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The principle of rule of law in times of financial crisis – institutional analysis

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"When in 1955 it was thus proposed to establish a Common Market the people of Europe still remembered the war, and were willing to accept measures which could guarantee peace and freedom. Peace and freedom were in the minds of both those who had visions of a brotherhood of European nations and of those who wanted to secure prosperity by creating a wider market for trade and industry. During the years which have passed since then, the fears of tyranny and war have faded. The organization known as the European Communities is no longer seen as a preserver of peace and liberty. The prosperity which so many had hoped for has come and has gone away again. Today the former enthusiasm for a united Europe has evaporated."

Ole Lando – Speech delivered on the opening of the FIDE Congress on June 22, 1978

Contents

Abbreviations

BRRD – Bank Recovery and Resolution Directive

BVerfG - German Constitutional Court

Charter – Charter of Fundamental Rights of the European Union

CJEU – Court of Justice of the European Union

CMLR – Common Market Law Review

DGS – Deposit Guarantee Scheme

EBA – European Banking Authority

ECB – European Central Bank

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EDIS – European Deposit Insurance Scheme

EFSF – European Financial Stability Facility

EFSM - European Financial Stabilisation Mechanism

EIB – European Investment Bank

ELA – Emergency Liquidity Assistance

EMI – European Monetary Institute

EMU - Economic and Monetary Union

ESAs – European Supervisory Authorities

ESCB – European System of Central Banks

ESCB Statute - The Statute of the European System of Central Banks and of the European Central Bank

ESFS - European System of Financial Supervision

ESM – European Stability Mechanism

ESRB - European Systemic Risk Board

IA – Impact Assessment

IGA – Intergovernmental Agreement

IMF – International Monetary Fund

MoU – Memorandum of Understanding

MS – Member State(s)

NCB - National central bank(s)

OMT programme – Outright Monetary Transactions programme

p. – page(s)

para. – paragraph(s)

SRB – Single Resolution Board

SRM – Single Resolution Mechanism

SSM – Single Supervisory Mechanism

TEC - Treaty establishing the European Community

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

The Court – The Court of Justice, as part of CJEU

Summary

The financial crisis in the EU has been and still is a very researched topic. Because it affected negatively the assets of many individuals, the demand for academic text explaining the crisis is high. This is why, today there are countless books and articles dealing with the causes of the crisis and offering solutions how to overcome it.

In this particular field, economics and law are very interconnected and require the author of the academic work to be familiar with both. However, even though this thesis uses many economic terms, its purpose is to present a legal analysis of the crisis and examine the changes in EU law caused by it. Therefore, this thesis offers different view and supplements the books which analyse the EU financial crisis from an economic perspective.

As the topic suggests, the principle of rule of law is central to this thesis. This principle is important as it is the basis upon which the EU is built. However, similarly to fundamental rights, this principle is weakened in times of crisis. In this regard, there have been many cases before the Court of Justice concerning the legality of EU measures that intended to combat the financial crisis and its negative consequences. The approach of the Court towards these cases seems to differ from the approach to the cases pre-crisis. However, the principle rule of law must equally apply at all times, including times of crisis.

The principle of rule of law is examined from the perspective of the EU institutions and bodies – the European Central Bank, as the main actor in the economic and monetary union; the Commission, as the executive of the Union, the various EU agencies as fulfilling certain tasks and finally, the Court of Justice of the EU as judicial authority which oversees the uniform application and interpretation of EU law. Each of these institutions has its role in the way out of the crisis. Moreover, each institution while fulfilling its tasks must conform with the principle of rule of law. Accordingly, a separate chapter is reserved in this thesis for the ECB. It was the most engaged institution when it comes to the crisis, but at the same time the most criticized institution. Another chapter deals with all the other above-mentioned institutions and bodies, which are examined in different parts of that chapter.

These two chapters present the characteristics and historic development of the institutions or the bodies, but at the same time critically asses their actions and their role in the financial crisis. This is because every action of an EU institution or body affects the principle of rule of law and the overall legal system of the EU.

This thesis ultimately sheds light on the central points of discussion which are presented in point 1.3 below. It gives the reader information regarding the status of the principle of rule of law in mid- and post-crisis Europe.

