Review, Issue 2; Allen, F., Carletti, E. and Gray, J. (eds.) (2015), The New Financial Architecture in the Eurozone, Brevan Howard Centre for Financial Analysis.

[4] Literature on the SSM is considerably extensive. See, *ex multis*, Gortsos, C.V. (2018), 'Legal Aspects of the European Central Bank (ECB): The ECB within the European System of Central Banks (ECSB) and the European System of Financial Supervision (ESFS) – Second (Extended and Updated) Edition'; Binder, J.H. (2017), "The Banking Union and national authorities two years down the line – some observations from Germany", EBOR 18:401–420; Binder, J.H., Gortsos, C.V. (eds.) (2016), *Banking Union: A Compendium*, Baden-Baden; Lamandini, M., Ramos, D. and Solana, J. (2017), 'The ECB Powers as a Catalyst for Change in EU Law: Part 2: The SSM, SRM and Fundamental Rights', Columbia Journal of European Law 23:199-263; Lamandini, M. et al. (2015), "Depicting the limits to the SSM's supervisory powers: the role of constitutional mandates and of fundamental rights' protection", Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia No. 79; Tröger, T. (2014), "The Single Supervisory Mechanism. Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement", EBOR 15:449-497; Ferran, E., Babis, V. (2013), 'The European Single Supervisory Mechanism', Journal of Corporate Law Studies 13:255-285; Wymeersch, E. (2015), 'The Single Supervisory Mechanism: Institutional Aspects', in Busch, D., Ferrarini, G. (eds.), *European Banking Union*, OUP.

[5] Recital (30) of the SSMR.

[6] See, among others, Haentjens, M. (2017), 'Selected Commentary on the Bank Recovery and Resolution Directive', in Moss, G., Wessels, B. and Haentjens, M. (eds.), *EU Banking and Insurance Insolvency*, OUP; Huertas, T.F. and Lastra, R.M. (2011), 'The perimeter issue: to what extent should lex specialis be extended to systematically significant financial institutions? An exit strategy from too big to fail', in Lastra, R.M. (ed.), *Cross-Border Bank Insolvency*, OUP; Dewatripoint, M. and Freixas, X. (2012), 'Bank Resolution: Lessons from the Crisis' in Dewatripoint, M. and Freixas, X. (eds.), The Crisis Aftermath: New Regulatory Paradigms, Centre for Economic Policy Research; White, P. and Yorulmazer, T. (2014), 'Bank Resolution Concepts, Tradeoffs, and Changes in Practices', Federal Reserve Bank of New York, Economic Policy Review, Vol. 20, No. 2; Armour, J. (2015), 'Making Bank Resolution Credible', in Moloney, N., Ferran, E. and Payne, J. (eds.), The Oxford Handbook of Financial Regulation, OUP; Wojcik, K.-P. (2016), 'Bail-in in the Banking Union', Common Market Law Review, Vol. 53, 91-138; Zavvos, G. and Kaltsouni, S. (2015), 'The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing', in Haentjens, M. and Wessels, B. (eds.), Research Handbook on Crisis Management in the Banking Sector, Edward Elgar; and, more recently, Gortsos, C.V. (2023), "The Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF): Legal Aspects of the Second Main Pillar of the European Banking Union', available at SSRN: https://ssrn.com/abstract=2668653; Maarand, M. (2022), 'Credit institution's limited rights for appealing the recovery and resolution measures in the European Union laws', Universitatis Tartuensis.

cover funding gaps; and (iii) and a harmonised system of national deposit-guarantee schemes, which should have led to a Single Deposit Insurance Scheme (“EDIS”), which is still pending..

Over the last decade, the BU has indeed emerged as one of the most noteworthy achievements of recent EU legislation. As it matures, the underlying legal structures of the SSM and the SRM become increasingly evident. Naturally, with the introduction of such an innovative institutional architecture, it was almost certain that, from its very implementation, the BU would be subject to intense scrutiny and a vast number of legal challenges[7]. In this context, the role of the Court of Justice of the European Union ("CJEU") has become of paramount importance, and the Court has, on several occasions, occupied a central role in establishing the exact contours of the supervisory regime, and the principles guiding it. The BU has significant implications for topics pertaining to the structure and functioning of the system, as well as for more fundamental issues of European law and its overarching principles. Indeed, the intricate and multifaceted structures of the SSM and the SRM have far-reaching ramifications, extending beyond the domain of banking and financial supervision to encompass the broader realm of European law. The issues that arise in the context of the SSM, for example, with regard to the principles of proportionality and subsidiarity, the protection of fundamental rights under Union law, the position of European Authorities and Institutions, the exercise of administrative discretion, generate strong tensions. Simultaneously, they confirm the natural tendency of EU law to innovate and introduce patterns that often force the re-evaluation of traditional legal categories.

In this regard, case law pertaining to the SSM and SRM is also illuminating traditional subjects such as the distribution of powers between Member States and EU Institutions, or the relationship between EU law and national law. It would be reasonable to state that the jurisprudence of the BU is currently at the core of the evolution of EU law on a wider level, especially given that the institutional model of the SSM is now reproduced in other regulatory fields[8].

While the variety and depth of topics emerging from an analysis of the SSM and the SRM is potentially limitless, this paper intends to assess, from a high-level perspective, some of the most significant legal considerations that can be identified from a decade of BU. Without any pretence of exhausting the relevant case law, the study aims to provide an overview of the trends consolidated over the past ten years, focusing, more particularly, on the SSM and the role played by the ECB.

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[7] See, for an overview, the European Banking Institute’s Banking Union Law List, available at: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

[8] The most recent example is the case of the European Anti-Money Laundering Authority (AMLAR). See Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 (OJ L, 2024/1620, 19.6.2024).

2. THE RELATIONSHIP BETWEEN THE ECB AND NATIONAL AUTHORITIES

In the context of any discussion on the structure of the SSM, and the role of jurisprudence in fuelling its functioning, two decisions are absolutely fundamental: (i) the CJEU's ruling in Case C-450/17 P (the so-called *Landeskreditbank* case)[9]; and (ii) the Court's judgement in Case C-219/17[10] (part of the *Berlusconi* saga). Each of these cases, and their impact to the broader functioning of the SSM, shall be examined below.

2.1. The *Landeskreditbank* case

The *Landeskreditbank* decision essentially concerns the criteria for identifying a credit institution as "significant," as well as the possibility of derogating from those criteria by way of exception on the part of the ECB. The issue is regulated by Article 6 of the SSMR and Article 70 of Regulation (EU) No 468/2014 of the European Parliament and of the Council ("the Framework Regulation") and, ultimately, regards the exercise of the discretions attributed to the ECB. However, the *Landeskreditbank* judgment[11], extending beyond the immediate issue at hand, also addresses a broader range of complex topics related to the SSM, its structure, and its operational mechanisms, reason for which it became so consequential in the brief history of the BU. Ultimately, the ruling also pertains to matters of sovereignty, as it concerns the distribution of authority between EU and national institutions in the context of EU banking supervision.

A review of the literature on the SSM[12] preceding the *Landeskreditbank* decision reveals a multitude of positions employed in attempts to frame the SSM and the relevant division of competences between the ECB and the NCAs from an institutional, or administrative, standpoint. By the time of the implementation of the SSM, there was a notable inclination among commentators to accentuate the constraints on the ECB's supervisory authority over less significant financial institutions and to contextualise the SSM within a framework predominantly centred on the cooperation between supervisory authorities. The *Landeskreditbank* decision represents a decisive departure from this approach.

In particular, the ruling held that, within the context of the SSM's institutional architecture, the ECB is "exclusively competent" to carry out, for prudential supervisory purposes, the "tasks" listed in Article

[9] Case C-450/17 P (*Landeskreditbank Baden-Württemberg — Förderbank v ECB*); See also the preceding judgment by the General Court on the same matter, Case T-122/15 (*Landeskreditbank Baden-Württemberg Förderbank* v *ECB)*. For a commentary, see, *inter alia*, Annunziata, F., 'European Banking Supervision in the age of the ECB. Landeskreditbank Baden-Württemberg – Förderbank v. ECB', European Business Organization Law Review, 2018.

