9

The European Banking Union: A Case of Tempered Supranationalism?

SERGIO FABBRINI AND MATTIA GUIDI

I. Introduction

The Banking Union (BU) can be considered the most important integrative project of the Economic and Monetary Union (EMU) after the single currency.[1] It is part of the complex set of measures approved by EMU and European Union (EU) authorities for dealing with the Euro crisis, which have 'had a profound impact on the constitutional order of the EU and its Member States'.[2] It is constituted by the Single Supervisory Mechanism (SSM), entered into force in November 2014, the Single Resolution Mechanism (SRM), become operative in January 2016, and a European Deposit Insurance Scheme (EDIS), which is still in the book because of the opposition coming from Northern European Member States (Germany in particular).[3] The project of a BU has been in the EU pipeline for a long time. However, with the Four Presidents' Report of June 2012, the BU has become a formal project of the EU political authorities, further celebrated by the Five Presidents' Report of June 2015. The aim of the project has been to break the vicious nexus between banking and sovereign debt crises, eradicating national supervisory forbearance and reducing banks' moral hazard. The BU has thus been seen as an indispensable institutional regime for preserving the integrity of the EMU through the reduction of fragmentation of the financial markets.[4]

The first two pillars have been introduced through a complex set of legal measures. The SSM was introduced through Regulation 1024/2013 ('SSM Regulation' henceforth), based on Article 127(6) of the Treaty on the Functioning of the European Union (TFEU), which aimed at creating a system of centralised

[1] N Véron, 'Europe's Radical Banking Union' (2015) *Bruegel Essay and Lecture Series*.

[2] A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford, Oxford University Press, 2015) 1.

[3] A Posen and N Véron, 'Europe's Half a Banking Union', *Europe's World*, 15 June 2014.

[4] E Barucci and M. Messori (eds), *Towards the European Banking Union: Achievements and Open problems* (Rome, Astrid, 2014).

banking supervision under the authority of the European Central Bank (ECB). The SRM was introduced through Regulation 806/2014 ('SRM Regulation'), Directive 59/2014 ('Bank Recovery and Resolution Directive' – BRRD) and the 'Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund' of 14 May 2014 ('Intergovernmental agreement' – IGA), and it was designed to deal with banks that are 'failing or … likely to fail' (Article 18.1, SRM Regulation). The SSM consists of a centralised supervisory system, based on a single legal framework and a supervisory authority constituted by both the ECB and national authorities – which form a network that resembles the architecture of EU competition policy. The ECB is the body responsible for its functioning, although the European Banking Authority (EBA) sets the supervisory rules and practices in order to preserve the interest of the Member States not participating in the SSM. The SRM consists instead of a much less centralised system than the SSM. In particular, the role of the ECB is limited at the advantage of an *ad hoc* body, the Single Resolution Board (SRB), and national resolution authorities.

The aim of this chapter is to understand the institutional nature of the BU, and notably whether it epitomises the logic of supranationalism or intergovernmentalism. It will be organised as follows: first, it will reconstruct the basic process of negotiation that led to the institutional features of the first two pillars of the BU; second, it will discuss the institutional structure of those two pillars in order to detect their institutional logic; third, it will derive from the BU's experience some considerations on the inter-institutional relations between supranational and intergovernmental actors in the EMU decision-making process. These inter-institutional relations are structurally conflicting. This is why this chapter identifies the BU as a case of a supranational project yet constrained by intergovernmental interests and considerations – according to the definition here, an example of tempered supranationalism.

II. The Making of the BU

Although the idea of creating a BU had been put forward by the European Parliament (EP) as early as 2000,[5] it was only with the emergence of the 2008 financial crisis that the possibility of uploading banking supervision and resolution mechanisms to the EU level became more realistic.[6] Both mechanisms have received

[5] See European Parliament resolution on the Commission communication on implementing the framework for financial markets: Action Plan (COM(1999) 232 – C5-0114/1999 – 1999/2117(COS)), available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0180+0+DOC+XML+V0//EN.

[6] See European Parliament resolution of 7 July 2010 with recommendations to the Commission on Cross-Border Crisis Management in the Banking Sector (2010/2006(INI)), available at: www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0276#def_1_1.

decisive input from the European Council's President report of 26 June 2012.[7] The report, entitled 'Towards a genuine Economic and Monetary Union', was prepared in collaboration with the presidents of the Commission, of the Eurogroup and of the ECB, and proposed – among other reforms – an 'integrated financial framework [which] elevates responsibility for supervision to the European level, and provides for common mechanisms to resolve banks …'.[8] This document was followed by a formal European Commission proposal that was then approved by the EU legislators: 'A Roadmap towards a Banking Union'[9] and a subsequent document 'A blueprint for a deep and genuine economic and monetary union: Launching a European Debate',[10] of November 2012, which defined the strategy to pursue. In this phase, the stress was on supervision and resolution.

It is, however, worth noting that the two pillars of SSM and SRM followed different procedures. The SSM was approved by the Council under unanimity rule, following Article 127(6) TFEU, which calls for such a procedure where the members of the Eurozone want to 'confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions'. For the SRM, instead, the adoption has been carried out through the ordinary legislative procedure (using Article 114 TFEU as a legal basis). It must be stressed that the debate and the negotiation on both institutions proceeded, in part, together, as they were obviously intertwined. However, given the different content, timing and decision-making procedures, it is better to analyse the development of each one separately.