1. Introduction

1.1 Background

The principle of rule of law is the core of every modern society. The EU has long ago surpassed the basic economic agenda and has evolved into a more of a political union[1] which required certain measures to be introduced for the purposes of legitimacy and legality. This was achieved most notably with the creation of the Charter of Fundamental Rights.[2] The Lisbon Treaty[3] states that the Treaties draw inspiration 'from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the *rule of law*. Moreover, Article 2 TEU states that, among others, the rule of law and human rights are values on which the EU is founded. In this regard, the Court has also stressed the importance of the rule of law, most notably in the *Les Verts* case[4] by stating that EU is based on the rule of law.

However, it is when one society considers such values to be only its *inspiration*, but not its *aspiration,* that those values become most fragile. It is when the citizens are not vigilant enough, because they consider such values to be ultimately achieved – that those values suffer the biggest threats. Therefore, the rule of law can never be taken for granted, no matter how advanced the society is. This is particularly relevant in times of crisis, when the authorities are willing to do 'whatever it takes'[5] to save the troubled entity from falling apart.

The EU started as an ambitious project.[6] Its founding fathers were aware that it cannot be achieved through a single plan and it would require time and dedication from all of its constituents. However, it is unlikely that they predicted the challenges it faces today. The geopolitical pressure, the social tensions and above all the economic uncertainty have given rise to Euroscepticism more than ever before. Some would even say that the EU and the Economic and Monetary Union are on the verge of collapsing.[7]

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[1] It can even be said that the EU is a federation *in statu nascendi* – see B. Koch and R. Eising, *The Transformation of Governance in the European Union* (Routledge, 1999) preface, p. 1.
[2] Charter of Fundamental Rights of the European Union, OJ 2012/C 326/2.
[3] Amendments to the Treaty to European Union and to the Treaty establishing the European Community, 17.12.2007 C 306/1, Article 1(1).
[4] Case 294/83 *Les Verts* [1986] EU:C:1986:166, para. 23.
[5] Speech by Mario Draghi, President of the ECB, at the Global Investment Conference in London 26 July 2012 https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html
[6] '[The ECSC] will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace' - The Schuman Declaration, 9 May 1950.
[7] Among which is the Otmar Issing, one of the architects of the monetary union http://www.centralbanking.com/central-banking-journal/interview/2473842/otmar-issing-on-why-the-euro-house-of-cards-is-set-to-collapse

Aside from such predictions, it is a fact that the financial crisis has affected the EU legal system as a whole. Without such crisis, a deeper EMU would not be a priority of the Juncker Commission.[8] The role of the Commission and the other EU institutions in the financial crisis is crucial, therefore will be assessed separately in different parts in this thesis. Moreover, the MS have also agreed to deepen the integration in the EMU and the internal market for financial services, under the pressure of the crisis. Even outside of the EU framework, the MS have taken action through international treaties.[9]

All this has led to a real gross domestic product growth rate of 2.2% in 2015, the highest since 2007,[10] and average government deficit of 2.4%, the lowest since 2008.[11] As the economy started growing, the unemployment rate fell to 8.1% in the beginning of 2017, the lowest since 2009.[12] From this it seems that the changes in the EU legal order are having the desired results, as the EU economy at present is similar to that of pre-crisis times.

However, such economic parameters are only one side of the coin. The other side is that crisis-induced measures may contradict well-established rules and principles. Furthermore, such measures are concerned with the long-term stability of the Union, the fruits of which are not to be seen in the present, or even in the foreseeable future. Because of this, on the one hand individuals may feel presently neglected by the Union and lose trust in it,[13] and on the other the MS may be reluctant to accept further integration and transfers of sovereignty to European level.

One indicator of this is the number of cases brought before the Court of Justice, which has risen proportionally as EU action increased. More importantly, the number of cases the subject-matter of which is approximation of laws has increased twice in 2013 compared to previous years. The number of such cases has remained high in the years that followed. [14] Also, there has been a significant increase in the cases concerning the economic and monetary policy of the Union, but more importantly those cases have been controversial and attracted a great amount of criticism.