[10] Case C-219/17 (*Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*).

[11] See Gasparri, G. (2017), 'I nuovi assetti istituzionali della vigilanza europea sul mercato finanziario e sul sistema bancario. Quadro di sintesi e problemi aperti', Consob, Quaderni Giuridici, 12, 32 ff.

[12] See, *ex multis*, Bundesbank (2013), 'European Single Supervisory Mechanism for banks - a first step on the road to a banking Union, Bundesbank Monthly Report'; Teixeira, P. G. (2014), 'The Single Supervisory Mechanism: Legal and institutional foundations', in Dal Testo unico bancario all'Unione bancaria: tecniche normative e allocazioni di poteri, Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, 73 ff.; Figliolia, C. (2016), 'I rapporti con le banche centrali nazionali', in Chiti, P.; Santoro, V. (eds.), *L'unione bancaria europea*, Pisa, 225 ff.; Wymeersch, E. (2012), 'The European Banking Union, a first analysis', Financial Law Institute, Working Paper Series, WP 2012-07, 2012, 17 ff.; Magliari, A. (2015), 'I procedimenti amministrativi di vigilanza bancaria nel quadro del Single Supervisory Mechanism. Il caso dell'applicazione dei diritti nazionali da parte della BCE', Riv. dir. banc., dirittobancario.it, 21, 2015, 22-23.; Ferran, E. (2015), 'The Existential Search of the European Banking national', ECGI Law Working Paper 297; D'Ambrosio, R. (2016), 'Meccanismo di vigilanza unico', in Enc. Dir., Milano, IX, 594 ff.; Macchia, M. (2015), 'L'architettura europea dell'Unione bancaria tra tecnica e politica', in Riv. it. dir. pubb. com., 1582 ff.; Lamandini, M. (2015), 'Il diritto bancario dell'unione', in BBTC, I, 423 ff.

4(1) in relation to "all credit institutions" established in the participating Member States, without drawing a distinction between significant institutions and less significant institutions[13]. However, for less significant institutions, the tasks are implemented through a decentralisation of the relative powers with the NCAs. In this sense, the most notable aspect of the ruling in the *Landeskreditbank* case pertains to the assertion by the Court that the ECB is entrusted with the ultimate responsibility for prudential supervisory functions over all credit institutions within the scope of the SSM, irrespective of whether the institution is classified as significant or less significant. In this sense, according to the ruling, when NCAs supervise less significant institutions, they do so on the basis of a "decentralised exercise of the ECB's exclusive competence"[14] and, thus, regardless of powers originally granted to them under the applicable national legislations.

2.2. The Berlusconi I decision

While the *Berlusconi* stream of cases before the CJEU still represents an unfolding saga, Case C-219/17 (so-called *Berlusconi I)* may be singled out as a deeply consequential judgment for the shaping of the SSM.

The case originated from a reference to a preliminary ruling requested by the Italian *Consiglio di Stato* and dealt with the issue of judicial review in the context of so-called composite procedures[15], which are those involving the participation both of the ECB and NCAs. In particular, under Articles 14 and 15 SSMR, the granting of authorisation to credit institutions and the assessment of acquisitions of qualifying holdings are procedures that start at the level of NCAs and conclude with a final decision issued by the ECB. More importantly, as clarified by the *Landeskreditbank* ruling, these are procedures over which the ECB has exclusive competence – regardless of the significance of the institution -, whereas NCAs merely exercise delegated tasks on behalf of the former. The role of the NCA consists, specifically, in receiving the application from the concerned parties and preparing a draft decision, which shall be further examined by the ECB.

In the context of these procedures, there remained the necessity to ascertain the precise role of NCAs and the ECB in order to determine the competent court for challenging the respective decisions. The *Berlusconi* judgment dealt precisely with this question, and the effects of the *Landeskreditbank* ruling are readily apparent. The approach derived from that case, in fact, reinforces the role and prerogatives of the ECB in comparison to those of NCAs, marking a clear shift towards stronger centralisation under the SSM. In particular, with regard to licensing and the acquisition of qualified holdings, the precedent set by the *Landeskreditbank* case entails that the ECB is not obliged to endorse the draft decision of the NCAs, as it holds exclusive competence for deciding on those matters.

A further, arguably more significant, consequence, ultimately embraced by the CJEU in *Berlusconi*, is that the draft decision of NCAs cannot be challenged before national courts[16]. As posited by the Court, indeed, "*[a]ny involvement of the national authorities in the course of the procedure leading to the adoption of such acts cannot affect their classification as EU acts where the acts of the national authorities constitute a stage of a procedure in which an EU institution exercises, alone, the final decision-making power without*

[13] See paragraphs 37-39 of the judgment.

[14] See par. 62 of the judgment.

[15] See Magliari, A. (2022), 'Composite procedures and judicial protection: in Fininvest and Silvio Berlusconi v. European Central Bank (T-913/16) the General Court delivers a "Pilate's judgment', Review of European Administrative Law. Regarding composite procedures in the EU Banking Union, see Bastos, F. (2021), "Composite procedures in the SSM and SRM – an analytical overview", in Zilioli, C., Wojcik, K.-P. (eds.), Judicial Review in the European Banking Union, cit.

[16] See par. 47 of the judgment.

being bound by the preparatory acts or the proposals of the national authorities […]"[17]. Moreover, since Article 263 TFEU confers upon the CJEU exclusive jurisdiction to review the legality of acts adopted by EU Institutions, only the final decision issued by the ECB is challengeable before EU courts[18].

The CJEU jurisprudence had already established that national courts may rule on irregularities that may vitiate a national act that is part of a decision-making process for the adoption of an EU act. Such a review should be carried out on the same terms as those on which national courts review any definitive act adopted by national authorities that is capable of adversely affecting third parties. This approach, however, was not followed in *Berlusconi I.* In fact, according to the Court, "*where the EU legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between the EU institution and the national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of the EU institution*"[19]. Thus, in order for such a decision-making process to be effective, the Court found that "*there must necessarily be a single judicial review, which is conducted, by the EU Courts alone, only once the decision of the EU institution bringing the administrative procedure to an end has been adopted […]*"[20].

The *Berlusconi* decision, therefore, clearly echoed the approach taken by the Court in *Landeskreditbank,* in fostering further levels of centralisation within the SSM in the hands of the ECB, thereby contributing to the reshaping of the institutional architecture of European banking supervision[21].

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[17] See par. 43 of the judgment.

[18] See also, by analogy, judgment of 22 October 1987, Foto-Frost, 314/85, EU:C:1987:452, paragraph 17.

[19] Id., par. 48 of the judgment.

[20] Id., par. 49 of the judgment.

[21] See Annunziata, F. (2019), 'Fostering Centralization of EU Banking Supervision Through Case-Law. The European Court of Justice and the Role of the European Central Bank'. Bocconi Legal Studies Research Paper No. 3372346.

3. THE RESOLUTION PROCESS

3.1. The peculiarity of the SRM

The SRM, just as the SSM, relies heavily on composite procedures for the execution of its recovery and resolution mechanisms, combining acts by the SRB, national resolution authorities ("NRAs") and, in some cases, EU Institutions (notably, the Commission and the Council). The mechanism is one of the most important components of the BU and applies to all credit institutions supervised under the SSM, enabling banks facing serious difficulties to have their resolutions managed efficiently with minimal costs to taxpayers and the real economy.

The single rulebook on banking resolution is built upon two main acts, which were initially published in 2014: (i) the BRRD[22], recently amended by Directive (EU) 2019/879 ("BRRD II")[23]; and (ii) the SRMR[24] (also called BRRR), as amended by SRMR II[25]. Neither the BRRD or the SRMR replace national rules on bank's insolvency, but rather harmonise *ex ante* measures for managing crises before insolvency and establish a "resolution procedure", featuring innovative tools for resolving "failing or likely to fail" institutions that are alternative to the ordinary winding-up and liquidation procedures[26]. This means that the winding-up and liquidation of distressed credit institutions still remains regulated by national law and regulatory provisions in force in each relevant Member State. In addition, from a supervisory perspective, the SRMR did not endow the SRB with powers to directly apply such national laws – such as the ECB with Article 4(3) SSMR - leaving, instead, the task to enforce SRB decisions in the hands of the NRAs, pursuant to Article 29 SRMR.