A. The Single Supervisory Mechanism

A draft proposal for a Council Regulation creating a SSM was elaborated by the European Commission on 12 September 2012.[11] The most relevant difference between the Commission's proposal and the text finally approved by the Council on October 2013 concerned the scope of the ECB's powers vis-à-vis those of national supervisory authorities. The initial proposal of the Commission envisaged a fully hierarchical institutional structure, similar to the one in place for monetary policy, in which the ECB would have been exclusively competent for banking supervision in all the Eurozone countries and for all Member State banks. Obviously, given

[7] See H Van Rompuy, 'Towards a Genuine Economic and Monetary Union' (26 June 2012) EUCO 120/12, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131201.pdf.

[8] ibid, 3.

[9] European Commission, *A Roadmap Towards a Banking Union*, Communication of 12 September 2012, COM/2012/510).

[10] European Commission, 'A blueprint for a deep and genuine economic and monetary union: Launching a European Debate', Communication of 28 November 2012, COM/2012/777.

[11] Proposal for Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM/2012/0511 final – 2012/0242 (CNS).

that the ECB could not possibly supervise more than 6,000 banks, the national authorities would have carried out most supervisory activities, though under the ECB's control.

It soon became evident that this proposal was not enjoying the necessary (unanimous) support by the Member States' governments. In particular, German savings banks (*Sparkassen*) started to voice their concerns about the proposed plan. The main issue they pointed to was the high administrative costs that an ECB-led supervision would have imposed on them. German savings banks claimed that they posed no systemic threat to the stability of the Eurozone financial system, and that the national regulator was in a better position to assess their situation. On the other hand, supporters of the Commission's proposal argued that the strong reciprocal links between German *Sparkassen*, their relationship, through ownership stakes and mutual guarantees, with larger banks, and the overall huge size of their combined assets justified their full inclusion in the proposed SSM.[12] ECB President Mario Draghi, on the other hand, explicitly endorsed the draft proposal.[13]

The negotiations on the SSM proceeded quite quickly in the first months of 2013, with a general informal agreement reached in March. A cornerstone of this agreement was, indeed, a separation between significant banks, whose supervision had to be delegated to the ECB, and all the others, which had to remain under the authority of national supervisors.[14] Another point of bargaining regarded the need to separate the ECB monetary policy activities from the banking supervision ones.[15] The solution finally reached by the Council was a compromise: although the national supervisory authorities remain formally competent for small banks, the framework for cooperation between ECB and national authorities (Regulation 468/2014 of the ECB) substantially reduced the latter's leeway. However, it must be noted that, given the unanimous decision-making procedure, Germany was able to veto the approval of a SSM which would have given the ECB direct supervisory powers on its savings banks.

B. The Single Resolution Mechanism

The negotiation process leading to the adoption of the SRM was longer and more complex, for three main reasons. First, the procedure required the involvement of the EP, which means (i) more readings before the adoption and (ii) more players with a potential veto taking part in the decision-making process. Second, the

[12] See for instance 'Germany's small banks fight union plans', *Financial Times*, 2 December 2012.
[13] See 'One regulator for all banks, says Draghi', *Financial Times*, 6 December 2012.
[14] See 'EU agrees on ECB bank regulatory role', *Financial Times*, 19 March 2013.
[15] See 'EU set to clash on bank deal as Germany sees treaty limit', *Bloomberg Business*, 14 April 2013, available at www.bloomberg.com/news/articles/2013-04-13/eu-set-to-clash-on-bank-deal-as-germany-sees-treaty-limit.

resulting policy was achieved through a combination of three different acts: the SRM Regulation, the BRRD and the IGA. Third, the policy choice regarded, among other things, the transfer of national funds to the EU level, in a fund managed by an institution insulated from the direct control of Member States.

The Commission put forward its draft proposal in July 2013, after the European Council reiterated (see the European Council conclusions of the December 2012[16] and June 2013[17] meetings) its request to the EU legislators to complete the remaining steps of the BU, and after an informal agreement on the SSM had already been reached. The main stages in the decision-making processes leading to the adoption of the SRM were the following:

(1) The Commission proposal of 10 July 2013.[18]
(2) The Council agreement of 18 December 2013, proposing a (large) number of amendments to the Commission proposal.[19]
(3) The negotiation between EP and Council, consisting of several trilogue meetings in February and March 2013,[20] leading to the adoption of the SRM Regulation in the first reading on 14 July 2013.

All in all, if it is considered how complex and ambitious the SRM is, the process was relatively short, lasting only one year in total. Despite different views regarding the legal instruments to be used, with regard to the composition of the Single Resolution Board (SRB) and the nature of the Single Resolution Fund (SRF), the EP and the Council were able to strike a deal. Although the bargaining concerned a large number of provisions in the SRM Regulation, it is worth stressing that the changes proposed in each stage of the negotiation process concerned three relevant issues: (i) the composition of the SRB, (ii) the resolution procedure, and (iii) the legal instrument used to transfer funds to the SRF and the managing of the transitional period.

[16] European Council, 'Conclusions' (14 December 2012) EUCO 205/12, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134353.pdf.

[17] European Council, 'Conclusions' (28 June 2013) EUCO 104/2/13, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/137634.pdf.

[18] 'Proposal for a regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council' (2013) COM/2013/0520, available at eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0520&from=EN.

[19] Council of the European Union, 'Proposal for a regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council' (19 December 2013) 18070/13, available at data.consilium.europa.eu/doc/document/ST-18070-2013-INIT/en/pdf. A document with the modifications proposed by the Council is available at: data.consilium.europa.eu/doc/document/ST-17742-2013-INIT/en/pdf.

[20] See Council of the European Union, 'Single Resolution Mechanism' (7 February 2014) 6187/14, available at data.consilium.europa.eu/doc/document/ST-6187-2014-INIT/en/pdf; Council of the European Union, 'Single Resolution Mechanism' (3 March 2014) 6956/14, available at data.consilium.europa.eu/doc/document/ST-6956-2014-INIT/en/pdf.