This points to the fact that the way out of the financial crisis may not have been as smooth as the economic values show. The changes brought by the crisis exceed the realm of macroeconomics and go deep into the constitutional and integration processes. This certainly did not go unnoticed by the MS, particularly the UK, which challenged many of the measures which

[8] Commission Work Programme 2017, COM (2016) 710 final, p. 10.
[9] *Inter alia*, Treaty on Stability, Coordination and Governance D/12/2 2012 and Treaty establishing the European Stability Mechanism T/ESM 2012-LT 2012.
[10] Eurostat, Real GDP growth rate – volume.
[11] Ibid, General government deficit/surplus.
[12] Ibid, Unemployment by sex and age - monthly average.
[13] In 2013, the EU citizens' confidence in EU institutions was lowest in history, source: EU Barometer.
[14] Court of Justice of the European Union - Annual report 2016 judicial activity p.95.

redesigned the institutional architecture of the EU. Individuals also challenged certain acts which reformed the substantive law of the EU, especially those concerning bank resolution and the granting of state aid. Those acts have affected the legal and economic position of individual depositors and the way in which their investments are used when a bank fails. The depositors claimed that this was an infringement of the right to property and/or breach of the principle of proportionality and sought the Court to remedy such situation. These cases are going to be critically assessed in the text that follows.

It is normal to expect that the resolution of any serious crisis would require reforms in all fields of the law, including the basic principles falling within the constitutional domain. It is also normal to expect individual rights, such as that to property, to be limited when that would protect the economy and minimise the risk of systemic failure. Nevertheless, there is a set of core rules, mostly in the form of general principles and values, which cannot at any time be disregarded. The rule of law is one of those principles.

It is a common misperception that the official authorities, unlike individuals, always stay within the boundaries of the law and their practices are legal. However, this is far from the truth and therefore this thesis has the purpose of critically examining the actions of the EU institutions and the way in which they handled the financial crisis. This includes the Court of Justice whose judgments have a major impact on the future functioning of the EU and are, consequently, going to be presented and analysed.

1.2 Research method and outline

The thesis uses the legal dogmatic approach as a main research method. This method consists of presentation and interpretation of EU legal acts and case-law. In addition to positive EU law, old EU laws which are no longer valid and soft law are going to be referred to. The purpose of such an approach is to examine how the financial crisis has influenced EU law and how the principle of rule of law in the EU have been affected by this.

Apart from presenting the law as it exists – *de lege lata*, this thesis is going to critically assess the law and propose solutions for how the law can be improved – *de lege ferenda*. Constant improvement and adaptation are crucial for a smooth functioning of a dynamic field such as the EMU. Moreover, no two crises are the same and the defences built against the last known crisis do not protect from the next one, which remains unknown.[15] This is why it is particularly important for scholars and legal practitioners to present their views on how the law can be developed in the future. The present thesis adopts such an approach.

[15] H. Kalimo and M. Jansson, *EU economic law in time of crisis* (Edward Elgar Publishing, 2016) p. 26.

Lastly, the comparative method is going to be relied on as a supplementary method, mostly in comparing the EU with the United States of America. The latter has also had a financial crisis and has differently coped with it. Admittedly, the US functions differently and in this regard, the Court has stated that the EU differs from other public law entities, therefore cannot be compared to them.[16] Nevertheless, contrasting the EU with the US or other states could lead to more reasoned solutions and proposals, thus it is used in this thesis.

Regarding the outlook, this main part of this thesis begins with a chapter which examines the role of the ECB in the financial crisis and its measures to combat the crisis. The ECB is the main actor in the EMU and has had major influence in the development of the EU in the financial crisis. Also, from its inception, the status of the ECB has been uncertain, to the point that it has been considered a 'special' institution. This uncertainty seemed to have been put to rest by the *OLAF* case.[17] However, only the ECB possesses effective mechanisms to fight the crisis, thus becoming crucial to the resolution of the crisis. This led to the question regarding the status of the ECB to be opened once again, as discussed below. Consequently, the ECB is the first EU institution to be examined in this thesis.

