Chapter 28

The 'Almost Completed House': An Introduction to the Economic and Monetary Union

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Abstract

The first part of this chapter will focus on the asymmetric nature of the Economic and Monetary Union and the lack of proper supervision in its initial form. The second part will elaborate on how an adequate supervision system – the Banking Union – was created after the 2010 Greek sovereign debt crisis. This chapter introduces the phases of the creation of the Banking Union and its already-functioning three pillars and examines their roles by analysing three main sources: the case-law of the Court of Justice of the European Union, the reviews of European Union institutions (or reviews completed under their aegis), and scholarly opinions. The third part focuses on three sets of crisis management strategies of the European Central Bank: those enacted in response to the Greek sovereign debt crisis, those enacted in response to the negative economic effects of the COVID-19 pandemic, and those enacted in response to the most recent issue, the consequences of the Russo-Ukrainian War. Regarding the Greek sovereign debt crisis, this section dispenses with introducing the related monetary measures in detail since very rich literature on this topic already exists; instead, the focus is on the legal disputes around the response, especially the Public Sector Purchase Program of the European Central Bank.

Keywords: *Economic and Monetary Union, Eurozone, European Central Bank, Banking Union, Single Supervisory Mechanism, Single Resolution Mechanism, Public Sector Purchase Program, COVID-19, Russo-Ukrainian War, ultra vires*

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1. The brief history of the creation of EMU and its initial weaknesses, with special regard to the lack of supervision

Despite the reforms seen in recent decades, the *Economic and Monetary Union* (EMU) is still far from being a so called *optimum currency area* (OCA), as described by Robert A. Mundell[1] and Béla Balassa.[2] It has always been a long way away from this state, and accordingly labelled the 'half-built house' by Fred Bergsten in 2012.[3] It is not surprising that Milton Friedman, similar to most other contemporary US scholars,[4] was very sceptical of the common European currency. Friedman identified structural weaknesses a decade before they became unambiguous in light of the 2008 crisis and predicted the downfall of the EMU before it was created. He argued that the chosen approach itself was a mistake;[5] the creation of the EMU should have been preceded by the creation of a political union. Based on historic examples, Friedman concluded that only monetary unions established along with political unions had historically been successful.[6] However, as Wolfgang Münchau stated, the Eurozone not only lacked the conditions to become an OCA, but also the political will to become one.[7] Due to the lack of a 'single European identity', EU decision-makers consciously avoided any issues related to the political union, even though the establishment of the EMU was a political rather than an economic question.[8] As a result of political dissent, the 'founding fathers' of the EMU gave up on creating a real economic and monetary union and instead created an asymmetric monetary union[9] in which monetary sovereignty was transferred to the Union[10] and the fiscal sovereignty of the Member States was left almost intact.[11]Besides this asymmetry, the EMU suffered from severe structural weaknesses: an appropriate supervision system was lacking. As the author of this chapter pointed out in a 2018 study, this was the 'original sin'.[12]

When the founding fathers realised that it was impossible to create a fiscal union alongside with the monetary one, they secured the independence of the *European*

1 Mundell, 1960, pp. 657–665.
2 Balassa, 1961, p. 324.
3 Bergsten, 2012, pp. 16–22.
4 See: Quinn, 2023, p. 784.
5 Friedman, 1997.
6 Artner and Róna, 2012, p. 100.
7 Münchau, 2013, p. 539.
8 Friedman, 1997; Buti, 2017, pp. 56–57; Bod, 2012, pp. 695–698.
9 For more on the history and basic concepts of the monetary union, see: Angyal, 2009, pp. 109–119.
10 Some authors argue that the only country that lost its monetary sovereignty was Germany: during the *European Monetary System* era, most Member States followed the Bundesbank's interest rates. Thus, these countries have gained influence over common monetary policy by participating in the ECB's decision making. See: Goodhard, 1995, p. 457.
11 Dabrowski, 2009, pp. 6–7; Artner and Róna, 2012, pp. 83–84.
12 Marinkás, 2018, pp. 437–471.

Central Bank (ECB) to the extent that, based on the wording of the *Maastricht Treaty*,[13] one could have regarded the ECB as a *sui generis* entity outside the EU institutional framework.[14] This issue was finally settled in the *Lisbon Treaty*.[15] In the meantime, the case law of the *Court of Justice of the European Union* (CJEU) sealed the leak, stating that the ECB is an integral part of the community, even if it has extraordinary independence.[16]

The founders of the EMU believed that on the long run the common currency would lead to convergence; that is, the negative effects of the lack of a common fiscal policy would be counterbalanced. In practice, however, the EMU did not facilitate real convergence among Member States and sometimes even caused their divergence.[17] In addition, it covered up differences,[18] which created the so-called 'moral hazard' issue or, in other authors' words, the 'free–rider' phenomenon:[19] the common currency incited certain Member States to borrow in the common currency and, when they could not meet their debt service obligations, to ask for bailouts from other Member States – put differently, a 'beggar-thy-neighbour' policy emerged.

The Greek example clearly shows that this possibility is real: the government obtained cheap loans in Euros at an interest rate of 3% instead of 18% in the drachma era,[20] creating a temptation to obtain more loans.[21] Friedman identified this as a factor that may enhance political conflict among Member States in the case of a future economic crisis. His prediction became true: when the crisis hit, it was hard to explain to the average German taxpayer why their tax should be spent helping Greek citizens,[22] even if Germany was the main beneficiary of the Eurozone.[23]

The founders of the Eurozone also foresaw the above issue and, in the absence of common fiscal policy, tried to avoid it by (i) adopting the *Stability and Growth Pact* (with all its deficiencies)[24] and (ii) enacting the 'no bailout' clause in Art. 125 of

13 Treaty of Maastricht, Treaty on European Union (Consolidated Version), 7 February 1992, OJC 325/5.
14 See: Angyal, 2008, pp. 116–131.
15 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, 1–271.
16 CJEU, 10 July 2003, C-11/00, *Commission v. ECB*, ECLI:EU:C:2003:395, paras. 122, 186.
17 Gottfried, 2021, p. 118.
18 Tarafás, 2013, p. 362.
19 Quinn, 2023, p. 785.
20 Forgács, 2015, p. 42.
21 The Giovannini Group, an advisory committee to the European Commission on financial integration, proposed as early as 2000 that public debt issuance in the Eurozone should have been subjected to community level co-ordination. See: Giovannini Group, 2000.
22 As Kata Csankovszki and Júlia Mező pointed out, this clearly demonstrated why a successful monetary union should consist of equally developed member states as the original theorists of the OCA argued. Csankovszki and Mező, 2012, pp. 37–38.
23 Marján, 2014, p. 76.
24 See: Quinn, 2023, p. 785.

the *Treaty on the Functioning of the European Union*[25] (TFEU) as well as its monetary counterpart, the prohibition of monetary financing, in Art. 123 of the TFEU. In other words, unlike traditional central banks, the founders of the EMU did not provide the ECB with the mandate to act as a *lender of last resort* (LLR). However, it became one on the long run.[26]

Even if the current decision makers were willing to provide fiscal policy tools for bailouts, in Friedman's view, the governing institutions of the EU would have lacked the room of manoeuvre the US Federal Government has, which disposes over a significant budget that enables it to counterbalance economic cycles.[27] On average, the US budget moved between 14% and 37% of GDP between 1945 and 2023.[28] In comparison, the EU budget reallocates 1% of the EU 27's GDP.[29] Friedman further argues that the US is not only a single market, where goods, labour force, services, and capital move freely, but also a single market, where – unlike in the EU – prices and wages are approximately identical in every state. Friedman believes that the latter two factors are the reasons for employee mobility in the US. Meanwhile, EU Member States exhibit serious differences in economic development.