C. The Composition of the SRB

As shown in Table 9.1, in its initial draft regulation, the Commission proposed a SRB whose members of the executive session would be four, only two of whom would have been appointed by the Commission and the Council together, while the EP was only meant to be heard before the final appointment decision was made. One of the two other members was to be appointed by the Commission and the other by the ECB. With this proposal, the power of the two supranational institutions was asserted vis-à-vis the interests of the intergovernmental institutions: the Commission reserved for itself the right to appoint one member of the SRB, and the ECB, although excluded from the management of the SRF, would have had a chance to influence the composition of the Board, given its strong involvement in the banking supervision activity. On the other hand, the Council had the power to co-decide (with the Commission) on the appointment of the Executive Director and Deputy Executive Director, the two most important members – because, in case of a tie in the executive session, the head would have had a casting vote. At the same time the EP got only a consultative role. However, the supranational logic of the proposal was significantly watered down in the final text.

Table 9.1 Changes that occurred in the various stages of the negotiation on the SRM Regulation regarding the appointment of the members of the SRB in its executive session

	Commission Proposal (July 2013)	**Council Agreement (December 2013)**	**Final Text (July 2014)**
Commission	Appoints two of four members with the Council, one out of four autonomously	Appoints all five members together with the Council (↓)	Appoints all six members together with the EP and the Council (↓)
Council	Appoints two out of four members with the Commission	Appoints all five members together with the Commission (↑)	Appoints all six members together with the EP and the Commission (↓)
European Parliament	Only consulted	Only consulted (=)	Appoints all six members together with the Commission and the Council (↑)
SRB	Not involved	Not involved (=)	Consulted (↑)
ECB	Appoints one member out of four autonomously	Not involved (↓)	Not involved (=)

Note: The symbols indicate whether the institution gained or lost power in that stage of the negotiations.

In the Council agreement of December 2013, the ministers of the Member States changed the initial text considerably, by assigning more powers to themselves while at the same time reducing the power of the other bodies. They increased by one the number of members of the SRB in its executive session, and proposed to appoint all of them, together with the Commission – in this way, they ensured that they would have a veto power (as an institution) on the composition of the Board. None of the supranational institutions was to gain power from the set-up proposed by the Council: the EP remained confined in its consultative role, while both the Commission and the ECB lost the power to appoint autonomously one of the members of the Board.

As one could expect, this arrangement was not well received by the supranational institutions, and by the EP in particular, whose approval was needed for the Regulation to pass. In the negotiations following the Council agreement, therefore, the EP managed to get an active role in the appointment of the now six executive members of the SRB. The procedure that was finally agreed prescribes, regardless of the technical legal wording, a role for the EP that is equivalent to that of the Commission and the Council. In this way, it can be argued that the Commission has seen its power in this procedure further reduced, because it now has to reach an agreement not only with the Member States' ministers, but also with the members of the EP. The same can be argued regarding the Council, which had to accept the EP's involvement in the appointment procedure. Moreover, the Commission is now asked to consult the SRB before appointing the new members. Although the effect of this provision should not be overestimated, it certainly signals an interest in preserving the independence of the institution.

D. The Resolution Procedure

The procedure for resolving a failing bank, which entails the use of money from the SRF, was also the object of a contrasted negotiation. In contrast to the two other aspects analysed in this section, however, the round of negotiations between the Commission, Council and EP, carried out in the first months of 2014, did not substantially change the compromise reached by the finance ministers in December 2013. The evolution of the SRM Regulation in this regard is shown in Table 9.2. As can be seen, in the first proposal, the Commission had granted itself a decisive role. According to that text, the Commission was the only body responsible for initiating a resolution procedure. The SRB could issue a recommendation to the Commission, suggesting that a procedure should be initiated, and it was responsible for drafting the resolution scheme, but it had no autonomous power. It was to have acted as an agent of the Commission.

Table 9.2 Changes that occurred in the various stages of the negotiation on the SRM Regulation regarding the adoption of a resolution procedure

	Commission Proposal (July 2013)	Council Agreement (December 2013)	Final Text (July 2014)
Commission	With our without recommendation from the SRB, it can initiate a resolution procedure	Together with the Council, it can block or amend a resolution scheme (↓)	Together with the Council, it can block or amend a resolution scheme (=)
Council	Not involved	Together with the Commission, it can block or amend a resolution scheme (↑)	Together with the Commission, it can block or amend a resolution scheme (=)
European Parliament	Not involved	Not involved (=)	Not involved (=)
SRB	Can recommend initiation of a resolution procedure to the Commission	Can initiate a resolution procedure (↑)	Can initiate a resolution procedure (=)

Note: The symbols indicate whether the institution gained or lost power in that stage of the negotiations.

The Council completely reversed this logic in its revised draft. It gave to the SRB alone the power to initiate a resolution, thus making it independent from the Commission. On the other hand, to compensate for this relevant power, it envisaged the possibility for the Council (within 24 hours) to propose amendments or even block the scheme prepared by the Board. In order to avoid politicising this decision, however, it proposed that this power of the Council could be exercised only after a proposal of the Commission. What this meant, in practice, is that both institutions had to agree on the amendments or on the veto for these to be effective. The text agreed upon by Council and EP made some stylistic modifications but, regarding the substance, only changed the timing for the Commission and Council's intervention, making it shorter. In the Council's formulation, the Board could object to the amendments proposed by Commission and Council, and in that case 24 more hours were given to consider the SRB's notice. This made it possible for this *navette* to last up to 48 hours. The final text has instead set a maximum of 24 hours for the whole procedure. It could be argued that shortening the time for amending the resolution scheme makes it less likely for the Commission and the Council to exercise their power – thus strengthening the position of the Board in this delicate decision.