In the second chapter of the main part, other instructions of the Union are presented, among which are the European Commission, the EU agencies and the CJEU. The Commission is the guardian of the Treaties that oversees the application of EU law[18] and proposes legislative initiatives to the Parliament and Council.[19] Moreover, the Commission can adopt non-legislative acts of general application.[20] On the other hand, the role of EU agencies, together with their number, is constantly on the rise.[21] Such agencies were also established in the financial sector and assisted the EU institutions in the financial crisis. Aside from this, there are many issues with the establishment of these agencies. Thus, a significant part of the second chapter of the main part focuses on EU agencies.

Lastly, judgments of the Court of Justice of the EU are presented and analysed. As expected, many of the issues encountered during the financial crisis had to be settled by the Court. Such judgments created precedents[22] and *de facto* affected the future functioning of the EU. It is important to examine how the Court coped with the difficult task of balancing different objectives. On the one hand, the ambitious institutions of the EU tried to 'save the Union' and on the other the overprotecting individuals tried to defend their rights. It follows that the Court

[16] Case C-359/92 *Germany v. Council* [1994] EU:C:1994:306, para.38. The European Court of Human Rights has also stated that the nature of the EU is 'sui generis', see ECtHR Judgment of 18/2/1999 – 24833/94 *Denise Matthews v. United Kingdom*, para. 48.
[17] Case C-11/00 *Commission v ECB* [2003] EU:C:2003:395.
[18] Article 17(1) TEU.
[19] Article 289(1) TFEU.
[20] Article 290(1) TFEU.
[21] Sometimes this is referred to as 'agencification' in the EU. See, Hofmann, Herwig C.H. and Morini, Alessandro, Constitutional Aspects of the Pluralisation of the EU Executive Through 'Agencification' (2012). Available at SSRN: https://ssrn.com/abstract=2031499
[22] Case 283/81 *CILFIT* [1982] EU:C:1982:335, para. 13.

played a decisive role in protecting the rule of law and fundamental rights in times of crisis, hence it is presented in end of the second chapter of the main part, before concluding the thesis.

1.3 Central points of discussion

As mentioned in point 1.1, the financial crisis has affected the EU legal system as a whole. This thesis revolves around the changes in the EU legal order brought by the crisis and their effect on the present and future functioning of the EU. More particularly, there are two main points and three additional questions inherent to this thesis. They are going to be discussed in the main part and a personal opinion will be given in the conclusion.

1. *The adaptation of the **EU regulatory framework** on the one hand, and the **EU institutional architecture** on the other, in order to survive the financial crisis and to prevent another crisis from occurring.*

This is the first central point that will be omnipresent in this thesis. It encompasses both the substantive law reform in the EU and the changes in the institutional structure of the EU, as both were needed for a successful recovery. These changes are not temporary and are intended to strengthen the EU and make it more resilient to future crises. Because of this, it can be said that 'the institutional and the constitutional balance of the EU has been irreversibly affected, for better or for worse.'[23]

2. *The principle of **rule of law** during and after the crisis.*

This is the second central point, which supplements the first. There is a causal link between these two points, as the changes in EU law certainly have an impact on the principle of rule of law. Ultimately only time will tell if the EU came out stronger from the crisis or if this was a wasted crisis. Nevertheless, this thesis examines whether those changes in EU law have a positive or negative impact on the principle of rule of law presently. Also, the thesis assesses what are the long-term and future effects in EU law, caused by such changes.

3. *How did the EU institutions **cope with the crisis** and was their action always **justified**?*

Apart from the substantive and the structural reforms, the EU institutions were and still are managing the financial crisis by using their Treaty-given prerogatives. This question concentrates on the executive institutions of the EU i.e. the Commission and the ECB. Both institutions have tried to alleviate the crisis by adopting measures in their respective field of competence. Some of those measures, however, have been criticized by legal practitioners and

[23] U. Neergaard, C. Jacqueson, J. H. Danielsen, J. P. Keppenne, *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (The XXVI FIDE Congress in Copenhagen, 2014, Vol.1) p. 179.

scholars and have even upset the Constitutional Courts of some MS. Therefore, any academic work regarding the financial crisis cannot bypass examining the EU crisis-management measures.

4. *Can the ECB be considered a **special institution** once again?*

The status of the ECB is another point which cannot be avoided. Since the Lisbon Treaty, the ECB is officially an institution of the Union.[24] However, it is undoubtedly a unique institution, as it is distinguished from other institutions by certain characteristics. This was, moreover, intensified by the financial crisis. Never before has the ECB been more important than today. Because of this, the debate regarding the status of the ECB may be opened once again. In this regard, this thesis will present a supported opinion.