Another weakness of the Eurozone, in its original form, was the lack of a proper supervisory system. The pre-crisis regulatory regime was based on minimum harmonisation, in which directives determined the minimum requirements at the EU level that could be surpassed by national legislators. This has led to divergent national rules that undermine legal certainty. It also incited, on the one hand, Member States to engage in regulatory competition to favour national banks and attract more businesses and, on the other hand, financial institutions to engage in regulatory arbitrage, exploiting national divergence to their advantage.[30] As Luigi Chiarella pointed out, the previous banking supervision and resolution framework – which was based on cooperation – failed during the crisis because domestic authorities were prone to turning a blind eye when it came to their '*national champions*'. [31] In summary, the above-mentioned lack of proper political legitimation and political union is the origin of the problems introduced below; namely, the asymmetric structure and lack of proper supervision.

25 Treaty on the Functioning of the European Union of 13 December 2007, OJ C 202, 7.6.2016, 47–360.
26 This will be further explored in the second and third parts of this chapter.
27 Friedman, 1997.
28 *University of California: Federal Budget Receipts and Outlays: Coolidge – Biden* [Online]. Available at: https://www.presidency.ucsb.edu/statistics/data/federal-budget-receipts-and-outlays (Accessed: 29 September 2023).
29 European Commission, 2023a.
30 Babis, 2018, p. 263.
31 Chiarella, 2016, pp. 41–46, 85.

2. The creation of the Banking Union and its elements established due to the 2010 financial crisis and the allocation of competences between the EU and its Member States

'Within our mandate, the ECB is ready to do whatever it takes to preserve the Euro. And believe me, it will be enough' – Mario Draghi, President of the European Central Bank (2011–2019).[32]

In October 2007, the ECOFIN Council acknowledged – though not *expressis verbis* – that the crisis in the US finance sector could possibly affect the single market. In conjunction with this, scholars,[33] think tanks,[34] and, in 2009, the expert group chaired by Jacques de Larosière,[35] suggested that the EU should create a community-level supervisory system. However, EU legislators and regulators were lagging behind;[36] it was not until 2011[37] that the EU, as a belated response to the crisis and to eliminate any possible threats that could jeopardise the stability of the financial systems of the EMU, established the *European System of Financial Supervision* (ESFS).[38]

What happened next was extraordinary and unthinkable, even a few years earlier.[39] In the words of Rachel A. Epstein and Martin Rhodes: 'supranationalism had gained momentum'.[40] In their view, the creation of the Banking Union was a consequence of an array of interests – both national and supranational – and the ability of the European Commission and the ECB to manipulate the policy process against Germany, which would have preferred to keep competence at the national level.[41] The world again witnessed the transfer of a significant amount of sovereignty to the supranational level – a level that could only be achieved under the exceptional

32 *Verbatim of the remarks made by Mario Draghi – Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012* [Online]. Available at: https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html (Accessed: 9 October 2023).

33 Dabrowski, 2009, pp. 17–18.

34 Lannoo, 2009, p. 59.

35 de Larosière Group, 2009, p. 86.

36 As advocate general Gerard Hogan wrote in his opinion in the *Landeskreditbank BadenWürttemberg v. ECB* case: '[…] legislators and regulators have struggled to come to terms with the enormity of this banking crisis and to understand how, in the face of what had previously seemed to be a perfectly adequate system of regulation, that system ultimately failed when it was put to the test in those dark days of 2008 onwards.' – CJEU, 5 December 2018, C-450/17 P, *Landeskreditbank Baden-Württemberg v. ECB*, Opinion of Advocate General Gerard Hogan, ECLI:EU:C:2018:982, para. 2.

37 To be more precise, in 2010 (before the ESFS), the Council called the *European Financial Stabilisation Mechanism* (EFSM) into being as a transitional solution. The aim was to provide credit for the Member States, which were struggling with problems. See: Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism, OJ L 118, 12.5.2010, 1–4.

38 See: Marinkás, 2018b, pp. 58–69.

39 Van Rompuy, 2014.

40 Epstein and Rhodes, 2016, p. 433.

41 Epstein and Rhodes, 2016, p. 433.

circumstances created by the sovereign debt crisis.[42] This finding is affirmed by the above discussion of the lack of political will at the time of the EMU's foundation.

A change in the ECB's director in 2011 also gave an impetus for the already ongoing policy changes: while Jean-Claude Trichet insisted that the restrictive dispositions of the TFEU – namely, the 'no bailout',[43] 'no default'[44] assumptions – should be maintained under all circumstances, the new president, Mario Draghi, gave his 'whatever it takes' speech in 2012, giving the green light to the *Outright Market Transactions*[45] (OMT) and other programmes, which saved the Eurozone. The *European Stability Mechanism* (ESM) started to function in 2012[46] outside the framework of the EMU because, according to the original political compromise embedded in Arts. 123 and 125, the ECB would not act as a sovereign LLR to Member States. The ESM was created to provide the EU with an LLR, which – in case of necessity – could grant credits to the member states and financial institutions facing crisis. The aim was to avoid breaching the Treaties by converting the ECB into an LLR. By the end of the day, however the ECB became a de facto LLR within the Eurozone: during the global financial crisis, over a quarter of the Member States received bailouts and, arguably, monetary financing of some kind.[47] – As elaborated on later.

In addition to the above, EU legislators created the *Banking Union* (BU) based on Art. 114 of the TFEU. In accordance with the European Commission's proposal,[48] the BU should have been based on four pillars: the *Single Rulebook*, *Single Supervisory Mechanism*[49] (SSM), *Single Resolution Mechanism*[50] (SRM), and *European Deposit Insurance Scheme* (EDIS). Until now, only the first three pillars have been realised, with the EDIS still under development.

However, the creation of such a system was a huge step, the newly established measures and institutions had to tackle one final obstacle: withstanding the supervision of the CJEU. They did well in this regard until the '*PSPP-decision*'[51] of the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) as it will be elaborated in Chapter Three.