E. The Legal Instrument Used to Transfer Funds to the SRF and the Managing of the 'Transitional Period'

The rationale of the SRM is that the fund(s) used to ensure the continuity of a bank's essential functions should come from fees levied on the banks themselves, and not from the national or EU budget. Although the principle was clear and shared by all the actors from the beginning, the way in which it should be applied was less so. The following three questions in particular were highly controversial (see Table 9.3): (1) what should the legal basis be for setting up this system? (2) How quickly should the Fund be constituted? (3) How long should it take before the SRF is fully mutualised? The choice regarding the first question has important consequences for the competence of the Court of Justice of the European Union (ECJ) and for the ability to modify those rules in the future. While a regulation is approved by the EP and by the Council voting under qualified majority rule, an intergovernmental agreement is instead adopted only by the States under unanimity rule, and can be changed only with the approval of all the contracting parties. Similarly, the application of an intergovernmental agreement is not subject to the ECJ competence. The Member States' governments are the only enforcers of those rules and, at the same time, their behaviour has to be supervised only by their national constitutional courts.[21] The second question concerns the length of the period in which the Fund will not be fully operational. Banking crises occurring in this period run the risk of being dealt with in the same way as the crises which originated the European sovereign debts crisis, ie by national governments with public budgets. The third issue regards the position of financially weaker States: the mutualisation of the funds implies, for instance, that a Greek bank could be resolved with funds coming (in part) from other countries as well, if the contributions raised in Greece were not sufficient. This will not happen (or will happen only partially) until the end of the transitional period.

Table 9.3 Changes that occurred in the various stages of the negotiation on the SRM Regulation regarding the legal instrument used to transfer funds to the SRF and the managing of the 'transitional period'

	Commission Proposal (July 2013)	**Council Agreement (December 2013)**	**Final Text (July 2014)**
Legal Instrument	The Fund was established and the funds mutualised only on the basis of the Regulation	The system for transferring national funds to the SRF is laid down in an IGA (↓)	The system for transferring national funds to the SRF is laid down in an IGA (=)
Length of the Transitional Period	Transitional period of 10 years before the Fund reaches its full target level	Transitional period of 10 years before the Fund reaches its full target level (=)	Transitional period of 8 years before the Fund reaches its full target level (↑)
National Compartments	No national compartments	National compartments gradually merged during the transition period (↓)	National compartments gradually merged during the transition period (=)

Note: The symbols indicate whether the EU institutions lost or gained power vis-à-vis the Member States.

[21] F Fabbrini, 'On Banks, Courts and International Law: The Intergovernmental Agreement on the Single Resolution Fund in Context' (2014) 21 *Maastricht Journal of European Law* 444.

In the first proposal of the Commission, the mutualisation was covered by the SRM Regulation, relying on a disposition of the BRRD. The length of the transitional period was set to 10 years, and there was no mention of national compartments, meaning that each country was supposed to contribute to the Fund in proportion to its banking sector's size, but in the case of a crisis the money from the Fund would have been used regardless of where it came from. This approach, 'supranational' from the beginning, was radically challenged by the Council, especially under German influence.[22] In particular, Germany's finance minister Schaeuble wanted the Fund to be composed of 'a network of national funds',[23] with no full mutualisation.

Not surprisingly, the compromise reached in the Council agreement of December 2013 marked a clear step back in terms of supranationalisation compared to the original Commission proposal. On the one hand, the transfer of funds from national resolution authorities to the SRF was now expected to be dealt with through an Intergovernmental Agreement (IGA) concluded by all members of the Eurozone. On the other, until the end of the transitional period, the contributions transferred from national authorities were set to remain formally separated in the SRF so that, in case of a resolution procedure involving one country's bank, the funds disbursed by that country's banks should be used entirely before funds from other countries were used. The IGA was unnecessary for setting up a resolution fund. However, through the IGA, the national governments of the Eurozone have created a financial regime separated from the EU legal order. In the final stage of negotiations with the EP, although the EP argued strongly for not unpacking the SRM in a Regulation and an IGA, the only change that it was able to persuade the Council to accept was the shortening of the transitional period from 10 to 8 years.

The Council position was that the legal basis for the Regulation, Article 114 TFEU (concerning approximation of law for the strengthening of the internal market), did not allow the EU legislators to impose a taxation on banks operating in Member States.[24] Therefore, the IGA was necessary in order to avoid the uncertainty related to possible appeals to the ECJ in such a sensitive policy area. However, a particular provision included in the IGA shows that the Member States also used it to protect themselves from future unwanted evolutions of the SRM. Article 9 of the IGA, indeed, states that if the SRM Regulation is changed against the will of a Member State with regard to the resolution procedure, the SRB's decision-making rules or other salient provisions, that Member State might invoke a 'fundamental change of circumstances' clause to block a particular measure, asking the ECJ to verify if such change has occurred. The 'fundamental change of circumstances' clause is a general rule regulating international treaties, codified

[22] See 'Berlin rejects Brussels' attempt at grabbing power to shut banks', *Financial Times*, 10 July 2013.

[23] 'Germany's SPD hints at greater solidarity with troubled EU states', *Financial Times*, 12 December 2013.

[24] Hinarejos, *The Euro Area Crisis* (n 2) 46.

by the Vienna Convention of 1969. The fact that it could be invoked for blocking the application of an action resulting from a change in a EU Regulation is equivalent, in practice, to recognising that each contracting party of the IGA has a veto power over modifications of the SRM Regulation: the uncertainty derived from the possibility that one State could in future block a resolution invoking this clause will prevent any change that would not be agreed by all the Eurozone Member States. The use of the IGA as a legal instrument, and the provision set out in Article 9 in particular, had the effect of weakening the supranational character of the SRM.