5. *Has the Court of Justice become **more lenient** towards the EU institutions, because they were 'saving the Union'?*

Exceptional times call for exceptional measures, and such measures are often contested before the Court of Justice. In this regard, the Court held that the TFEU established a 'complete system of legal remedies',[25] which means that every natural or legal person concerned with an EU measure can have it reviewed. The legal routes for bringing the case before the Court, however, can be different. Closely linked with this system is Article 19(1) TEU. The text of the said Article states 'the Court ensures that in the interpretation and application of the Treaties the law is observed.' Thus, this last question incorporates two parts. Firstly, the procedural rules on standing and the Court's interpretation of these rules. These rules are important as they determine and limit access to justice. Secondly, the substantive rules and how the Court interpreted and applied them in particular cases before it. Basically, how the Court decided in the merits of the case, thereby establishing a precedent for future cases.

1.4 Reservations

The concept of financial crisis is broad and entails many elements which are practically impossible to thoroughly examine in one academic writing. This thesis concentrates on the legal implications of the financial crisis. The economic aspect of the crisis is briefly considered only as supplementary to the legal. Also, as the title suggests, this thesis will only analyse the impact of the crisis on the principle of rule of law on European level. The impact on the rule of law on national level is not assessed. However, the reactions of the MS to the crisis, which were discussed or moreover, adjudicated at Union level, are present in this thesis. Other fields of EU law, such as State Aid or the Court's admissibility rules, are analysed only through the prism of the financial crisis and as much as it is required for the purposes of this thesis.

[24] Article 13(1) TEU.
[25] Case C‑274/12 P *Telefónica SA v European Commission* [2013] EU:C:2013:852, para. 57.

2. European Central Bank

2.1 Institutional characteristics

The ECB was formally established with the Maastricht Treaty, in Article 4a of the TEC Consolidated version 1992.[26] However, the ECB and the euro did not just come out of the blue.[27] Point 2.3.1 of this thesis deals in detail with the establishment of the EMU. In this part, it suffices to say that the creation of a functional ECB was Stage 2 of the EMU. The predecessor of the ECB, the European Monetary Institute was created on 1 January 1994 and was a transitional body. The purpose of this body was to strengthen and adapt central bank cooperation and make the preparations required for the establishment of the ECB.[28] The first president of the EMI was Mr. Alexandre Lamfalussy, an economist who was part of many important processes within the EMU. The next president, Mr. Wim Duisenberg was the last president of the EMI and the first president of the newly-formed ECB. With the completion of its tasks and as State 2 was coming to an end in 1998, the EMI disappeared as a legal entity.[29] The physical assets and staff of the EMI moved to the ECB and thus, the ECB was fully functional from 1 June 1998.

In addition, a Protocol on the Statute of the ESCB and of the ECB[30] was annexed to the Maastricht Treaty.[31] This Statute regulates the function of the ECB in more detail and has the same legal value as the Treaties i.e. it is primary EU law. From then, the ESCB Statute was changed by the Treaty of Amsterdam,[32] the Treaty of Nice,[33] Council Decision 2003/223/EC,[34] and the Acts of Accession of other MS in the euro area.

For quite some time after its creation, the ECB was not an institution of the Union. The mention of the ECB is missing both from Article 4 TEC Consolidated version 1992 and Article 7 TEC Consolidated versions 1997, 2002 or 2006. Instead, the ECB is mentioned in Article 4a TEC 1992 and Article 8 TEC 1997 and later versions. This was also the case with the aborted Constitutional Treaty,[35] which did not mention the ECB as one of the main institutions of the

[26] OJ C 224/5, 31.8.1992, p. 6–79. The European Investment bank was established already with the Treaty of Rome Article 129, but amended with the Maastricht Treaty.
[27] I. Maes and F. Moss, Progress through crisis? Proceedings of the conference for the 20th anniversary of the establishment of the European Monetary Institute (2014) p. 71.
[28] Article 109f(2) TEC Consolidated version 1992.
[29] Ibid, Article 190l(2).
[30] OJ C 326/235, 26.10.2012.
[31] Article 106(4) TEC Consolidated version 1992.
[32] OJ C 340, 10.11.1997, p.1.
[33] OJ C 80, 10.3.2001, p. 1.
[34] OJ L 83, 1.4.2003, p. 66.
[35] Treaty establishing a Constitution for Europe, OJ C 310, 16.12.2004, Article I-19.