42 Howarth and Quaglia, 2016, p. 458.
43 Art. 125 of the TFEU.
44 Art. 9 of the TFEU.
45 See: Cœuré, 2013.
46 Treaty Establishing the ESM (signed on 2 February 2012, entry into force: 27 September 2017).
47 Quinn, 2023, p. 760.
48 European Commission: Communication from the Commission to the EP and the Council. A Roadmap towards a Banking Union, Brussels, 12.9.2012, COM(2012) 510 final, p.10.
49 Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, 63–89 (SSM Regulation).
50 Regulation (EU) 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 […], OJ L 225, 30.7.2014, 1–90 (SRM Regulation).
51 Bundesverfassungsgericht, 2 BvR 859/15 –, Rn. 1–237, Judgment of 5 May 2020 (PSPP).

2.1. The Single Rulebook (2013–)

The Single Rulebook, contrary to its name, is not a single document but comprises various sets of rules; namely, the *Capital Requirements Regulation* (CRR),[52] *Capital Requirements Directive* (CRD),[53] *Bank Recovery and Resolution Directive*[54] (BRRD), and *Deposit Guarantee Schemes Directive* (DGSD).[55] The harmonisation model chosen for the Single Rulebook, which combines different layers of legislation – including directly applicable regulations and directives that need implementation – allows flexibility in making technical rules which can be changed to adapt to financial markets without the need to proceed with time-consuming EU legislation. However, it was a legitimate concern that flexibility could have led to divergence between Member States as seen in the former system, where some Member States engaged in so-called 'gold-plating' – that is imposing requirements beyond the common regulatory framework –, while others adjusted their regulations to attract businesses or promote national champions resulting in regulatory competition.[56] In the opinion of Valis Babis, the definition of capital is an ample example of how these fears are well-founded; while the delineation of capital is a fundamental principle of banking regulation and banks must hold adequate high-quality capital to absorb losses, the regulation does not provide a clear definition of the term.[57]

2.2. The Single Supervisory Mechanism (2014) and the national competent authorities

While less significant credit institutions[58] fall under the supervision of national authorities, significant ones[59] fall under the direct supervision of the ECB.[60] It must

52 Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, 1–337.

53 Directive (EU) 2013/36 of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms […], OJ L 176, 27.6.2013, 338–436.

54 Directive (EU) 2014/59 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 […], OJ L 173, 12.6.2014, 190–348.

55 Directive (EU) 2014/49 of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast), OJ L 173, 12.6.2014, 149–178.

56 Babis, 2018, pp. 263–265, 269–272, 274.

57 Babis, 2018, p. 272.

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

59 The delimitation is to be made as contained Art. 6 para. (4) of the SSM Regulation.

60 The decisions of the ECB can directly affect individual credit institutions, which are subject to a two-fold system of review: an *internal administrative review* and an *external judicial review*. See: Chiarella, 2016, p. 70.

be pointed out that the notion of credit institutions is a concept of EU law that shall prevail.[61] The ECB's Framework Regulation[62] for the SSM – alongside with the *Court of Justice*'s (hereinafter: CJ) case-law – further refined the rules on cooperation,[63] including (i) the methodology for determining the quantitative criteria for classifying banks as significant or less significant, (ii) the exercise of powers, and (iii) the relations between domestic regulators and the ECB. [64] The *General Court* (GC) also contributed to the clarification of certain definitions and interpretation of some of the provisions.[65]

Based on Art. 32 of the SSM Regulation by 31 December 2015 and subsequently every three years thereafter, the European Commission shall publish a report on the application of this regulation. The Commission in its belated report hit a positive tone.[66] The *European Court of Auditors* (ECA)[67] and the *German Federal Ministry of Finance* (*Bundesministerium der Finanzen*)[68] evaluated the first three years of the SSM as a success, although it was also indicated that there is still room for further improvement. For example, the German Federal Ministry of Finance's reports highlighted that the ECB should put further emphasis on maintaining a strict separation between the ECB's monetary policy functions and its supervisory tasks as required by the SSM Regulation. Meanwhile, in a 2016 report, the *Bruegel* criticized the *black box nature*[69] of the SSM's decision making procedure (although the report also had a

61 Chiarella, 2016, p. 48.

62 Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities, OJ L 141, 14.5.2014, 1–50 (SSM Framework Regulation).

63 CJEU, 8 May 2019, C-450/17 P, *Landeskreditbank Baden-Württemberg v. ECB*, ECLI:EU:C:2019:372; CJEU, 19 December 2018, C-52/17, *VTB Bank (Austria) AG v. Finanzmarktaufsichtsbehörde*, ECLI:EU:C:2018:648; CJEU, 19 December 2018, C-219/17, *Berlusconi and Fininvest v. Banca d'Italia and IVASS*, ECLI:EU:C:2018:1023; CJEU, 13 September 2018, C-594/16, *Buccioni v. Banca d'Italia*, ECLI:EU:C:2018:717.

64 For a more detailed analysis, see: Marinkás, 2018a, pp. 437–471.

65 CJEU, 16 May 2017, T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB*, ECLI:EU:T:2017:337; CJEU, 13 December 2017, T-712/15, *Crédit Mutuel Arkéa v. ECB*, ECLI:EU:T:2017:900; CJEU, 24 April 2018, T-133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*, ECLI:EU:T:2018:219; CJEU, 13 July 2018, T-751/16, *Confédération nationale du Crédit mutuel v. ECB*, ECLI:EU:T:2018:475; CJEU, 13 July 2018, T-745/16, *BPCE v. ECB*, ECLI:EU:T:2018:476; CJEU, 13 July 2018, T-757/16, *Société générale v. ECB*, ECLI:EU:T:2018:473; CJEU, 13 July 2018, T-758/16, *Crédit agricole SA v. ECB*, CLI:EU:T:2018:472; CJEU, 13 July 2018, T-768/16, *BNP Paribas v. ECB*, ECLI:EU:T:2018:471.

66 European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation, Brussels, 11.10.2017, COM(2017) 591 final, pp. 18–19.

67 European Court of Auditors, 2016, p. 136.

68 Federal Ministry of Finance (Bundesministerium der Finanzen): The Single Supervisory Mechanism: Lessons learned after the first three years, January 2018, pp. 4–5.