F. The Stalemate on EDIS

The constant inter-institutional tension between supranational actors and national governments has finally stalled the negotiation regarding the third pillar of the BU, the EDIS. The Five Presidents' Report of June 2015[25] made it clear that it was necessary to accelerate the process for setting up the latter. The Report states that:

> the current set-up with national deposit guarantee schemes remains vulnerable to large local shocks (in particular when the sovereign and the national banking sector are perceived to be in a fragile situation), common deposit insurance would increase the resilience against future crises. A common scheme is also more likely to be fiscally neutral over time than national deposit guarantee schemes because risks are spread more widely and because private contributions are raised over a much larger pool of financial institutions. Setting up a fully-fledged EDIS will take time, but taking concrete steps in that direction should be a priority already … using the possibilities under the current legal framework.[26]

The Report also offers some suggestion on how to devise the common deposit guarantee scheme. For instance, it might 'be privately funded through *ex ante* risk-based fees paid by all the participating banks in the member states and devised in a way that would prevent moral hazard. Its scope should coincide with that of the Single Supervisory Mechanism'.[27] The Commission thus submitted a draft proposal for a 'Regulation of the European Parliament and of the Council, amending Regulation (EU) 806/2014 to establish a European Deposit Insurance Scheme'[28] on November 2015, but also this proposal has not met friendly ears in the European Council and in the ECOFIN. In particular, the German government has publicly

[25] JC Juncker, D Tusk, J Dijsselbloem, M Draghi and M Schulz, 'Completing Europe's Economic and Monetary Union' (22 June 2015) The Five Presidents' Report, available at https://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en.
[26] ibid, 11.
[27] ibid.
[28] See 'Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme' (2015) COM (2015) 586, available at http://eur-lex.europa.eu/procedure/EN/2015_270.

opposed the proposal, fearing that it would create the institutional condition for a mutualisation of debts. Indeed, the third pillar of the BU is far away from entering into the pipeline of the negotiations.

III. The Institutional Outcome: The SSM

Because of the stalled negotiation with regard to the third pillar, the analysis in this chapter of the institutional structure of the BU will concern the only two pillars that have been set up: the SSM and the SRM. Although the activities carried out in implementing both mechanisms are strictly related to each other, the institutional structure of the two is significantly different. This section will analyse the specific features of both pillars with regard to three aspects: (a) the tasks conferred to existing and newly created institutions in the framework of the SSM and SRM (ie which policies are established); (b) the procedure for appointing the members of these institutions (ie who chooses those who decide); and (c) the decision-making process for, respectively, supervision and resolution activities (ie how decisions are made).

A. SSM: Policies

The SSM assigns to the ECB (in cooperation with national supervisory authorities) the prudential supervision of the most 'significant' banks of the Eurozone – although the mechanism can be extended to other countries that may request so. All banks in the participating Member States that either:

(1) have assets of more than €30 billion,
(2) have assets which constitute at least 20 per cent of their home country's GDP,
(3) have requested or received assistance from the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM), or
(4) are among the three most significant ones in the country,

are directly supervised by the ECB. The ECB, following a notification of a national authority or acting on its own initiative, can also decide to consider a financial institution significant if its cross-border activities represent a relevant part of its total assets and liabilities (Article 6(4), SSM Regulation). The prudential supervision on all the other banks is still carried out by national supervisory authorities, but in a much more centralised framework than before, in which the national supervisory procedures are adopted by the ECB, and all national supervisory activities must be notified to the ECB (Article 6(7), SSM Regulation).

The prudential supervision on the most significant banks consists of a wide range of supervisory and investigatory powers. In particular, the ECB has been delegated, among others, the power to request information (Article 10), conduct investigations (Article 11), conduct on-site inspections (Article 12), grant authorisations to operate in a participating Member State (Article 14), assess the acquisition of qualifying holdings in banks (Article 15). The ECB and the national authorities, in the framework of the SSM, must act independently from EU and national political authorities. At the same time, the ECB must also interact with the EP and the Council: it must submit to them an annual report and it can be heard by parliamentary committees or by the Eurogroup. However, this relation cannot be configured as a form of accountability of the ECB towards EU institutions.[29]

B. SSM: Appointment Procedures

The tasks conferred on the ECB in the SSM are carried out by a Supervisory Board (SB), that is, 'an internal body' (Article 26(1), SSM Regulation) of the ECB. The SB is composed by a Chair, a Vice-Chair who is also a member of the Executive Board of the ECB, four other members appointed by the Governing Council of the ECB, and one representative of the national competent authority per participating Member State. Unlike the other members of the SB, the Chair and Vice-Chair are appointed through a process that involves not only the ECB and the national authorities, but also the EP and the Council (acting under qualified majority voting). All in all, the SB is a body clearly dominated by the ECB, which controls the appointment of all the members except the Chair. The Chair, which is the member of the SB enjoying the highest independence from the ECB, has some autonomous powers and functions: she or he presides a Steering Committee which sets the agenda of the SB meetings, has a casting vote in case of a tie, and deals with representatives of the EP and Eurogroup. However, the Chair's ability to steer the activities of the SB is constrained by the other SB members. The term of office of the Chair is five years, and it is not renewable.