Nonetheless, there is a possible horizontal parallelism that can be traced between the SRB, within the SRM, and the ECB, under the SSM, since both authorities concentrate powers at the EU level and coordinate national authorities within their respective supervisory systems. However, unlike the ECB, which is an EU Institution pursuant to Article 282 TFEU, the SRB is an EU agency[27] with a specific structure aimed at ensuring an effective decision-making process in resolution. It is precisely this peculiarity, and the myriads of legal effects that it entails for the purposes of judicial review that present the most sensitive challenges to the SRM. Indeed, as the SRB pertains to the realm of decentralised agencies set up in order to assist EU institutions in policy making and implementation, it is subject to the so-called *Meroni* doctrine. According to the CJEU's jurisprudence, encompassing, most notably,

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[22] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190–348).

[23] Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC, OJ L 150, 7.6.2019.

[24] 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, p. 1–90).

[25] Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms, PE/47/2019/REV/1, OJ L 150, 7.6.2019.

[26] See Binder, J.H. (2016), "Resolution: Concepts, Requirements and Tools' in Binder, J. and Singh, D. (eds.) *Bank Resolution: The European Regime*, OUP.

[27] See, ex multis, Chiti, E. (2009), 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', 46 Common Market Law Review, 1395; Schneider, J. (2009), 'A Common Framework for Decentralized EU Agencies and the Meroni Doctrine', 61 Administrative Law Review, 29; Stefan, G. and Orator, A. (2010), 'Everything Under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine', European Law Review, Vol. 35, n. 3; Simoncini, M. (2015), 'The erosion of the Meroni doctrine. The case of the European Aviation Safety Agency (EASA)', European Public Law, XXI(2): 309-342.

decisions in *Meroni*[28], *Romano*[29] and the *Short selling* case[30], EU Institutions are prohibited from granting wide discretionary powers to EU agencies. Instead, any conferral of implementing powers must be clearly delineated by the empowering legal act, and the exercise of the relevant powers must be effectively controlled by the delegating authority and subject to legal review. The main purpose of the doctrine is the safeguarding of the EU's institutional balance, reason for which it determines that political power cannot be conferred upon executive bodies. Therefore, the SRMR, following the principles laid down in *Meroni*, has established that the SRB, as an agency, does not have the power to take final decisions in cases involving the exercise of wide discretionary powers. Instead, the SRMR requires acts by the Commission and the Council to give legal force to certain measures, such as approving a resolution scheme.

In the realm of the SRM, the last decade has also witnessed an abundance of cases challenging several aspects of the resolution process, involving, *inter alia*, the division of powers within the system, the standard for judicial review, the discretion of the SRB, the liability of authorities, and legal standing of applicants[31]. Among such cases, one particular string of rulings by the CJEU is worth examining in this brief paper, as it directly sheds light on the most vulnerable - and controversial – aspects of the SRM: the *Banco Popular* judgments.

3.2. The Banco Popular cases

The five rulings by the General Court[32], and the subsequent judgment of the CJEU following the appeal[33] in the case of the resolution of the Banco Popular Español ("BPE") deserve particular attention as they dialogue directly with crucial issues of the *Meroni* doctrine, in practice altering some of the core principles that have been established since the *Short selling* decision.

On 6 June 2017, the ECB declared that BPE, the sixth largest Spanish banking group, was experiencing severe financial difficulties due to a liquidity crisis, primarily caused by a significant outflow of deposits. On the following day, the SRB adopted a resolution decision, transferring all shares and capital instruments of BPE to Banco Santander for the nominal sum of one euro. In a subsequent development, the Commission ratified the resolution decision of the SRB within the subsequent hour, thereby precipitating the sale of BPE.

This was the inaugural instance of the SRM being deployed in relation to a credit institution within the European context. While all account holders were safeguarded, the resolution resulted in a financial burden of over 3 million euros for shareholders and creditors. The bail-in procedure established a centralised and autonomous decision-making process pertaining to bank resolution, predicated upon the close collaboration between an EU agency and an EU institution.

As hinted above, the resolution procedure, pursuant to Article 18 SRMR, involves a composite procedure where, in an initial assessment phase, the SRB, in conjunction with the ECB, determines

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[28] Cases 9/56 and 10/56 (*Meroni & Co, Industrie Metallurgiche SpA v High Authority*).

[29] Case C-98/80 (*Giuseppe Romano v Institut national d'assurance maladie-invalidité*).

[30] Case C-270/12 (*United Kingdom v the European Parliament and the Council*).

[31] See, *inter alia*, Cases C-551/19 P and C-552/19 P (*ABLV Bank and Others v ECB*); Case C-425/19 P (*Commission v Italy and Others*).

[32] Across the five actions brought before the General Court, there was a variegated set of applicants, each of them affected in a particular way by the resolution of BPE, namely: (i) BPE's shareholders (Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (T-481/17) and Aeris Invest Sàrl (T-628/17)); (ii) shareholders or owners of Additional Tier 1 capital instruments or Tier 2 capital instruments issued by BPE (Eleveté Investment Group, SL and 19 legal or natural persons (T-523/17)); (iii) investment fund managers holding Additional Tier 1 and Tier 2 capital instruments (Algebris (UK) Ltd and Anchorage Capital Group LLC (T-570/17)); and (iv) Mr Antonio del Valle Ruíz and other legal and natural persons who were shareholders or held BPE's bonds (Del Valle Ruíz (T-510/17)).

[33] Case C-551/19 (*European Commission v Fundación Tatiana Pérez de Guzmán el Bueno and others*).

whether a credit institution is failing or likely to fail (the so-called FOLTF test), whether there is a prospect of private sector measures, and whether resolution is in the public interest. Subsequently, it is for the Commission to endorse or reject the resolution scheme in relation to its discretionary aspects, potentially involving the Council for the final adoption of the decision. Thus, the SRB acts during the preparation of the resolution scheme but cannot adopt a final decision without the involvement of EU institutions. In light of these aspects, the applicants in *Banco Popular* challenged the SRB's resolution scheme and its exercise of discretionary powers, especially in view of the extremely limited time available for the Commission to conduct a political control over the SRB's acts[34]. In essence, the challenges sought to question whether the SRB, disposing of wide-ranging discretionary powers, was acting, in effect, as the hidden decision-maker under the SRM.

The first issue to be addressed by EU Courts, regarding the above, consisted of ascertaining the nature of the SRB decision containing the resolution scheme and whether such decision is challengeable before courts. In effect, it is settled case-law that an action for annulment may be brought, under the fourth paragraph of Article 263 TFEU, read in conjunction with the first paragraph thereof, against all measures or acts adopted by the EU institutions, bodies, offices and agencies, whatever their form, which are intended to produce legal effects binding on and which are capable of affecting the interests of a natural or legal person by bringing about a distinct change in their legal position. In order to ascertain whether an act produces such effects and may, accordingly, form the subject matter of such an action, it is necessary to examine the substance of that act and to assess those effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution, body, office or agency which adopted the act[35]. Considering such precedent, the General Court sought to assess both the content and the context in which the act was adopted, especially regarding the powers of the SRB.

In this regard, the General Court found that the Commission's involvement does not merely "rubber stamp" the SRB's decisions on resolution[36]. Rather, the SRB, throughout the entire initial assessment phase, is required to constantly inform the Commission, the Council and the ECB of the ongoing process. In addition, the Court held that since Commission representatives participate in the meetings of the SRB as permanent observers and have access to all documents, thereby enabling the EU Institution to assess the margins of discretion of the SRB on a continuous basis, the Commission's endorsement of the resolution scheme "is not a mere formality"[37].