69 The lack of transparency was also a key point of the Transparency International report: Braun, 2017, p. 77.

positive tone at times). The Bruegel, just like the ECA[70], suggested streamlining the decision-making procedure and delegating decision-making.[71] The SSM related case–law of the GC – each of the judgments[72] delivered after the Bruegel's report – supports these findings: the pleas-in-law presented by the financial institutions were mostly based on the insufficiency of the ECB's reasoning, incorrect interpretations of EU law, and an excess of power. With regard to the latest CJEU judgments and scholarly reviews of the SSM Regulation and its implementation, one can argue that a scheme like the SSM requires clear relationship of accountability between the ECB and the national competent authorities (NCAs); however, such a relationship is not fully fledged in the current legal framework, as pointed out by Karagianni and Scholten.[73]

In its second evaluation under Article 32 of the SSM Regulation – published in April 2023 –, the European Commission concluded the following:

> The SSM has developed into a mature organisation that is functioning well. More than 8 years since its inception, the SSM has proven to be a respected supervisory authority capable of delivering on its mandate as set out in the SSM Regulation. […] The SSM has also shown to be capable of rapidly adapting to emerging supervisory challenges as well as to unexpected adverse events. The review found that the SSM was generally praised, including by industry stakeholders, for its swift and agile approach to addressing the challenges posed by the COVID-19 crisis.[74]

Other opinions support the idea that the SSM has had positive effects on the banking system; however, some effects, such as enhanced profitability, were unintentional.[75]

2.3. The Single Resolution Mechanism (2016-) and the responsible national authorities

As mentioned in Section One, the SRM covers the same scope as the SSM. The purpose of the SRM Regulation is to provide a framework for the resolution of failing banks within the BU with minimal costs for taxpayers and the real economy. The banking sector finances this resolution procedure through a single resolution fund. The SRM Regulation gave rise to the *Single Resolution Board* (SRB), a new EU agency

70 European Court of Auditors, 2017, p. 68.
71 The Bruegel referred to the more transparent US system as an example to be followed. See: Schoenmaker and Véron, 2016, pp. 4–6.
72 T-122/15; T-712/15; T-133/16; CJEU, 13 July 2018, T-733/16, *La Banque postale v. ECB*, ECLI:EU:T:2018:477; T-745/16; T-751/16.
73 Karagianni and Scholten, 2018, pp. 185–194.
74 European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism Established Pursuant to Regulation (EU) No. 1024/2013, Strasbourg, 18.4.2023, COM(2023) 212 final, p. 23.
75 Avgeri et al., 2020, p. 34.

that started functioning in 2015, and *national resolution authorities*[76] (NRAs). If a financial institution falls within the competence of the SRB, it adopts the resolution scheme under Art. 18 para. (1) of the SRM regulation if (i) 'the entity is failing or is likely to fail; or (ii) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures […] would prevent its failure within a reasonable timeframe.' The SRB also adopts the resolution scheme if (iii) 'a resolution action is necessary in the public interest pursuant to Article 18(5)'.

Art. 18 para. (7) states, 'Immediately after the adoption of the resolution scheme, the Board shall transmit it to the Commission. Within 24 hours from the transmission of the resolution scheme by the Board, the Commission shall either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme […]' The Commission within 12 hours from the transmission of the resolution scheme by the Board, may propose to the Council: (i) 'to object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfil the criterion of public interest referred to in paragraph 1(c)', or (ii) 'to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.' Based on this regulation, the Council acts according to a simple majority. The regulation requires the Council or Commission to provide reasons for exercising its power of objection. If no objection has been expressed by the Council or the Commission within 24 hours after its transmission by the Board, the resolution scheme enters into force.

The first nine SRM-related cases tried by the GC – even if eight out of nine cases[77] were dismissed as inadmissible for various reasons[78] – showed that the financial institutions did not evaluate the procedure of the SRB as transparent; in their applications,[79] they frequently claimed that (i) the SRB should have notified them of their decisions (not only the NRAs) and that (ii) the SRB should have disclosed more details on the grounds of its decision.

76 For details on the Hungarian regulation and domestic supervision system, please see: Nagy and Csiszár, 2016, pp. 157–163.

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

78 T-661/16, Order of the GC, paras. 49, 55; T-14/17, Order of the GC, paras. 33, 51; T-42/17, Order of the GC, paras. 24, 51; T-494/17, Order of the GC, paras. 24–26, 69; T-618/17, Order of the GC, paras. 15, 23–27.

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

Two novel judgments, both delivered on 1 June 2022, revolving around the resolution of the *Banco Popular Group* (the sixth-largest banking group in Spain at the time of the resolution) also show issues around clarity many years after the SRB was implemented, such as who should be notified. In the T-510/17 *Antonio Del Valle Ruíz v. European Commission and Single Resolution Board* case,[80] in their first plea-in-law,[81] the applicants claimed that the SRB's procedure under Art. 18 of the SRM Regulation contradicted Arts. 41 and 47 of the *Charter of Fundamental Rights of the EU* (Charter).[82] Emphasis was placed on the right to an effective remedy and a fair trial under Art. 47 of the Charter, since, in their view, the fact that shareholders and creditors are not heard during the procedure infringes on this right.[83] The GC reiterated that while no provision of the SRM Regulation expressly excludes or restricts the rights of shareholders and creditors of the entity concerned to be heard during the resolution procedure, such a hearing procedure, which would be lengthy in the case of thousands of shareholders and creditors, is contrary to the very purpose of the procedure and may jeopardise its effectiveness,[84] since the decision procedure under Art. 18 of the SRM Regulation is aimed at:

> […] ensuring the continuity of the critical functions of the entity concerned and […] protecting the stability of the financial system of that Member State and, therefore, preventing contagion to other Member States of the euro area would have been exposed to serious risks.[85]

This risk is real, as the background of the case proves: on 31 May 2017, *Reuters* published an article entitled 'EU warned of wind-down risk for Spain's Banco Popular'; the publication was based on the allegations of an EU official, whose identity remains unknown. As a result, Banco Popular faced massive liquidity outflows during the first few days of June 2017.[86] Regarding the infringement of Art. 47 of the Charter, the GC stated that:

> It is sufficient to note that the applicants' argument is based on a misinterpretation of the scope of the right to an effective remedy enshrined in Article 47 of the Charter, which guarantees a right to an effective remedy against an act which adversely affects a person and not before the adoption of the act.[87]

80 CJEU, 1 June 2022, T-510/17, *Antonio Del Valle Ruíz v. European Commission Single Resolution Board*, ECLI:EU:T:2022:312.
81 The applicants submitted nine pleas-in-law. The author introduces only the first and the ninth as the most relevant ones.
82 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, 391–407.
83 T-510/17, para. 113.
84 T-510/17, paras. 124, 151, 165.
85 T-510/17, paras. 152, 161.
86 T-510/17, paras. 42–44.
87 T-510/17, para. 190.

Therefore, the GC rejected the first plea-in-law as unfounded.[88]

In the ninth plea, the applicants claimed under Art. 277 of the TFEU that Arts. 18 and 22 of Regulation No. 806/2014 contradict the principles relating to the delegation of power set out by the CJEU in its 1958 *Meroni* v. *High Authority* judgment.[89] In the applicants' view, '[…] the provisions of Article 18(7) of [the SRM Regulation], according to which the Commission is to endorse the resolution scheme within 24 hours […] it is the SRB which decides on the resolution policy, with the Commission simply carrying out a 'rubber–stamp' function'.[90] The GC first reiterated that the Founding Treaties do not elaborate on the issue of conferring powers on an EU body, office, or agency. As highlighted by Advocate General *Niilo Jääskinen*,[91] in *United Kingdom v. Parliament and Council*:[92]

> […] no mention is made of agencies in either Article 290 TFEU, which provides for delegation of rule-making in legislative acts to the Commission, or Article 291 TFEU which confers implementing powers on the Member States, the Commission, and in some limited circumstances the Council.[93]