C. SSM: Decision-making Process

The independence of the SB from Commission, Council and EP is reinforced by the decision-making procedures. The SB, indeed, is the only decision-making body, and it decides by simple majority – in case of a draw, the Chair has a casting vote. The only exception is when the SB adopts regulations 'necessary to organise or specify the arrangements for the carrying out of the tasks' of banking supervision (Article 4(3), SSM Regulation); in this case it must do so using the qualified majority voting system used in the Council – this means that the authorities of

[29] For an overview of accountability mechanisms, see M Guidi, *Competition Policy Enforcement in EU Member States*, pp. 53–58 (Basingstoke, Palgrave Macmillan, 2016).

the biggest countries have a decisive weight in shaping the rules of the game. That said, neither the Commission, nor the EP or the Council are involved in the SSM decisions. A representative of the Commission can participate in the meetings of the SB as an observer, but the representative has no access to confidential information. So, the SSM Regulation is very strict and explicit in insulating the SSM not only from the influence of the EP and the Council, but also from that of the Commission.

D. SSM: Overall Institutional Logic

It is plausible to argue that the SSM functions according to a supranational logic, although supranationalism has an evident technocratic character. The ECB was the most effective entrepreneur for the launch, design and implementation of the SSM[30] and the main beneficiary of the project. The ECB is responsible for its functioning. To this end, it can issue guidelines and instructions to national authorities, it may decide to exercise a direct supervisory powers on national institutions, it sets the supervisory standards to be met in the BU. It is the ECB that grants and withdraws banking licences or assesses acquisitions and disposals of specific holdings in credit institutions. It is the ECB that has to verify the compliance of supervised banks with prudential requirements and has to verify the respect, by the supervised banks, of appropriate governance arrangements (like the competence of the management, their remuneration practices, their capacity to prevent and manage financial risks). It is the ECB that has the power to check whether recovery plans are effectively pursued by credit institutions under supervision. The ECB has also the authority of early intervention in those credit institutions in breach of prudential requirements. It is plausible to argue, as Henning[31] does, that the ECB behaved as a strategic actor in a politically fragmented monetary union.

Of course, the SB is distinct from the ECB, although it is located within the ECB building. The ECB is in charge of monetary policy, where the SB is in charge of banking supervision. Indeed, a mediation panel has been set up in order to solve disagreements between the ECB Governing Council and the SB (Regulation 673/2014 of the ECB). In order to stress the independence of the SB, it has been avoided to redouble its governance structure in an executive and plenary session (as in the SRB see below), with the latter constituted by national authorities. The SB directs the supervision of the 128 major banking groups, representing 85 per cent of bank total assets, that have already been subject to comprehensive assessment of risks and asset quality (Asset Quality Review – AQR), followed by

[30] S De Rynck, 'Banking on a Union: The Politics of Changing Eurozone Banking Supervision' (2016) 23 *Journal of European Public Policy* 119.

[31] R Henning, 'The ECB as a Strategic Actor: Central Banking in a Politically Fragmented Monetary Union' in J Caporaso and M Rhodes (eds), *Political and Economic Dynamics of the Eurozone Crisis* (Oxford, Oxford University Press, 2016).

a stress test. The SSM thus strengthens the role of the ECB and at the same time it benefits from the latter's independence from national authorities. Through the SSM an important step towards a financial union has been made. However, the role assigned to the supranational ECB has ironically deepened the democratic deficit of the SSM, because the ECB itself does not meet the basic criteria of transparency.[32] However, it is probably implausible to expect technocracy to be democratised.[33]

IV. The Institutional Outcome: The SRM

The decision to establish a SRM derived from the shared recognition, by EU and national authorities, that domestic insolvency procedures were insufficient for dealing with national banks' crisis, nor they were institutionally justifiable. In fact, the burden of bank crises has been traditionally offloaded onto the shoulders of national taxpayers, thus further aggravating national public debt. The Regulation and the Directive promoting the SRM have reversed this approach. It is up to shareholders to bear the first losses of the bank's failure, thus followed by unsecured creditors. Only after the private sector has absorbed a quota of bank losses are national governments allowed to intervene with public resources, as a last resort's institutions. Through the institutionalisation of the bail-in principle, the SRM has introduced a radical change of the paradigm organising the relation between a bank and the holders of bank accounts.[34]

The rationale for the establishment of the SRM has been twofold: on the one hand, by creating a stable system for dealing with bank failures, it aims at reducing the risk of national and European financial crises; on the other, by establishing the principle that the banks themselves contribute to resolution funds, and that shareholders and creditors must be the first to bear the costs (through the so-called bail-in tool), it aims at preventing taxpayers from paying for bank failures through public budgets.[35] One of the main reasons for creating the SRM was to avoid the vicious circle that transformed a financial crisis in a large scale sovereign debt crisis. This happened because some governments increased their deficits to repay the losses that private banks had incurred. By doing so, however, they paved the way for speculation on their sovereign bonds and on the whole EMU.

[32] C Gandrud and M Hallerberg, 'Does Banking Union Worsen the EU's Democratic Deficit? The Need for Greater Supervisory Data Transparency' (2015) 53 *Journal of Common Market Studies* 769.

[33] M Everson, 'Banking on Union: EU Governance Between Risk and Uncertainty' in M Dawson, H Enderlein and C Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* (Oxford, Oxford University Press, 2015).

[34] S Micossi, G Bruzzone and J Carmassi, 'The New European Framework for Managing Bank Crises (November 2013) *CEPS Policy Brief* No. 304.

[35] The involvement of shareholders and creditors, through the so-called 'bail-in tool', in the resolution of banks is also meant to avoid moral hazard. The expectation of having to pay the price of bank mis-management should reduce moral hazard and act as an incentive to actively monitor the management's activities.