Union. This ambiguity and vagueness led to different opinions regarding the status of the ECB. Some scholars even considered the ECB to be a 'special' institution.[36]

The Court's interpretation of the status of the ECB, given in the *OLAF* case[37] in 2003, partly settled this uncertainty. Thus, during this pre-Lisbon period the ECB was 'a body, office or agency [which] owes its existence to the EC Treaty'[38] and which 'falls squarely within the Community framework'.[39] After this ruling, there was not much space left for debate regarding the position of the ECB in the framework of the Union. However, the financial crisis, and the role of the ECB in it, seems to have opened this debate again. This is analysed in point 2.1.4 of this thesis in detail.

The ECB was expressly mentioned as an institution of the Union by the Treaty of Lisbon, in Article 13(1) TEU. Moreover, paragraph 2 of the said Article made the ECB subject to the principle of conferral and institutional balance. However, the ECB has two significant characteristics, which the other institutions lack. Those are separate legal personality and constitutionally-protected independence, which are discussed below. In addition, the democratic accountability of the ECB is examined, as it is a complementary concept to its independence. These characteristics form the specific status of the ECB, which it is examined at the end.

2.1.1 Legal personality

Firstly, the ECB has separate legal personality, both in the international sphere and in relation to the MS or other EU institutions. This is established in Article 282(3) TFEU and Article 9.1 ESCB Statute. Contrary to this, the other institutions of the Union do not enjoy separate personality from the Union. For example, the Commission represents the whole EU, as the Union has legal personality accorded by Article 47 TEU. In this regard, it is worth mentioning that the EIB also has distinct legal personality, by virtue of Article 308 TFEU.

This led some scholars to consider that a separate legal personality is indispensable for one banking authority to fulfil its tasks, as central banks need to be able to acquire rights and assume obligations themselves. They also need to be able to enter into international treaties. Thus, the case of the ECB is nothing out of the ordinary.[40] In this regard, Zilioli and Selmayr claim that the international legal personality of the ECB, as is normally the case with central banks, is derivative, limited and relative.[41] The first means that the personality is *derived* from the State's legal personality and it is *limited* because it exists only for fulfilment of specific tasks accorded to

[36] T. Tridimas, Community Agencies, Competition Law and ECSB Initiatives on Securities Clearing and Settlement (2009) Yearbook of European Law Volume 28, p. 216. Also, R. Lastra, *Legal Foundations of International Monetary Stability* (Oxford, 2006) chapter 7.
[37] Case *OLAF* (n 17).
[38] Ibid, para. 91.
[39] Ibid, para. 92.
[40] R. Torrent, Whom is the European Central Bank the central bank of?: Reaction to Zilioli and Selmayr, CMLR 36 (Kluwer Law, 1999) p. 1233.
[41] C. Zilioli and M. Selmayr, *The Law of the European Central Bank* (Hart Publishing, 2001) p. 180.

it by the State. Lastly, it is *relative* since it is conditional on recognition by other subjects of public international law.

However, the same authors claim that this separate legal personality makes the ECB an 'organization of Community law'[42] which is on equal footing with the EU or Euroatom. Thus, the ECB is not within the EU framework,[43] as its legal personality goes beyond that of the EIB, which is clearly an EU body. This academic debate is the subject matter of part 2.1.3 of this thesis.

On the other hand, neither the ESCB nor the Eurosystem have a legal personality. They are consisted of 29 and 20 separate legal entities, respectively: the ECB and the NCB, who are acting as their 'agents'. It is interesting to draw a parallel with the US here. The Federal Reserve System in the USA, similarly to the ESCB, is not a legal entity. It consisted of Board of Governors and 12 Federal Reserve Banks, who have legal personality.[44] In this regard, the US and the EU have a very similar structure of their monetary authorities.