It is therefore the case law – in particular, *Meroni and the United Kingdom v. Parliament and Council* – that elaborated on the issue of the autonomous powers of EU agencies. In the latter case, the CJEU updated the Meroni doctrine and expanded the scope of powers delegable to agencies to include discretionary powers as long as adequate controls were in place.[94]

In the GC's view, the EU legislator avoided an 'actual transfer of responsibility' within the Meroni judgment. First, the SRM Regulation states that the resolution scheme may enter into force only if no objection has been expressed by the Council or the Commission regarding the discretionary aspects of the scheme within 24 hours of its transmission. Thus, to produce legal effects for the resolution scheme, it is necessary for an EU institution to approve it. This finding is supported by preambulars 24 and 26 of the SRM Regulation.[95] Second, under Art. 14 of the SRM Regulation the Commission is also obliged to make the assessment under Art. 18 when it has to endorse the choice of a resolution tool and comply with the public interest criterion. Under Art. 43 para. (3), the Commission is entitled to designate a permanent observer, who is entitled to participate in meetings of the executive

88 T-510/17, para. 203.
89 CJEU, 3 June 1958, C-9/56, *Meroni v High Authority*, ECLI:EU:C:1958:7; On the issue of the applicability of the Meroni case in the current institutional context, see: Ferran, 2012.
90 T-510/17, paras. 204–205.
91 CJEU, 12 September 2013, C-270/12, *United Kingdom v. Parliament and Council*, Opinion of Advocate General Niilo Jääskinen, ECLI:EU:C:2013:562.
92 CJEU, 22 January 2014, C-270/12, *United Kingdom v. Parliament and Council*, ECLI:EU:C:2014:18.
93 Opinion of Advocate General Niilo Jääskinen, C-270/12, para. 75.
94 Babis, 2014, pp. 266–270.
95 T-510/17, paras. 215–219.

and plenary sessions of the SRB as well as the debates and who has access to all documents; consequently, the Commission becomes aware of the resolution scheme before it is transferred by the SRB and has sufficient time to assess its discretionary aspects during the preparation of the scheme. Therefore, in the GC's view, the SRB does not have the autonomous power to decide on the resolution of an entity or the resolution tool pursuant to Art. 22 of the SRM Regulation.[96] Accordingly, the GC rejected the ninth plea-in-law as unfounded.[97]

The legal nature of the resolution scheme was also one of the core issues in the T-481/17 *Fundación Tatiana Pérez […] v. SRB* case.[98] In its intervention[99], the Commission claimed that the action was inadmissible because the resolution scheme was an intermediate measure, which did not produce legal effects. It submitted that, by its decision, it approved the resolution program, made its own, attributed binding legal effects to it, and that, therefore, the action brought solely against the resolution program was inadmissible. In the view of the GC, while there is no doubt that – as the Commission argued at the hearing –, the resolution program will only enter into force with its support, this does not mean that the Commission's support extinguishes the autonomous legal effects of the resolution scheme. Contrary to the Commission's assertion, respect for the principles laid down in the Meroni judgment concerning the delegation of powers does not mean that only the decision adopted by the Commission produces legal effects.[100] As Preambular (26) of the SRM Regulation states:

> […] The procedure relating to the adoption of the resolution scheme, which involves the Commission and the Council, strengthens the necessary operational independence of the Board while respecting the principle of delegation of powers to agencies, as interpreted by the Court of Justice of the European Union.

As the GC reiterated, the division of competencies between the SRB and the Commission, according to the SRM Regulation, does not support the Commission's argument that it makes the resolution program its own by endorsing it. The Commission has its own power to assess the discretionary aspects of the resolution program and decide whether to endorse or object to it. On the other hand, it has no power to exercise the powers reserved for the SRB or to amend the resolution programme or its effects; that is, the Commission cannot object to or alter the technical aspects of the resolution scheme. Furthermore, it should be noted that Art. 86 of the SRM Regulation provides that all decisions of the SRB – with the exception

96 T-510/17, paras. 227–228, 230–232.
97 T-510/17, para. 234.
98 CJEU, 1 June 2022, T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v. SRB*, ECLI:EU:T:2022:311.
99 The applicants submitted ten pleas-in-law. The author dispenses with them and focuses on the intervention of the Commission.
100 T-481/17, paras. 107, 127.

of decisions which may called into question before an appeal body – may be challenged before the CJEU by means of an action under Art. 263 of the TFEU. In the GC's view, the resolution programme falls conceptually within this category of decisions, and no reservation in that article or any other provision of the [SRM Regulation] allows its exclusion.[101] It must, therefore, be concluded that it follows from the wording of Art, 86 of the SRM Regulation – as well as from other provisions of the Regulation –, that the resolution scheme adopted by the SRB may be challenged individually without requiring the launching of a procedure against the Commission's decision to endorse it.[102]

Based on Art. 94 of the SRM Regulation, the Commission shall publish a report on the application of this regulation by 31 December 2018 and every three years thereafter. The evaluation of the SRM's first years of functioning showed a somewhat mixed picture. While reports made by EU institutions[103] – including the first evaluation of the Commission under Art. 94 of the SRM Regulation[104] – or on behalf of EU institutions[105] seemed to hit a cautious tone,[106] some scholars concluded[107] that the member states of the BU had recognised the prevalence of the ECB's competencies. In their view, the SRM regulation leaves no room for national resolution tools. Contrary to this optimistic evaluation, the author of the current article, after examining the case law of the CJ and the GC,[108] concluded that the national central banks – quoting Chiarella – are still prone to protect the so-called 'national champions' by calling the SRM's competence into question. In addition, the SRM seemed afraid to use its competencies. As pointed out by Nicolas Véron,[109] its hesitation to order the liquidation of *Banca Popolare di Vicenza* and *Veneto Banca* cost the Italian taxpayers a significant amount. As *Martin Sandbu* noted, the ECB started to use its recent empowerment half-heartedly.[110]

Unlike the SSM, recent academic evaluations show that there are shortcomings and legal uncertainties in the functioning of the SRM,[111] as proven by the two judgments of 1 June 2022 introduced in this study.

101 T-481/17, paras. 132, 140.
102 T-481/17, paras. 143–144.
103 European Court of Auditors, 2017, p. 68.
104 See also: European Commission, The Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation), Brussels, 30.4.2019, COM(2019) 213 final p. 15.
105 Véron, 2019, p. 21.
106 On the negative side, the agency was understaffed and resolution planning was not completed within the deadline. However, these shortcomings were associated with the initial period and could be tackled in the future. European Court of Auditors, 2017, paras. 34, 55–56, 60, 63, 64–68, 103, 114, 125, 141.
107 Busch, Louisse and van Rijn, 2019.
108 For details see: Marinkás, 2018a.
109 Véron, 2018.
110 Sandbu, 2015, p. 313.
111 Culpepper and Tesche, 2021, pp. 134–150; Smoleńska, 2022, pp. 42–53.