A. SRM: Policies

The SRM has been established to manage failures of credit institutions of all the Member States participating in the SSM. The term resolution indicates 'the restructuring of an institution in order to ensure the continuity of its essential functions'.[36] As in the case of the SSM, there is a division of labour between EU and national authorities. The resolution of the banks supervised by national supervisory authorities is carried out by the national resolution authorities, while the resolution of significant banks supervised by the ECB is managed by the SRB at EU level. However, while the SB is located in Frankfurt, the SRB has been located in Brussels in order to make clear, even symbolically, its distance from the ECB and its independence. The practical management of bank failures in the SRM takes the form of resolution schemes adopted by EU or national authorities, which include a variety of operations aimed at preserving market stability.[37] For the resolution scheme, as we have seen, the SRM Regulation allows EU authorities to use money from an SRF, established through an intergovernmental agreement that merges together contributions raised at the national level.

B. SRM: Appointment Procedures

The outcome of the negotiation between the Council and the EP has been a SRB completely and symbolically separated from the ECB – therefore very different from the SB, which is an internal body of the ECB. This choice is clearly reflected in the appointment procedures. In contrast with the SSM, the ECB is completely excluded from the process. The members of the SRB are of two types: six members take part in the executive sessions, in which all the most relevant decisions (included the adoption of resolution schemes) are taken; representatives of the national resolution authorities participate, together with the six other members, in the plenary sessions.

The six members that participate in executive sessions are appointed, for five years without possibility of renewal, through a complex procedure (Article 43, SRM Regulation) involving all of the three EU decision-makers: a list of candidates for the six posts is proposed by the Commission, and must be approved by the EP; after the EP's approval, the Council, acting by qualified majority voting, implements the appointments. In simpler terms, all of the three institutions have a veto

[36] See European Commission, 'A single rulebook for the resolution of failing banks will apply in the EU as of 1 January 2015' (31 December 2014) IP/14/2862, available at: europa.eu/rapid/press-release_IP-14-2862_en.htm?locale=en.

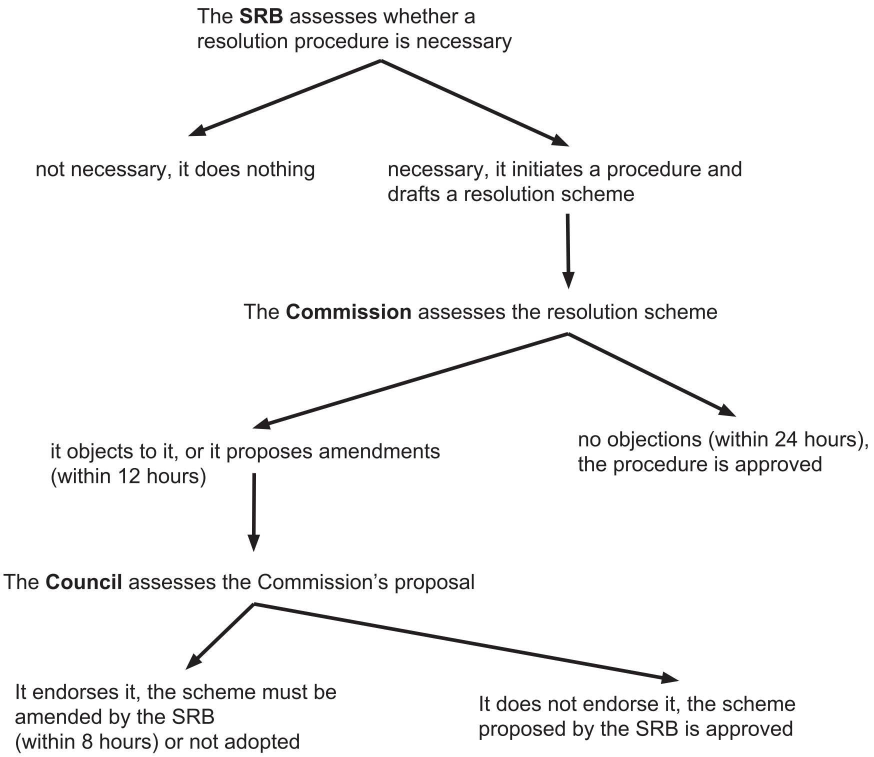
[37] See SRM Regulation, recital 59: '… The relevant resolution tools should include the sale of the business or shares of the institution under resolution, the setting up of a bridge entity, the separation of the performing assets from the impaired or under-performing assets of the failing entity, and the bail-in of the shareholders and creditors of the failing entity'.

power over the choice of the six main members of the SRB. Yet the last decision pertains to the national governments in the Council.

C. SRM: Decision-making Process

With regard to the decision-making process, the SRB has less autonomy than the SB in banking supervision. The process for passing resolution schemes (Article 18, SRM Regulation, see Figure 9.1) is initiated by the SRB, and then transmitted to the Commission, which, within 24 hours, can endorse or object to it. If the Commission does not endorse the scheme, it can (within 12 hours) propose the Council (i) to object to it (if it deems that the resolution is not in the public interest), or (ii) to propose that the amount of the fund provided for should be modified (in this case, the SRB can, within eight hours, draft another scheme in accordance with the request of Commission and Council). It is important to note that the Council, in approving or rejecting the Commission's proposal, decides by simple majority.

Figure 9.1 The resolution procedure (Article 18, SRM Regulation)



Certainly, the Commission has another means to intervene in this process, that is by assessing that the use of the SRF is incompatible with EU competition policy regarding state aid (Article 19, SRM Regulation). If the Commission detects such incompatibility, it may ask the SRB either to revise the draft resolution scheme or to block its adoption. In the latter case, however, the Council can overrule the Commission's opinion by deciding, unanimously, that the use of the Fund is compatible with the internal market rules. In this procedure there is a tension between the technical role of the Commission as a EU competition enforcer and the political role of the Council that takes over if the need to avoid a financial crisis must prevail.