Therefore, in its reasoning, in order to adhere to the *Meroni* prohibition of an actual transfer of responsibility, the General Court distinguished between the competence of the SRB and that of the Commission on the basis of the technical nature of the former's powers and the discretionary competence of the latter in the procedure. The informal participation of the Commission in the SRB's

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[34] In fact, according to Article 18 SRMR, the approval of resolution schemes should observe the following procedure: (i) within 24 hours from the transmission of the resolution scheme to the Commission, the latter must either endorse it or object to it with regard to its discretionary aspects; (ii) in case the Commission endorses the resolution scheme, it immediately enters into force; (iii) on the contrary, if there is an objection to the discretionary aspects of the scheme, the SRB has 8 hours to modify it following the Commission's requests; (iv) also within 24 hours from the transmission of the resolution scheme by the SRB, the Commission may refer the approval of the resolution scheme to the Council, which may also approve or object to it based on an assessment of the fulfilment of the public interest criterion. The justifications for the rather tight timeframe for the approval of the final decision is clarified in recital (56) of the SRMR, which states that "in order to minimise disruption of the financial market and of the economy, the resolution process should be accomplished in a short time".

[35] See, to that effect, Case 60/81 (*IBM v Commission*); C-551/19 P and C-552/19 P (*ABLV Bank and Others v ECB*); C-348/20 P (*Nord Stream 2 v Parliament and Council).*

[36] See par. 229 of the decision.

[37] See paragraphs 231 et seq.

resolution decision, in this sense, was sufficient as a procedural element to ensure that it could make an informed assessment of the discretionary aspects of the final decision and could constitute as the effective decision-making authority.

As a consequence of the above, the General Court hence concluded that the resolution scheme could be regarded as a challengeable act for the purposes of Article 263 TFEU[38]. In that regard, it noted, in the first place, that if a resolution scheme enters into force only as a result of its endorsement by the Commission, that does not mean that that endorsement has the effect of eliminating the independent legal effects of that resolution scheme and replacing them with those of the Commission decision alone[39]. In paragraphs 128 to 130 of that judgment, while taking the view that the Commission's endorsement is a necessary step for the entry into force of the resolution scheme and that its endorsement gives legal force to that scheme, the General Court held that compliance with the principles relating to the delegation of powers laid down in *Meroni*, does not imply that only the decision adopted by the Commission produces legal effects.

In the second place, the General Court rejected the argument that a resolution scheme is not binding on the Commission and constitutes a preparatory measure which is not capable of forming the subject matter of an action under Article 263 TFEU. In that regard, it held that, in the context of the complex administrative procedure established by the SRMR, a resolution scheme cannot be regarded as a preparatory measure intended to pave the way for the Commission decision[40]. In its view, while, pursuant to Article 18(7) SRMR, the endorsement of the resolution scheme by the Commission has the effect of making it enter into force and while that institution may object to that scheme with regard to its discretionary aspects, it may neither object to nor amend its purely technical aspects.

This rationale was, however, rebutted by the Court of Justice in its judgment of 18 June 2024. As regard the context in which the resolution scheme was adopted, the Court observed that Article 18 SRMR on the adoption of the resolution procedure is grounded in the *Meroni* doctrine, as confirmed by recitals (24) and (26) of such regulation[41]. The Court acknowledged, therefore, that the exercise of the resolution powers provided for in the SRMR falls within the resolution policy of the EU, which only EU institutions may establish, and that there remains a margin of discretion in the adoption of each specific resolution scheme, given the considerable impact of the resolution decisions on the financial stability of the Member States and on the Union as such, as well as on the fiscal sovereignty of the Member States. According to the Court, the EU legislature, for those reasons, considered it necessary to provide for the adequate involvement of the Council and the Commission, namely involvement that strengthens the necessary operational independence of the SRB while respecting the principles of delegation of powers to agencies identified in the judgment in *Meroni* and *Short selling*.

The Court argued that while Articles 7 and 18 SRMR provide that the SRB is responsible for drawing up and adopting a resolution scheme, they do not confer on it the power to adopt an act producing independent legal effects. In the context of the resolution procedure resulting from Article 18 SRMR, endorsement by the Commission is an essential element for the entry into force of the resolution scheme, which also impacts the content of the scheme itself[42]. In particular, the Court found that, contrary to what the General Court held, a distinction cannot be drawn between discretionary aspects and technical aspects, for the purposes of determining the act against which an action may be brought

[38] See par. 124 of the decision.
[39] See par. 127 of the decision.
[40] See par. 137 of the decision.
[41] See par. 69 of the decision.
[42] See par. 83 of the decision.

in the context of a resolution scheme endorsed in its entirety by the Commission. Thus, it is only by the Commission's endorsement decision that the resolution action adopted by the SRB in the resolution scheme was definitively fixed and that that action produced binding legal effects, with the result that it is the Commission, and not the SRB, which must answer for that resolution action before the EU judicature, according to the principles laid down in *Meroni*[43].

Thus, the Court held that, contrary to what the General Court stated, it cannot be inferred that the resolution scheme did not produce independent legal effects or constitute the outcome of the resolution procedure itself, that outcome having materialised only through the endorsement of that scheme by the Commission. Therefore, the Court of Justice concluded that the resolution scheme does not constitute a challengeable act for the purposes of the fourth paragraph of Article 263 TFEU[44]. Therefore, only the Commission's endorsement may be challenged.

The effects of the Court of Justice's judgment in *Banco Popular* are immense and should have lingering implications, not only limited to the sphere of banking resolution. The judgment restored core principles of the original *Meroni* decision, some which were apparently eroded over the last decades[45], in effect also questioning some aspects of the *Short selling* case, such as the division between technical and political powers. In the latter decision, the Court ruled that as long as objective criteria and circumscribed conditions leading to the exercise of the powers are amenable to judicial review, delegation could involve some "margin of discretion" when a "high degree of expertise" is required to pursue the objective of financial stability. The short-selling case thus establishes that insofar as EU agencies exercise regulatory tasks within the priorities set and the policy choices made by EU legislative acts, no significant transfer of responsibilities occurs. This contrasts with the decision in *Banco Popular,* where the Court stated that the exercise of the resolution powers under the SRMR falls within the resolution policy of the EU, which only EU institutions may establish, and that the adoption of resolution schemes entail a margin of discretion that exceeds the SRB's powers.

More importantly, by recalling *Meroni*, the Court stressed its importance as safeguarding the balance of powers, which, is "a fundamental guarantee granted by the Treaties"[46]. Although the topic as deeply complex and may still give rise to potential questions, the Court of Justice seems willing to build the new legal system created by the BU on the solid grounds of the Treaty, carefully treading over the strenuous yet crucial matters of institutional balance and judicial review in light of fundamental principles and guarantees.

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[43] See paragraphs 85-92 of the decision.

[44] See par. 97 of the decision.

[45] See Pelkmans, J., Simoncini, M. (2014), "Mellowing Meroni: How ESMA can help build the single market", CEPS Commentary; Annunziata, F. (2021), 'The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni', European Banking Institute Working Paper Series No. 106; Simoncini, M. (2023), 'Live and let die? The Meroni doctrine in 2023', EU Law Live Symposium: The Agencies of the European Union – Legal Issues and Challenges; Chamon, M. (2023), "The non-delegation doctrine in the Banco Popular cases", REALaw.blog available at https://wp.me/pcQ0x2-s6.

[46] See par. 72 of the decision.

4. THE LIMITS TO THE APPLICATION OF NATIONAL LAWS

Article 4(3) SSMR was, from the outset, notoriously controversial for granting the ECB with powers to directly apply national laws for the purpose of carrying out supervisory tasks. Entirely unseen ten years ago at the dawn of the SSM, the tool introduced by Article 4(3) still raises a myriad of questions discussed in literature[47] and has already led to an extensive case law from the CJEU, whose judgments are yet to produce a settled understanding on the limits, methods, standards, and effects related to the interpretation and application of national laws by the ECB, including with respect to non-trivial aspects of judicial review.

Specifically, Article 4(3) SSMR requires the ECB to "*apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options*". As recently acknowledged by Advocate General ("AG") Càpeta, "*[t]he SSM is unique in that it is the first situation in EU law in which an EU institution, as opposed to a national one, is directly obliged to apply national law*"[48]. As an EU Institution, the ECB is bound by the principle of primacy of Union law[49] and decisions adopted by the ECB based on national legislation are legal acts within the meaning of Article 288(4) TFEU, subject to judicial review by Union courts and to administrative procedures and standards governed by EU law[50].