2.4. The European Deposit Insurance Scheme

The Commission's 2015 proposal on the EDIS[112] alleges that the current framework of national *Deposit Guarantee Schemes* (DGSs)[113] is vulnerable to external shocks. The EDIS could remedy this vulnerability and would increase the resilience of the BU against future crises. The Commission indicated that Art. 114 of the TFEU provided the legal basis for the proposed regulations. The Commission argued that, to be effective, legislation needs unified applicability within the participating Member States; that is, the legislation has to be approved in the form of a regulation, and the creation of a board representing all members of the BU is needed. The board would be the SRB, expanded to make it eligible to administer EDIS. Based on the proposal, participating Member States would be members of the Eurozone and those other Member States that have established close cooperation with the ECB under Art. 4 para. (1) of the SSM Regulation. The Board is fully financed by administrative contributions from credit institutions affiliated with the participating DGSs. This means that EDIS-related functions do not require contributions from the EU budget. The EDIS will be implemented in three successive stages: a reinsurance scheme for participating in national DGSs in the first three-year period, a co-insurance scheme for participating in national DGSs in the second four-year period, and full insurance for participating in national DGSs in the steady state. National DGSs would be eligible to gain financing from the fund if they are being built in line with a precise funding path and otherwise comply with essential requirements under EU law. The introduction of the EDIS would be accompanied by ambitious measures to reduce risk in the banking sectors of Member States.

Most academic analyses[114] and a recent ECB study[115] displayed a positive attitude towards the creation of the EDIS and supported the findings of the effect analysis conducted under the aegis of the Commission,[116] emphasising its positive effect on the resilience of the BU; however, political opposition hindered its creation.[117] The most explicit opposition to the EDIS came from the German government, as was the case with the Banking Union's other elements. The German government and the main political parties criticised the EDIS proposal as an unacceptable step towards debt mutualisation. The German finance minister, Wolfgang Schäuble, argued that it was unacceptable that the 'backstopping of depositors

112 European Commission (2015) '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', Strasbourg, 24.11.2015, COM(2015) 586 final, p. 69.

113 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast), OJ L 173, 12.6.2014, 149–178.

114 Fernandez-Aguado et al., 2022, p. 244; Cerrone, 2018, p. 237.

115 Eule, Kastelein and Sala, 2022.

116 *Effects analysis on the European deposit insurance scheme (EDIS)* [Online]. Available at: https://finance.ec.europa.eu/system/files/2017-02/161011-edis-effect-analysis_en.pdf (Accessed: 29 September 2023).

117 Howarth and Quaglia, 2018, pp. 190–209.

[could] become an excuse for banks to behave irresponsibly, potentially leaving German taxpayers to foot the bill'. Schäuble believed that measures that ensured banks had big enough buffers of capital and debt to absorb financial shocks and gave authorities the power to force losses on creditors without facing litigation should 'have priority'.[118]

However in its 2017 communication[119] the Commission urged the creation of the EIDIS, it only submitted its legislative proposal on 23 April 2023.[120] While this time too, the ECB proved to be supportive,[121] political opposition to an EU-wide deposit insurance scheme remains very strong.[122]

3. The ECB's crisis management strategies

3.1. Crisis management programs related to the Greek Sovereign Debt Crisis and the creation of the Banking Union

The CJEU has always displayed an 'amicable attitude' towards the institutional framework of the ECB's crisis management[123] or, as *Dawson* and *Bobic* more bluntly put it, the 'answer to any question related to ECB activity (at least on monetary questions) seems to be known in advance'.[124] Scholars have also observed that the ECB and the CJEU were not in an easy situation: in the words of *Yair Listokin*: in the 'OMT-case'[125] these two institutions could have chosen either the functional 'amendment' of the Founding Treaties or taken the risk of the Eurozone's possible fall. They chose the first option.[126] Similarly, functioning of the *European Securities and Markets Authority* (ESMA)[127] and the ESM were stated by the CJEU as being conform to the Treaties.[128] The national constitutional courts displayed the same

118 *EU to strengthen management of banking crises*, 2023; See also: Brunsden, 2015.
119 Communication to the European parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on Completing the Banking Union', Brussels, 11.10.2017, COM(2017) 592 final, p. 20.
120 European Commission, 2023b.
121 *Opinion of the European Central Bank of 5 July 2023 (CON/2023/19)* [Online]. Available at: https://www.ecb.europa.eu/pub/pdf/legal/ecb.leg_con_2023_19.en.pdf (Accessed: 9 October 2023), para. 2.2.
122 *EU to strengthen management of banking crises*, 2023.
123 Angyal, 2015, pp. 129–143.
124 Dawson and Bobic, 2019, pp. 1005–1040.
125 CJEU, 16 June 2015, C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:400.
126 Listokin, 2019, p. 280.
127 CJEU, 22 January 2014, C-270/12, *United Kingdom v. EP and Council*, ECLI:EU:C:2014:18.
128 CJEU, 27 November 2012, C-370/12, *Thomas Pringle vs. Government of Ireland and Others*, ECLI:EU:C:2012:756.

attitude.[129] The first 'warning' from the BVerfG arrived in 2019, when it stated, 'in the current state of the Banking Union there is still a sufficient level of legitimacy feedback'.[130]

In the words of José Luís da Cruz Vilaça,[131] the BVerfG 'crossed the red line'[132] with the so-called 'PSPP judgment' of 5 May 2020[133] when it stated that the ECB acted ultra vires, and in violation of Germany's constitutional identity by implementing the PSPP.[134] The judgment caused a major earthquake in legal scholarship[135] and heated public debates, since the BVerfG did it at the worst possible time, at the beginning of the COVID-19 pandemic in May 2020, which, based on the knowledge available at the time, threatened to have unforeseen health and economic consequences. During this time, EU institutions were eager to seek a legal basis for their work to tackle the economic consequences of the pandemic.[136]

As the BVerfG argued, Member States are the Masters of the Treaties and, consequently, EU institutions are not allowed to establish powers for themselves not conferred on them by treaty provisions, and Member States are not bound by decisions of EU institutions in case these decisions contradict the principle of conferral.[137] Asset purchases by the German Federal Bank (*Deutsche Bundesbank*) within the framework of the PSPP fall under the competence of Member States based on the Founding Treaties. Thus, in the BVerfG's view, the PSPP is essentially an intervention in the economic policy of Member States and enables the ECB to pursue an autonomous economic policy, contrary to the provisions of the Treaties.[138]

The ECB has taken note of the BVerfG's decision without commenting on its merits and has declared its intention to continue to use its powers to fulfil its purpose, as laid down in the Founding Treaties.[139] The CJEU, departing from its habit to never comment on a national court judgment, made the following statements in its press release:[140]

129 Austrian Constitutional Court (*Verfassungsgerichtshof*, VfGH) Verfassungsgerichtshof, No. SV 2/12–18, Judgment of 16 March 2013 (ESM Treaty); Verfassungsgerichtshof, No. SV1/2013–15, Judgment, 3 October 2013 (Fiscal Compact); French Constitutional Court (*Conseil constitutionnel*), 2012–653 DC, Judgment, 9 August 2012 (Fiscal Compact); Bundesverfassungsgericht, 2 BvR 1390/12, Judgment, 12 September 2012 (ESM Treaty).