2.1.2 Independence

Secondly, the ECB is independent from other institutions or bodies of the Union and from the MS, as stated in Article 130 TFEU,[45] as well as Article 7 of the ESCB Statute. The fact that the independence of the ECB is protected by the TFEU means that it is of constitutional value and is outside of the reach of the EU legislator. This express reference of ECB's independence in the TFEU is a result of the German, or more particularly, ordoliberal influence in the formation of the ECB and the ESCB Statute.[46] On the other hand, France always advocated a politically subordinated ECB.[47] The independence of the ECB has three aspects.

Firstly, the ECB enjoys institutional independence. This aspect of the independence indicates that the ECB shall not 'seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body.'[48] Moreover, 'Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence'[49] by not seeking to influence the ECB in the performance of its tasks. Thus, the requirement of institutional independence is *symmetrical* - it does not only prohibit the ECB from taking or seeking instructions, but also requires the authorities of the MS and the

[42] C. Zilioli and M. Selmayr, The constitutional status of the European Central Bank, in CMLR 44, p. 358.
[43] Ibid, p. 366.
[44] R. Lastra and L. Satragno, The Role of Central Banks in Monetary Affairs: a Comparative Perspective in T. Cottier, R. Lastra and C. Tietje (eds), *The Rule of Law in Monetary Affairs: World Trade Forum* (Cambridge University Press, 2014) p. 93.
[45] Interestingly, Article 130 TFEU also protects the independence of the NCB, even though it is uncommon for the TFEU to intervene in national legislation.
[46] In the 1990s, when the ECB was created, the principle of central bank independence was not yet established. Many of the NCB were under the control of the governments. See, V. Berg, *The Making of the Statute of the European System of Central Banks – an Application of Checks and Balances* (Rozenberg Publishers, 2005) p. 23-32.
[47] *Inter alia,* Nikolas Sarkozy's speech "Pour la France du travail" in Agen on 22 June 2006.
[48] Article 130 TFEU.
[49] Article 282(3) TFEU.

EU to refrain from seeking to exert influence.[50] Moreover, the independence has two aspects – *instrument* and *goal* independence. The former means that the ECB through the ESCB independently decides how and through which instruments to implement the monetary policy of the Union. The latter refers to the fact that the ECB also defines the monetary policy of the Union, in accordance with Article 127(2) TFEU. For example, the ECB does not only maintain price stability, but also defines what is price stability - keeping the year-on-year increase in the Harmonised Index of Consumer Prices for the euro area of below 2%.[51] In this way, the ECB is truly independent both from the institutions of the Union and the governments of the MS.

Secondly, the ECB is financially independent, as it has its own budget.[52] This means that the ECB can finance its activities itself and is not dependant on the EU budget. It is the only institution in the Union with its own capital. This financial independence is further protected by the prohibition of monetary financing in Articles 123(1) TFEU and Article 21.1 of the ESCB Statute. In this regard, the ECB cannot guarantee for the liabilities of the institutions of the EU or the MS, for example by purchasing debt instruments, as this can jeopardize the independence of the bank. This was the core of the *Gauweiler* case,[53] which will be presented later.

Thirdly, the personal independence of the members of the Executive Board of the ECB is protected by several Treaty provisions. To begin with, Article 283(2) TFEU prescribes that the members of the Executive Board are selected 'from among persons of recognised standing and professional experience in monetary or banking matters'. Thus, political affiliation cannot be considered. The same Article establishes that the term of office is eight years and is not renewable.[54] Both characteristics are unique. The 8-year mandate is the longest among the EU institutions.[55] The Commissioner's[56] and members of Parliament[57] mandate is five years, and the mandate of the Judges of the Court of Justice[58] and Members of the Court of Auditors[59] is six years. This assures that political cycles and changes do not influence the members of the Executive Board of the ECB and that they can be consistent with their tasks. On the other hand, the Board members' term of office is the only one which is not renewable.[60] This means that they will not "hope" for renewal of their term of office from the European Council, by conducting favourable policies at the end of their mandate. However, Zilioli notes that after their mandate