More generally, the SRB emerges as a chiefly technical institution (similar to the ECB), whose power is influenced by the Commission but constrained by the Council. The rationale for the Commission intervention is different in the two cases analysed above. In the standard procedure, the Commission is supposed to evaluate whether the resolution proposed by the SRB is 'necessary in the public interest' (Article 18(1), SRM Regulation): this is a political assessment, for which the Commission is involved because of its executive role. In the second case, the Commission is, instead, involved as an independent enforcer of EU competition policy. As regards the Council, the majority required for its interventions is related to the nature of its mandate and makes a decision more, or less, likely. In the standard procedure, when deciding by simple majority, the Council acts as a legislative chamber of the bicameral EU legislature. When the Council is called to overrule the Commission's assessment on state aid, it acts as a purely intergovernmental body subject to the unanimity requirement. In both cases, it is the Council that has the last word on the Commission's objections, although the latter are more difficult to be refuted as the Council has to vote unanimously against them.

D. SRM: Overall Institutional Logic

Because bank resolution has inevitable financial implications, the national governments have control over the last decision of the resolution process. The Commission may object or ask for amendments to the SRB assessments, but then the Council has the power not to endorse the Commission's proposal, letting the original scheme of the SRB be approved. In this process, the influence of the ECB is also limited. The ECB may communicate to the SRB and the Commission that a bank is failing or likely to fail for several reasons (breach of regulatory requirements, assets lower than liabilities, losses eroding a significant share of capital, inability to repay a debt), but the SRB can then repeat the assessment conducted by the ECB in order to verify the critical conditions of the bank. If the ECB alarm is confirmed, the SRB will adopt a resolution scheme detailing the use of resolution tools within the framework of the SRF. The resolution scheme enters into force after 24 hours, unless the Commission objects to it. If that happens, it is up to the Council to make the final decision. If the scheme implies the mobilisation of public funds, then the Commission has to ensure that the use of public funds does not contravene the prohibition of state aid, as required by the EU antitrust legislation. The process is extremely complex, involving a panoply of political actors and implicating an inevitable politicisation of the decision finally taken.[38] Moreover, the SRB governance, with its redoubling of an executive and plenary sessions, increases the influence of national resolution authorities to the detriment of supranational ones. Indeed, the plenary sessions (constituted by representatives of the resolution authorities of all the participating Member States) have the power to decide (through a majority of 2/3 representing 50 per cent of the paid contributions) the use of liquidity support of significant size (more than 20 per cent of the capital paid into the fund or when the total disbursement exceed €5 billion). After all, the SRF has been set up through an IGA external to EU law. The IGA has decided the transfer of national contributions to national compartments of the Fund outside of any EP control. This is why the SRM is highly influenced by intergovernmental interests: it is structured around institutions whose functioning is largely controlled by national governments.

V. Conclusions

The BU is the most important project pursued by the EMU after the adoption of the single currency. This chapter has shown that its negotiation process and institutional outcomes have been largely constrained by the contradictory forces that constitute the EMU. The EMU, since its inception in the Maastricht Treaty, was based on the combination of a supranational institution (the ECB) exclusively in charge of monetary policy and intergovernmental institutions (the ECOFIN and the then informal European Council become a formal institution of the EU with the 2009 Lisbon Treaty) coordinating nationally decentralised economic policies. At the same time, the policies of the common and then single market continued to be managed through the supranational framework (inclusive of both supranational institutions such as the Commission and the EP). This was the structure of the Maastricht compromise, then confirmed by the Lisbon Treaty – a compromise that has created a dual constitution, one intergovernmental and the other supranational.[39] When the Euro crisis exploded, an intergovernmental constitution to frame the policies for dealing with it was already in place, although mitigated by the existence of a powerful supranational (but technocratic) institution like the ECB. Although the Euro crisis opened a critical juncture where it was possible to redefine the institutional and policy features of the EU, its dramatic and

[38] G Bruzzone, M Cassella and S Micossi, 'The EU Regulatory Framework for Bank Resolution' (2015) *Working Paper* 8-2015, School of European Political Economy, LUISS Guido Carli, Rome.

[39] S Fabbrini, *Which European Union? Europe After the Euro Crisis* (Cambridge, Cambridge University Press, 2015).

accelerated impact has ended up reinforcing the path-dependent logic generated by the previous constitutional settlement.

Indeed, the Lisbon Treaty's allocation of economic policy responsibility favoured institutional and policy answers to the crisis that have increased the decision-making power of national governments coordinating within the intergovernmental institutions (the European Council and the Council of the EU), to the detriment of the Union's actors operating in the supranational institutions (such as the Commission and the EP). The BU epitomises the outcome of the struggle between the two logics and the configuration of interests and institutions backing each of them.[40] Indeed, this chapter has tried to show that the supranational logic has been preeminent in the setting up of the SSM, whereas the intergovernmental interests were able to impose their own view in the setting up of the SRM. Indeed, the struggle between the two logics has continued to be persistent to the point of causing a stalemate in the establishment of the third pillar of BU, the EDIS. Without the EDIS, not only the BU will be incomplete, but the 'bank crises/sovereign debt crisis' loop will not be interrupted.[41] After all, the EMU, and more generally the EU, are based on the attempt to compound the interests of national governments and the European citizens, an attempt that is destined to achieve inevitable sub-optimal equilibria because of the contradictory forces that generate them.

[40] A Ubide, 'How to Form a More Perfect European banking Union' (October 2013) *Policy brief* No PB13-23, Peterson Institute for International Economics, Washington D.C.

[41] D Schoenmaker, 'Firmer Foundations for a Stronger European Banking Union' (2015) *Bruegel Working Paper* no 2015/13.