130 BVerfG, 2 BvR 1685/14, 2 BvR 2631/14. Judgment of Juli 2019 (Banking Union); See furthermore: Horváth et al. 2021, pp. 116–137.

131 Former Judge and Advocate General of the Court of Justice of the European Union, former President of the General Court.

132 da Cruz Vilaça, 2020; See also: Lenaerts, 2021, p. 11.

133 Bundesverfassungsgericht, 2 BvR 859/15 –, Rn. 1–237, Judgment of 5 May 2020 (PSPP).

134 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121, 14.5.2015, 20–24. – No longer in force.

135 See: Metzinger, 2022, pp. 13-54.

136 Marinkás, 2022, pp. 71–96.

137 BVerfG, 2 BvR 859/15, paras. 111, 157, 234.

138 BVerfG, 2 BvR 859/15, paras. 135, 142, 163.

139 European Central Bank, 2020a.

140 Court of Justice of the European Union, 2020.

> [the] Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court […] In order to ensure that EU law is applied uniformly, the Court of Justice alone […] has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty.

The CJEU has stated that it would refrain from communicating further on this matter. The President of the European Commission, Ursula Von Der Leyen,[141] notably recalled three basic principles:

> (i) that the Union's monetary policy is a matter of exclusive competence; (ii) that EU law has primacy over national law and that (iii) rulings of the European Court of Justice are binding on all national courts. The final word on EU law is always spoken in Luxembourg. Nowhere else.

The European Commission launched an infringement procedure against Germany some thirteen months later.[142] According to *Federico Fabbrini,* this is no coincidence: these thirteen months were long enough to 'save the BVerfG from itself'.[143] The Bundesbank, the German government and the lower house of the German parliament (*Bundestag*) 'settled the matter' by conducting the proportionality assessment, when they inspected publicly unavailable documents provided by the ECB.[144] Referring to the above assessment and to some formal deficiencies, the BVerfG in its April 2021 Decision[145] rejected two applications for the enforcement of the judgment of 5 May 2020 under Art. 35 of the Law on the BVerfG *(Bundesverfassungsgerichtsgesetz, BVerfGG).*[146] This time was also sufficient to negotiate the package at the EU level to counter the economic crisis caused by the COVID-19 pandemic, without the Commission having to confront the German government during negotiations. As Fabbrini wrote in June 2021, the issue had effectively been resolved by the time the Commission responded to its merits, so there would be no real stake in the proceedings.

141 European Commission, 2020.
142 European Commission, 2021a.
143 Fabbrini, 2021.
144 See: Deutscher Bundestag, Drucksache 19/20621 (19. Wahlperiode). Antrag der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN Urteil des Bundesverfassungsgerichts zum Anleihekaufprogramm PSPP der Europäischen Zentralbank (1 July 2020); See furthermore: *Bundestag: EZB hat Karlsruher Vorgaben zu Anleihekäufen erfüllt* [Online]. Available at: https://www.bundestag.de/dokumente/textarchiv/2020/kw27-de-anleihekaeufe-703660 (Accessed: 29 September 2023).
145 Bundesverfassungsgericht, 2 BvR 1651/15 –, Rn. 1–111, Order of 29. April 2021, paras. 82–88.
146 'Bundesverfassungsgerichtsgesetz in der Fassung der Bekanntmachung vom 11. August 1993 (BGBl. I S. 1473), das zuletzt durch Artikel 4 des Gesetzes vom 20. November 2019 (BGBl. I S. 1724) geändert worden ist'.

Unsurprisingly, the European Commission closed the infringement procedure against Germany in December 2021.[147]

Some academics argued that launching the infringement procedure was not a wise move since, by the end of the day, the German Government could have been made to pay for the act of the independent judicial branch.[148] It is no coincidence that, until the 2018 CJEU decision in *European Commission v. French Republic*[149], no judgment had been delivered in which the Commission had invoked a breach of Art. 267 para. (3) of the TFEU. However, it is clear from previous cases that such infringements may lead to infringement proceedings.[150] Others argue that launching the infringement procedure was a necessary move: the European Commission – chaired by a German citizen at that time – could not dispense with the infringement proceedings against Germany, given that this omission could have served as a basis for other countries not to comply with the provisions of the Founding Treaties.[151]

According to Grégory Claeys, the BVerfG's judgment was logically flawed in the first place because its statement that the CJEU did not examine the proportionality of the ECB's decisions in sufficient detail leads to the conclusion that the BVerfG did not take into account that the ECB's primary objective under the provisions of the Treaty is to achieve price stability. Any other objective can only be taken into account afterwards. In other words, the ECB cannot arrange price stability and other objectives in arbitrary order; thus, the proportionality test required by the BVerfG cannot be carried out. In Claeys' view, the PSPP judgment's only positive outcome was that it highlighted a fundamental problem in the Eurozone: namely, that twenty years after the establishment of the ECB, it is still not entirely clear what exactly does and does not fall within the ECB's mandate.[152] Following this train of thought, it is worth mentioning David Quinn's opinion that the newfound role of the ECB as an LLR within the Eurozone, legitimated by the CJEU's case law, led to a growing gap between the formal and functional constitutional framework of the ECB: the governance structure of the ECB was not designed to house contested disputes over distributional choices. Even assuming utmost probity and technical competence, its decision-makers are not directly elected by European demos; thus, its decisions on the above-mentioned distribution choices suffer from a democratic deficit.[153]

147 European Commission, 2021b.
148 Riedl, 2021.
149 CJEU, 4 October 2018, C-416/17, *European Commission v. France*, ECLI:EU:C:2018:811.
150 Fazekas, 2021, p. 278; See also: CJEU, 9 December 2003, C-129/00, *Commission of the European Communities v. Italian Republic*, ECLI:EU:C:2003:656; CJEU, 30 September 2003, C-224/01, *Gerhard Köbler v. Republik Österreich*, ECLI:EU:C:2003:513, para. 55; CJEU, 13 June 2006, C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, ECLI:EU:C:2006:391, paras. 32, 43; CJEU, 12 November 2009, C-154/08, *Commission of the European Communities v. Kingdom of Spain*, ECLI:EU:C:2009:695.
151 Everson and Joerges, 2021.
152 Claeys, 2020, pp. 7–9.
153 Quinn, 2023, p. 76.

Nevertheless, as Isabel Schnabel[154] concluded the reforms that followed the 2008 global financial crisis made the financial system safer and more resilient. Tighter regulations and higher capital ratios have been key factors enabling banks to act as shock absorbers rather than shock amplifiers during the (COVID-19) pandemic.[155] Other scholars have arrived at similar conclusions.[156]

3.2. COVID-19-related crisis management

'Extraordinary times require extraordinary action. There are no limits to our commitment to the Eurozone'– As Christine Lagarde, President of the European Central Bank (2019-) stated in March 2020.[157]

The *Pandemic Emergency Purchase Programme* (PEPP)[158] was one such answer to the shocks of the COVID-19 pandemic, with an initial envelope amounting to EUR 750 billion.[159] The PEPP was increased and extended twice in terms of its amount and duration, ultimately reaching EUR 1850 billion.[160] On 16 December 2021 the Governing Council of the ECB decided to discontinue net asset purchases under the PEPP by the end of March 2022.