The rationale behind such a complex device can be attributed to the fact that despite the process to harmonise national substantive rules applicable to credit institutions started in 1993 and these have, since then, become increasingly uniformised with the establishment of the European Banking Authority ("EBA") and the creation of the Single Rulebook, there still exist large disparities across national laws. For this reason, the BU continues to place a significant reliance on the various national choices concerning the content of the applicable rules and focuses on "models of supervision" and the "interplay between supervisors"[51].

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[47] See Gortsos, C.V. (2021), "The Crédit Agricole cases: banking corporate governance and application of national law by the ECB", in Zilioli, C., Wojcik, K.-P. (eds.), Judicial Review in the European Banking Union. Cheltenham: Edward Elgar; Lo Schiavo, G. (2019), 'The ECB and its application of national law in the SSM', in Lo Schiavo, G. (ed.), The European Banking Union and the Role of Law, cit.; Coman-Funk, F. and Amtenbrink, F. (2018), 'On the Scope and Limits of the Application of National Law by the European Central Bank within the Single Supervisory Mechanism', 33 BFLR. 133; Boucon, L., Jaros, D. (2018), 'The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism: A new Mode of European Integration?' European Journal of Legal Studies, Vol. 10, 155-187; Giglioni, F. (2015), 'The European Banking Union as a new Model of Administrative Integration?', in Chiti, E., Vesperini, G. (eds.), T*he Administrative Architecture of Financial Integration, Institutional design, Legal issues, Perspectives*, cit.; Witte, A. (2014), 'The application of national banking supervision law by the ECB: three parallel modes of executing EU law?', 21 MJECL 89; Witte, A. and Lackhoff, K. (2022), 'Art. 4 SSMR' in Binder, J., Gortsos, C.V., Lackhoff, K. and Ohler, C. (eds.), Brussels Commentary on the European Banking Union, Baden-Baden: Beck C. H.

[48] See the Opinion of AG Càpeta in Case C-579/22 P delivered on 11 April 2024 (ECLI:EU:C:2024:296), par. 26. See also Witte, A. (2014), 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?', Maastricht Journal of European and Comparative Law, Vol. 21, 2014, 89; Wissink, L., Duijkersloot, T., Widdershoven, R. (2014), 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', Utrecht Law Review, 10(5), 92-115.

[49] See Case 26/62 (*Van Gend en Loos v Nederlandse Administratie der Belastingen*), Case 6/64 (*Costa v ENEL*), Case 11/70 (*Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*), Case 106/77 (*Amministrazione delle Finanze dello Stato v Simmenthal Spa*), Case C-106/89 (*Marleasing SA v La Comercial Internacional de Alimentacion SA*).

[50] See Witte, A., Lackhoff, K. (2022), 'Art. 4 SSMR', cit., 71.

[51] See the Opinion of AG Càpeta, par. 27. See also Boucon, L., Jaros, D., "The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism: A new Mode of European Integration?", cit., 163.

In the context of judicial review, the interpretation of national statutes may be *autonomous* or *deferential*[52]. The former implies that EU courts would engage in a review adopting the principles, standards, and rules arising from EU law[53], disregarding the traditional stances of the relevant national courts. By contrast, a deferential approach would entail Union courts striving to align their interpretation of national law with that of national jurisprudence. In the event that national case law does not offer an immediate solution, EU courts would then be obliged to interpret the case in accordance with the traditions and methods prevailing in the relevant jurisdiction, as opposed to those deriving from EU law.

The two approaches have different consequences. Autonomous interpretation could be seen by national courts as contrary to the Member State's legal standards or even, in extreme cases, in conflict with fundamental rights or principles[54]. Conversely, deferential interpretation could lead to greater fragmentation among jurisdictions and pose more obstacles to ensuring consistent methodologies and respecting the *iura novit curia* principle, although it arguably provides for more legal certainty at the national level.

While, at first, EU Courts seemed to favour a deferential approach when dealing with issues arising from Article 4(3) SSMR, more recent cases – still at the level of the General Court, however - demonstrate the choice for a more autonomous interpretation.

The questions – both actual and potential – arising from Article 4(3) SSMR are nonetheless still numerous and variegated[55]. To name only a few, there still lacks clarity as to whether the ECB is required to apply only substantive national law or also procedural national law, where relevant; whether the ECB is competent to also apply and interpret national legislation not strictly pertaining to the field of prudential regulation, but also matters with which the former may intersect (such as corporate or labour laws); how the ECB should apply a provision of EU law where there lacks the national legislation transposing the directive, or where there is a clear contrast between the EU-derived provision and national constitutional rules. Such matters, however, are likely to be addressed by the CJEU over time.

In the following paragraphs, we have chosen to focus our analysis only on the question of deference versus autonomy, as we understand that the development of the Court's decisions on this issue represents a crucial innovation in terms of defining the Union's legal framework.

4.1. Early deferential and autonomous approaches

One of the first cases brought to the CJEU in which the ECB directly applied national law, *Crédit Agricole*[56], consisted of a challenge to ECB decisions refusing the appointment of persons intending to

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[52] The concepts of 'autonomous' and 'deferential' interpretation were originally proposed by Andreas Witte. See Witte, A. (2021), 'The application of national law by the ECB, including options and discretions, and is impact on the judicial review' in Zilioli, C. and Wojcik, K.-P. (eds.), Judicial Review in the European Banking Union. cit.

[53] See, e.g. Lenaerts, K. And Gutiérrez-Fons, J. (2010), 'The Constitutional allocation of powers and general principles of EU law', CML Rev. 47: 1629-1669.

[54] See, in this regard, Case C-493/17 (*Weiss and Others*) and the reaction of the German constitutional court (judgment of the Bundesverfassungsgericht ("BVerfG") of 5 May 2020). See also Case C-62/14 (*Peter Gauweiler and others*) and the BVerfG judgment of 2 June 2016. For an overview, see Annunziata, F., Lamandini, M., Ramos Muñoz, D. (2020), 'Weiss and EU Banking Union Law: A Test for the Fundamental Principles of the Treaty', EBI Working Paper Series No. 67.

[55] See, for a thorough analysis of the topic, Annunziata, F., D'Ambrosio, R. (2024).

[56] Joined Cases T-133/16 to T-136/16 (*Caisse régionale de crédit agricole mutuel Alpes Provence et al v ECB*). See Gortsos, C.V. (2021), 'The Crédit Agricole cases: banking corporate governance and application of national law by the ECB' in Zilioli, C., Wojcik, K.-P. (eds.) Judicial Review in the European Banking Union, Cheltenham; Simon, D. (2018), 'Surveillance prudentielle', in Europe 2018 Juin comm., 6/2018, 30-31; Annunziata, F., D'Ambrosio, R. (2019), 'L'applicazione del diritto degli Stati membri da parte della Banca Centrale', Giurisprudenza commerciale, 46.4, 707-718.

simultaneously occupy the positions of chairmen of the "*management body in its supervisory function*" and "*effective directors*" of the group's governance structure. In the judgment, the Court confirmed that "*pursuant to Article 4(3) of Regulation No 1024/2013, the ECB was required to apply not only Article 13(1) of Directive 2013/36 but also the provision of national law transposing it* […]"[57], and concluded that "*thus, Article 4(3) of Regulation No 1024/2013 necessarily requires the Court to assess the legality of the contested decisions in the light of both Article 13(1) of Directive 2013/36 and the second paragraph of Article L. 511-13 of the CMF*"[58]. In examining the matter under consideration, the Court recalled a fundamental tenet of its established jurisprudence, which establishes that "*[w]here the interpretation of a national law provision is at issue, it should be borne in mind that, according to settled case-law, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts*"[59]. In light of this principle, the General Court placed considerable weight on the fact that the same case had recently been decided by the Conseil d'État[60] and thus followed the arrêt verbatim. This led to the conclusion that the ECB had not erred in its interpretation of French legislation.