While the CJEU has not scrutinized the PEPP, some scholars have matched this at the theoretical level. In his March 2020 paper, *Sebastian Grund* argued that, on the basis of the related case law of the CJEU, if such a procedure would have been initiated, the PEPP would pass the 'test' set by the CJEU as (i) the measures do not exceed the ECB's mandate, (ii) the measures respect the principle of proportionality, and (iii) the programme does not breach the prohibition of monetary financing enshrined in Art. 123 para. (1) of the TFEU.[161] Additionally, Yves Mersch, a member of the ECB's Executive Board,[162] also argued in November 2020 that the PEPP was in line with the Founding Treaties, and that the ECB had not exceeded its powers with the programme. Furthermore, he stressed that the CJEU consistently held that the ECB enjoys broad discretion in defining monetary policy within its mandate to pursue the objective of price stability. This discretion is not without limitations; on

154 Member of the Executive Board of the European Central Bank (Incumbent from 1 January 2020).
155 Schnabel, 2020.
156 Fernandez-Aguado et al., 2022, p. 243; Cerrone, 2018, p. 224.
157 *ECB's commitment to the euro has "no limits"*, 2020.
158 Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91, 25.3.2020, pp. 1–4; For the ECB's Summary, visit: *Pandemic Emergency Purchase Programme (PEPP)* [Online]. Available at: https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html (Accessed: 29 September 2023).
159 While the first response to the pandemic on 12 March 2020 included the announcement of an additional envelope of €120 billion under our regular asset purchase programme (APP), it quickly became clear that the APP was not an adequate tool to deal with the sudden and severe dislocations in euro area bond markets when the crisis hit with full force. Schnabel, 2021.
160 European Central Bank, 2020b.
161 Grund, 2020.
162 Incumbent: 15 December 2012 – 14 December 2020.

the one hand, the ECB's actions are scrutinised by the CJEU and, on the other hand, the ECB is bound to respect certain established legal principles. The ECB's measures must be proportionate to the ECB's legitimate objectives: they must not undermine the spirit of the 'no bailout clause' and its monetary policy counterpart, the prohibition of monetary financing. Mersch stressed that Art. 4 of the original PEPP decision – promulgated on 24 March 2020 – states *expressis verbis* that measures must comply with the requirements of necessity and proportionality.[163] As is clear from Mersch's speech, the proportionality requirement is to be met by considering economic analyses that show whether the measures (i) are capable of achieving the monetary policy objective pursued, (ii) do not go beyond what is necessary, and (iii) avoid any disadvantages that are manifestly disproportionate to the objectives pursued.

Collateral easing measures also played a key role in the ECB's monetary policy response to the COVID-19 pandemic. Temporary collateral measures were introduced in April 2020 to ensure that the banking sector could expand its access to central bank liquidity on favourable terms via targeted longer-term refinancing operations (currently, TLTRO III), allowing it to continue to cover the funding needs of the Eurozone economy. The three interconnected primary objectives were: pre–empting shortages of eligible collateral; adding flexibility to the collateral framework; countering adverse pro–cyclical feedback effects. These collateral easing measures were gradually phased out by March 2024, based on the ECB's March 2022 announcement.[164]

Regarding academic evaluations, the ECB played a highly positive role in diminishing the economic impact of COVID-19 on its members.[165] In the words of co-authors *Lucia Quaglia* and *Amy Verdun*, the ECB–SSM is an 'understudied' supranational institution with a proven ability to make a considerable mark on policy development and to act quickly in the 'vacuum' left by other EU-level institutions. Summarising their thoughts, they argue that the ECB was entrepreneurial in responding to the crisis that required a response at the EU level: it took on supranational leadership as soon as it realized that national decision makers could not do so right away.[166]

3.3. Russo-Ukrainian War

As Christine Lagarde stated in October 2023, we are in a state of 'permacrisis': a constant succession of serious and unprecedented crises. Still, the ECB's mandate, is price stability. As it has been in the last 25 years. It is the ECB's compass. In Lagarde's view, key ECB interest rates have reached levels that, maintained for a sufficiently long period, will substantially contribute to the timely return of inflation to the target. As Lagarde stated, the ECB has raised rates because it is the most efficient and

163 Mersch, 2020.
164 Bakker et al., 2022.
165 Quinn, 2023, p. 790.
166 Quaglia and Verdun, 2023, pp. 139–156.

effective tool currently enabling it to reduce inflation and ensure price stability.[167] In July 2022, for the first time in the previous six years, the ECB increased its fixed interest rate to 0.5 percent. In the next period, the ECB increased its interest rates almost monthly. By June 2023, the rate reached 4% – the highest level since the start of the global financial crisis of 2007.[168] The ECB's other tool for fighting inflation is the phasing out of net purchase programs.[169] According to statistical data, these tools seem to be working.[170]

4. Conclusions

The first part of this chapter considered why the EMU was called a 'half-built house' in its original form that is, the introduction explored the EMU's initial asymmetric nature and lack of a proper supervisory mechanism. The second part turned to notable subsequent developments: first, the ECB successfully managed the Greek sovereign debt crisis by various purchase programmes and, with the consent of the CJEU, emerged as the de facto LLR within the Eurozone (without a de jure authorisation, as some scholars pointed out). Second, the crisis created a situation in which Member States were willing to transfer certain elements of their sovereignty to the supranational level – something that seemed unimaginable a few years ago. They created the BU's first three pillars: the Single Rulebook, SSM, and SRM. The fourth pillar, the EDIS, is still under construction due to political opposition over the last decade. While the European Commission's April 2023 proposal may provide new impetus for its creation, political opposition remains significant. The already-implemented regulatory and institutional measures proved to be effective in enhancing the resilience of the financial system, even if the functioning of the resolution mechanism still exhibits uncertainties. Nevertheless, by the time the COVID-19 pandemic and its economic consequences arrived, the ECB had already experienced crises and was well equipped to handle another one.

167 *Interview with Christine Lagarde, President of the ECB, conducted by Marie-Pierre Gröndahl on 2 October 2023*, 2023.

168 *Fluctuation of the European Central Bank fixed interest rate from 2008 to 2023* [Online]. Available at: http://web.archive.org/web/20230224110544/https://www.statista.com/statistics/621489/fluctuation-of-fixed-rate-interest-rates-ecb/ (Accessed: 29 September 2023).

169 Panetta, 2022.

170 *Euro Area Inflation Rate* [Online]. Available at: https://tradingeconomics.com/euro-area/inflation-cpi (Accessed: 29 September 2023).

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