A similar approach was taken in *Crédit Mutuel Arkéa*[61], where the General Court reiterated the above conclusion, but added that "[…] *in the absence of decisions by the competent national courts, it is for the Court to rule on the scope of those provisions*"[62]. The case revolved around a stipulation of national legislation pertaining to Article 10 CRD, which was pivotal in ascertaining whether the credit institution could be regarded as a supervised entity. In the initial phase, the General Court rejected the petition, directly interpreting the national legislation and determining that the ECB's decision was lawful. Subsequently, however, a ruling from the *Conseil d'État* provided an interpretation of the relevant provision of French law (in particular, Article L-511.30 of the *Code Monétaire et Financier*). As a result, in the second instance, the Court of Justice was able to use the decision as a parameter, substituting the grounds of the General Court's judgment, even though the outcome was similar.

A different approach was adopted by the Court in *Berlusconi II* (Case T-913/16)[63], which followed the aforementioned *Berlusconi I* judgment. The case consisted in an action for annulment, and became impactful for the controversial position held by the General Court, which posited that "*[…] according to settled case-law, it follows, from the need for uniform application of European Union law and from the principle of equality, that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union*"[64]. Thus, albeit acknowledging that "*Article 4(3) of Regulation No 1024/2013 provides that, for the purpose of carrying out the tasks conferred on it by that regulation and with the objective of ensuring high standards of supervision, the ECB is to apply all relevant EU law and, where that EU law is composed of directives, the national legislation transposing those directives […]*", the Court held that Article 4(3) SSMR "*[…] cannot be understood as making an express reference, for the interpretation of the concept of acquisition of a qualifying holding, to the law of*

[57] Par. 48 of the judgment.

[58] Par. 49 of the judgment.

[59] Par. 84 of the judgment.

[60] Conseil d'État, 9ème - 10ème chambres réunies, 30/06/2016, 38382.

[61] Joined Cases C-152/18 P and C-153/18 P (*Crédit mutuel Arkéa v ECB*).

[62] Case T-712/15, par. 132 and Joined Cases C-152/18 P and C-153/18 P, par. 99.

[63] See Annunziata, F. (2022), 'Qualifying shareholders and the fit and proper assessment. A new chapter in Fininvest-Berlusconi v ECB (Case T-913/16)', Op-Ed, EU Law Live Blog.

[64] See par. 44 of the judgment. See also Case C-508/12 (Vapenik), Case C-483/17 (Tarola), Cases C-424/10 and C-425/10 (Ziolkowski and Szeja) and Case C-140/12 (Brey).

the Member States"[65]. The primary rationale for this interpretation is that the term "qualifying holding" is referenced in both Article 22 of the CRD and Article 15 of the SSMR. Notably, neither of these provisions makes any reference to national legislation. This omission is viewed by the Court as a clear indication that the provisions are to be understood independently of any national legislation. The Court thus concluded that *"[the] concept must therefore be regarded, for the purposes of the application of Article 15 of Regulation No 1024/2013 and Article 22 of Directive 2013/36, as an autonomous concept of EU law which must be interpreted in a uniform manner throughout the Member States"*[66].

In contrast to previous cases, the approach taken by the Court in this instance was to move away from simply reproducing existing judgments rendered by national courts in order to interpret the relevant provisions. Instead, the Court took the matter upon its hands, directly examining national laws and providing its own interpretation of the applicable rules. Furthermore, the judgments adopted an EU-centred interpretation, whereby EU law takes precedence over national legislation, which was also a departure from the approach taken until then.

4.2. A new trend towards centralisation?

Challenges to the exercise of the ECB's powers in connection with Article 4(3) SSMR continue to mount and more recent cases have been subject to the General Court's review, which has led to deeply significant judgments.

In *Corneli*[67], in examining an ECB decision to place an Italian credit institution, Banca Carige, under temporary administration, the General Court held that, in accordance with the principle or duty of "conforming interpretation," when national courts apply domestic law, they are bound to interpret it, to the extent feasible, in a manner that aligns with the directive's wording and purpose. This approach is intended to facilitate the realisation of the directive's intended outcome.[68]. According to the Court, *"[t]his obligation to interpret national law in conformity with EU law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them"*[69].

The Court explicitly remarked, however, that *"the principle of conforming interpretation has certain limits"*[70]. By citing *Impact*[71] and *Dominguez*[72], the Court held that *"[t]he obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem"*[73]. Therefore, it follows that *"the obligation to interpret national law in conformity with EU law […]*

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[65] See paragraphs 46 and 47 of the judgment.

[66] See par. 49 of the judgment.

[67] Case T-502/19 (Corneli v ECB). See, in this regard, Annunziata, F., De Arruda, T. (2023), 'The Corneli Case and the Application of National Law by the European Central Bank', EU Law Live Weekend Edition. The Corneli saga, however, still lingers: while the decision in Corneli has been appealed to the Court of Justice (Case C-777/22 P (*ECB v Corneli*)), additional applications were filed (see, for instance, Case T-1192/23 (*Alessio and Others v ECB*)) and the General Court has already issued a new ruling in *Malacalza* (Case T-134/21 (*Malacalza Investimenti Srl and Vittorio Malacalza v ECB*)) , dismissing an action for damages arising from the same facts of Corneli.

[68] References are made, *inter alia*, to Case C-555/07 (*Seda Kücükdeveci v Swedex GmbH & Co. KG.*) and Case C-573/17 (*Poplawski*). See also C-240/95 (*Schmit*), par. 14, and C-433/13 (*Commission v. Slovakia*), par. 81.

[69] Case T-502/19, par. 103.

[70] Id., par. 105.

[71] Case C-268/06 (*Impact v Minister for Agriculture and Food and Others*).

[72] Case C-282/10 (*Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*).

[73] Case T-502/19, par. 105.

cannot serve as a basis for an interpretation which runs counter to the wording used in the national measure transposing a directive"[74].

In addition, the General Court recognised a duty of the ECB, as an EU Institution, *to* comply with EU law in its actions under Article 4(3). According to the ruling, *"[…] that obligation stems from the principle of legality, which requires the institutions to observe, subject to review by the EU Courts, the rules to which they are subject. Specifically, that obligation is expressed, as regards prudential supervision […] in Article 4(3) of Council Regulation (EU) No 1024/2013 […]"*[75]. Nonetheless, the Court held, in a highly consequential reading of Article 4(3) SSMR, that *"[i]t follows from that provision, however, that where EU law involves directives, it is the national law transposing those directives that must be applied. The provision cannot be read as having two distinct sources of obligations, namely EU law in its entirety, including directives, to which the national law transposing them should be added. Such an interpretation would imply that the national provisions differ from directives and that, in such a case, the two types of document are binding on the ECB as separate legislative sources. Such an interpretation cannot be accepted, since it would be contrary to Article 288 TFEU, which provides that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"*[76]. In light of these observations, the Court determined that the ECB had incorrectly applied national legislation, establishing an interpretation of Article 4(3) SSM whereby the ECB is obliged to correctly apply national rules transposing directives, even if the wording of national legislation does not precisely align with the text of the directive[77].

This approach is, however, far from being settled. While the *Corneli* decision has been appealed before the Court of Justice, in *Sber*[78] and *BAWAG*[79], the General Court went even further in innovating the interpretation of Article 4(3) SSMR, effectively diverging from the previous precedent.

In particular, regarding the former ruling, Sberbank Europe AG, an Austrian credit institution, challenged in Court an ECB decision to levy on it an onerous measure, namely absorption interest, as set out in the applicable national law (point (2) of Article 97(1) of the Austrian Banking Act (the *Bankwesengesetz* or, simply, "*BWG"*) in addition to an earlier administrative pecuniary penalty it imposed on the bank pursuant to Article 18(1) SSMR for having violated large exposures limits established by the prudential regulatory framework. The measure contained in the contested decision has been qualified as an administrative measure in the sense of Article 65(1) CRD by the CJEU in a previous decision (in Case C-52/17, *VTB*)[80] and thus the ECB was the competent to impose the measure provided for by the national law. The ECB did not examine whether it was proportionate to levy absorption interest in the light of the circumstances of the case, since it found that it was prevented from doing so on account of the Austrian Supreme Administrative Court's[81] interpretation of point 2 of Paragraph 97(1) of the BWG. The Austrian Court indeed, when considering this rule, established that the competent authority (in this case the ECB) is "barred from considering the degree of unlawfulness of the breach".

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74 Id., par. 106.

75 Id., par. 111.

76 Id., par. 112.

77 See Sarmiento, D. (2022), 'Setting the limits of implementation of national law by EU Institutions: the Corneli v ECB case (T-502/19', Op-Ed EU Law Live blog, 14 October 2022, available at https://eulawlive.com/op-ed-setting-the-limits-of-implementation-of-national-law-by-eu-institutions-the-corneli-v-ecb-case-t-502-19-by-daniel-sarmiento.

78 Joined Cases T-647/21 and T-99/22 (*Sber v ECB*).

79 Case T-667/21 (*BAWAG PSK v ECB*).

80 Judgment of 7 August 2018, *VTB Bank (Austria) AG v Finanzmarktaufsichtsbehörde*, C-52/17, EU:C:2018:648, paragraph 42.

81 *Verwaltungsgerichtshof*, judgment No 95/17/0139 of 15 May 2000.

In its ruling, the Court of Justice first stated that "[…*] in so far as the interpretation of a provision of national law is at issue, it should be recalled that, in principle, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts*" (paragraph 58). Subsequently, in paragraph 60, the Court held that "*[t]he situation is different, however, where the interpretation of the national courts does not make it possible to ensure the compatibility of national law with a directive*". Furthermore, in paragraph 61 the EU judges added that "*[i]n such a situation, compliance with the principle of the primacy of EU law means that the General Court must, as must a national court, where necessary, interpret national law so far as possible in the light of the wording and the purpose of the directive transposed in order to achieve the result sought by the directive […]*", further establishing, in paragraph 63, that "*[w]here it is unable to interpret national law in compliance with the requirements of EU law, the General Court, like the national court which is called upon to apply provisions of EU law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any national legislation, even if adopted subsequently, which is contrary to a provision of EU law with direct effect (see, to that effect, judgment of 24 June 2019, Popławski, C-573/17, EU:C:2019:530, paragraphs 58 and 61*)".

In view of the above, the Court thus concluded that since absorption interest constitutes an administrative measure within the meaning of Article 65(1) CRD, its application is governed by Article 70 CRD, which mandates that competent authorities applying such measures should take into account all relevant circumstances of the case (*inter alia*, the gravity and duration of the breach, the degree of responsibility for the infringement, the gains made or losses avoided, the losses caused to third parties by the breach). It follows, therefore, that an interpretation of point 2 of paragraph 97(1) of the Austrian BWG, which places the ECB in a situation of non-discretionary competence, would prevent it from considering all the relevant circumstances, as determined by the CRD regime, thereby entailing an incompatibility with the rules laid down in Article 70 CRD[82].

The *Sber* decision is of paramount importance in establishing the relationship between national legislation and the legal system at Union level: where there is a conflict between a national law, as interpreted by a national court, and an explicit provision of a Directive, as implemented by national legislation, the latter should prevail. In light of the ruling's conclusions, in effect, Directives appear very similar to Regulations, and, to a certain extent, the judgment seems to broaden the situations where the direct application of Directives is permitted under EU law.

In addition to the above, another relevant consequence of the decision concerns the competence of the ECB to implement administrative measures regulated under national legislation. In this regard, it can be drawn from the judgment that as the BU conferred upon a European Institution competence to exert administrative acts, even where these acts are provided for by national legislation, the European Institution is strictly bound to the rules and principles of the EU legal system. Thus, even though Article 4(3) SSMR establishes that the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives, in applying national provisions the ECB cannot breach general principles of the EU legal order (in *Sber*, the principle of proportionality in applying administrative sanction). Indeed, it is established case-law that the principle of proportionality is one of the general principles of Union law underlying the constitutional traditions common to the Member States, which must be observed by national legislation that falls within the scope of Union law or implements that law[83]. In this regard, AG Bobek has opined that if a provision of Union law that establishes a proportionality requirement has direct effect (which may well be the case

[82] *See par. 71 of the decision.*
[83] Judgment of 4 October 2018, Dooel Uvoz-Izvoz Skopje Link Logistic N&N, C-384/17, EU:C:2018:810, paragraph 40.

of Article 70 CRD), then national courts and administrative authorities must disapply any national provision insofar as its application would lead to a result contrary to Union law, and, if necessary, supplement the applicable domestic provisions with the criteria of the requirement of proportionality laid down in the case-law of the CJEU[84].

The judgments in *Sber* and *BAWAG*, therefore, signify a profound transformation in the stance hitherto adopted by the Court in *Corneli* and the jurisprudence that preceded it. They entail a reversal of the literal interpretation of a national provision by a national court when such an interpretation is at odds with the overarching principles of EU law or the objectives of the Directives in question. While it is premature to assume that the latest rulings by the Court signal a definite approach towards ensuring an absolute primacy of EU law by EU Courts in connection with the application of national law by the ECB, the judgments have unquestionably validated the mechanism of Article 4(3) SSMR, and appear to signal a shift – already materialised in other aspects of the SSM – towards an effective centralisation at the EU level.

In fact, the rulings also reinforce the ECB's autonomy in exercising functions that were previously the responsibility of national authorities. This autonomy, moreover, as established in *Sber*, must be guided solely by principles of EU law. While the latest judgments of the Court are still pending review by the Court of Justice, they already have an undeniable impact upon the process of integration of Member States with respect to the exercise of administrative powers.

[84] Opinion of Advocate General Bobek of 23 September 2021, Landesverwaltungsgericht Steiermarkt, C-205/20, EU:C:2021:759.

5. THE ECB'S DISCRETION AND THE "LIMITED STANDARD OF REVIEW"

Over the past decade, there has also been considerable discussion surrounding the discretion that is enjoyed by the ECB in the context of banking supervision[85], where it is more constrained than in the domain of monetary policy[86]. In the latter, the Treaty provides for the attribution of a comprehensive mandate to achieve the objective of maintaining price stability (Article 127 TFEU). The manner in which monetary policy should be conducted is, therefore, not delineated by the Treaty or by any other legislative text. In contrast, the function of banking supervision is clearly defined by a multitude of regulations that elaborate upon the objectives of the ECB's powers and the prerequisites for their exercise under the BU.[87].

Furthermore, when analysing the extent of discretion exercised by the ECB in the supervision of the banking system, it is essential to consider the recent evolution of the underlying body of legislation and soft law measures. Following the implementation of the BU, EU legislatures have pursued two distinct paths. On the one hand, the objective of harmonising rules has resulted in an increase in the number of detailed provisions established by Directives, Regulations, Regulatory Technical Standards ("RTS") and Implementing Technical Standards ("ITS") prepared by the EBA. Consequently, in numerous instances, the legislature has set forth comprehensive *ex ante* limitations on the authority's discretion (see, for instance, the granting of authorisation to engage in banking activities). Conversely, the necessity to eschew a supervisory model based on the "tick box" approach prompted the legislature to confer upon the authority greater latitude to assess the "qualitative aspects" (as opposed to the "quantitative aspects") of conducting banking business, as set forth in Article 16 SSMR.

In the first case, the review of administrative discretion is rigorous, necessitating an evaluation of the appropriate application of all conditions required for the exercise of power[88]. In the latter case, the ECB's discretion pertains to the "supervisory approach" chosen by the legislature. *Ex post* controls are thus limited to an assessment of its compliance with the duty of care, with a particular focus on procedural aspects.

An analysis of recent case law from the Court of Justice[89] reveals that the application of the "limited standard of review" in the banking supervisory field entails a varying degree of judicial scrutiny, contingent on the way in which the law delineates the discretionary powers of the ECB. In particular, the CJEU has emphasised that where EU courts review the legality of a complex "economic assessment" carried out by the Commission or another EU Institution and that institution affords a "wide discretion", the review will be limited to whether the procedural requirements have been met, whether the statement of reasons is sufficient, whether the facts have been correctly stated, whether there has been

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[85] See, *ex multis*, Ioannidis, M. (2021), 'The judicial review of discretion in the Banking Union: from 'soft' to 'hard(er)' look?', in Zilioli, C., Wojcik, K.-P. (eds.), Judicial Review in the European Banking Union, cit.

[86] See Case C-62/14, *Gauweiler and Others*, EU:C:2015:400, on the validity of the decision of the Governing Council of the ECB approving the programme of Outright Monetary Transactions (OMTs). In his opinion in the same case (EU:C:2015:7), AG Cruz Villalón argued at point 111 "... the intensity of the judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution". See also Markakis, M., 'Judicial Review of the European Central Bank's Actions', in Markakis, M., (ed.), *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance*, OUP, 2020.

[87] See Lehmann (2017), 'Varying standards of judicial scrutiny over central bank actions', in *Shaping a new legal order for Europe: a tale of crises and opportunities*, ECB, pp. 112-132.

[88] See Case T-733/16, *La Banque postale* v *ECB*, paragraphs 77-97.

[89] Case T-712/15, *Crédit Mutuel Arkéa* v *ECB*; Joined Cases T-133/16 to T-136/16, *Caisse régionale de crédit agricole mutuel Alpes Provence and Others* v *ECB*; and Case T-733/16, *La Banque postale* v *ECB*.

a manifest error of assessment, and whether there has been a misuse of power[90]. In this sense, judicial review of discretionary acts of the ECB do not concern the merits of the decision[91], but instead focus on controlling the legality of the decision, ensuring that it does not exceed the strict limits established by law and is based on a careful and impartial assessment.

Nonetheless, even under a limited standard of review, there are still stringent requirements limiting the exercise of discretionary powers. In particular, the ECB's actions, like those of any other EU institution or body, are strictly bound by the general principles of EU law, such as proportionality, equal treatment, legitimate expectations, legal certainty and good administration. This entails a "principle-oriented review" by the courts. In *Banque postale,* for instance, the General Court found that the ECB had misused its discretion in the application of a CRR provision allowing a zero-weighting for certain assets in the calculation of the leverage ratio. By doing so, the ECB has committed a manifest error and, moreover, has failed as good administrator (the principle of good administration), as guaranteed by Article 41 of the EU Charter of Fundamental Rights, since, as held by the Court, "the ECB, in the contested decision, did not carry out a detailed examination of the characteristics of regulated savings products, but merely indicated in an abstract manner the risks involved in the period for adjusting the positions of the applicant and of the CDC" [92]. As a consequence, the contested ECB decision was declared unlawful and annulled.

The ruling in *Crédit Lyonnais*[93] by the Court of Justice, however, offers a different stance on the judicial review of the ECB's discretion. There, the Court of Justice held that the General Court's previous judgment in the first instance[94] departed from the ECB's assessment and replaced the ECB's assessment with its own without establishing that the ECB's assessment was manifestly incorrect. According to the Court of Justice, the General Court also failed to demonstrate that the ECB did not fulfil its obligation to examine all relevant aspects of the situation[95]. In fact, the ruling found that the General Court did not establish a manifest error of assessment but substituted its own assessment for that of the ECB[96], thereby exceeding the scope of its judicial review.

In light of the above considerations, it can be concluded that the need to limit discretion depends on many factors, which must be balanced with opposing reasons and assessed in the context of the relationship between public authorities and the source of legitimacy of their powers[97]. Thus, since the limits to the control of the legitimacy of an administrative decision by the ECB depend on the degree of discretion conferred on the authority by the legislature under each given regime, the inevitable conclusion – in the current state-of-the-art – is that such an assessment can only be made on a case-by-case basis.

[90] See Case C-12/03 P, *Commission v Tetra Laval*, paragraph 39; Case T-201/04, *Microsoft v Commission*, paragraphs 87-89; Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, par. 69; Case T-342/07, *Ryanair v Commission*, par. 30; Case C-386/10 P, *Chalkor v Commission*, par. 54; Case C-199/11, *Otis and Others*, par. 59; Case C-295/12 P, *Telefonica and Telefonica de España v Commission*, par. 54; and Case C-67/13 P, *Groupement des cartes bancaires (CB) v Commission*, par. 46.

[91] See on this point Prek and Lefèvre (2019)"'Administrative discretion', 'power of appraisal' and 'margin of appraisal' in judicial review proceedings before the General Court", *Common Market Law Review*, Vol. 56, No 2, pp. 339-380, who have raised serious doubts that the complexity of the assessment, based on economic grounds, *per se* implies that the assessment falls within the sole jurisdiction of the administrative body and that the Court is prevented from exercising a comprehensive review.

[92] See paragraphs 105-109 of the decision.

[93] Case C-389/21 P (*European Central Bank v Crédit Lyonnais*).

[94] Case T-758/16 (*Crédit Agricole v ECB*).

[95] See paragraphs 70, 74-75 of the judgment.

[96] See paragraphs 71-72 of the judgment.

[97] See Mattarella (2019), p. 39.

This conclusion is far from implying that the judicial authorities will simply throw up their hands[98] when faced with the actions of an institution enjoying "technical discretion" as the ECB. On the contrary, the case law analysed leads us to conclude that the ECB's actions are subject to intense judicial scrutiny, albeit with respect for the separation of powers (executive and judicial), as advocated by Montesquieu, which characterises the modern legal systems of the EU countries.

[98] See Dawson, M., Maricut-Akbik, A. and Bobić, A. (2019), "Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism", *European Law Journal*, Vol. 25, pp. 75-93.

6. FINAL REMARKS

The analysis above is not intended to exhaust or substitute a decade of comprehensive and granular research in the area of banking supervision, nor to summarise the numerous and deep ramifications of the relevant CJEU case law applicable to the sector. Our intention is merely to balance, in hindsight, how some of the most significant rulings of EU Courts have shaped the architecture and practice of the BU from its inception. The issues, as should be clear, are an evolving discussion, with several crucial aspects still to be clarified: the precise criteria and methodology to be adopted by the ECB in the interpretation of national laws under Article 4(3) SSMR, the exact requirements derived from the shape-shifting *Meroni* doctrine applicable to the SRM, the standard for judicial review of ECB decisions, are some of the many challenges yet to be fully addressed by Courts.

However, despite acknowledging that there are still bridges to be gapped, it appears undeniable that the BU is, today, much more resilient and efficient than it was upon its introduction. With the support of truly landmark decisions by the CJEU, both the SSM and the SRM operate in a much more solid legal basis than before, with clearer margins of discretion delineated for the authorities involved, a more robust legal certainty for judicial review, and an unequivocal trend towards centralisation in the hands of Union supervisors. Indeed, it can be argued that the SSM stands today as an optimal model that might be considered and eventually replicated, with any due adaption, in other areas of EU economic governance, particularly in instances where there is a need to navigate the interface between national and supranational spheres in a manner that facilitates coordinated action. In particular, the SSM, as re-interpreted by the EU Court of Justice, achieved a proportionate solution between centralisation of supervision in the financial sector, and maintenance of national competences, within a common framework. The CJEU's emphasis on centralisation ultimately facilitates the internal systems, organisation, ensuring the maintenance of effective checks and balances on the exercise of powers at the Union level. Moreover, the SSM model, which governs the ECB's action when the legal framework is partly determined by national laws, as interpreted by recent Court of Justice rulings, represents an important step forward in EU integration. It appears to be a viable solution to overcome the remaining differences between national legal systems, which contribute to the fragmentation of the EU banking system.

A comprehensive analysis of the most pivotal CJEU rulings suggests that, in fact, with the backing of the jurisprudence in this domain, the BU may be on the verge of attaining a truly complete legal order: one that may not be devoid of ambiguities and lacunae, but is nevertheless robust, functional, and capable of constantly learning and revising its stances to ensure a proper safeguarding of the fundamental rights and guarantees enshrined in the Treaties.

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Since the inception of the Banking Union numerous decisions of the CJEU have been issued. The purpose of this paper is to assess the impact of some of the key decisions on the legal framework established 10 years ago, showing how they have been instrumental in supporting a centralised and integrated model of banking supervision at the EU level. In that context, the SSM could represent an example of a truly integrated EU legislative system, with a proper institutional balance.

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