[50] C. Zilioli, The Independence of the European Central Bank and Its New Banking Supervisory Competences, p.11 in Dominique Ritleng*, Independence and Legitimacy in the Institutional System of the European Union* (Oxford, 2016).
[51] The definition of price stability - https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html (Accessed on 20.5.2017)
[52] Article 28 of the ESCB Statute.
[53] Case C-62/14 *Gauweiler* [2015] EU:C:2015:400.
[54] Also, confirmed in Article 11.2 ESCB Statute.
[55] Not including the members of the European Council and Council of the EU, as they are consisted of representatives of the national governments.
[56] Article 17(3) TEU.
[57] Article 14(3) TEU.
[58] Article 253 TFEU.
[59] Article 286(2) TFEU.
[60] Again, excluding the European Council and Council.

ends, the Board members would still need support for their next position, thus their independence may be jeopardized towards the end of the term. For this purpose, she proposes minimum age of appointment.[61] Finally, only the Court of Justice can dismiss Board members at the request of the Governing Council or the Executive Board and only because of exhaustive reasons.[62] From this, it is clear that the independence of the ECB is highly valued and protected.

In this regard, it is useful to compare the independence of the ECB with that of the Commission, as both are institutions which do not serve national, but instead Union interests. Article 245 TFEU prohibits the MS from seeking to influence the Commission, however there is nothing regarding the influence of other Union institutions. Moreover, the Commission is financed by the EU budget and the term of office of the Commissioners is five years and renewable. From this, it can be seen that the independence of the ECB was essential for the Treaty drafters, who regulated it in detail in the TFEU itself, thereby giving it constitutional character.

On the other hand, the level of statutory independence does not always reflect the level of actual independence of the central bank.[63] Admittedly, a central bank cannot act in isolation from other policies. The members of the board of the central bank are necessarily influenced by the events in their country. Similarly, members of the ECB Governing Council must at some point come in contact with national representatives or representatives of EU institutions. This is even more relevant today when the ECB, as will be seen below has different roles within the EU legal order. This unavoidably affects the independence of the ECB in practice, as will be seen in the next points of this thesis.

Nevertheless, the independence of the ECB is functional, as held by the Court in the *OLAF* case.[64] This means that the ECB's independence is not an end in itself. Instead it is serves the purpose of achieving the objectives and fulfilling the tasks assigned to it by the Treaties. The abovementioned case concerned the jurisdiction of the European Anti-Fraud Office (OLAF) which was established by the Commission. The ECB, considering that OLAF would hinder its independence, adopted Decision 1999/726/EC which established an internal body responsible for combating fraud within the ECB, thereby preventing OLAF from exercising its investigatory powers over it. The outcome of the case was the annulment of Decision 1999/726/EC.

The Court began by acknowledging the importance of the ECB's independence.[65] However, in paragraph 135 the Court upheld the claim of the Commission that such

[61] C. Zilioli, Commentary to Article 11 of the Statute, in H. von der Groeben, J. Schwarze and A. Hatje (eds), *EUV-AEUV-Kommentar* (7th edn, 2014).
[62] Article 11.4 of the ESCB Statute.
[63] F. Amtenbrink and J. De Haan, The European Central Bank: An independent specialized organization of Community law – A Comment, CMLR 39, p. 72. See also, A. Cuckierman, *Central Bank Strategy, Credibility and Independence* (Cambridge, 1992), p. 369.
[64] Case *OLAF* (n 17).
[65] Ibid, para. 130-132.

independence is strictly functional and is limited to the performance of the specific tasks conferred upon the ECB by the TFEU and the ESCB Statute. That paragraph is very significant for this part of the thesis, but also relevant for part 2.1.4 of this thesis. Therefore, it is reproduced in original:[66]

> *"By contrast, as the Commission and the interveners have rightly pointed out, recognition that the ECB has such independence does not have the consequence of separating it entirely from the [European Union] and exempting it from every rule of [Union] law. First, it is evident from Article [127(1) TFEU] that the ECB is to contribute to the achievement of the objectives of the [European Union], whilst [Article 13(2) TEU] states that the ECB is to act within the limits of the powers conferred upon it by the [TFEU] and the ESCB Statute. Second, as the Commission has observed, the ECB is, on the conditions laid down by the [TFEU] and the ESCB Statute, subject to various kinds of [Union] controls, notably review by the Court of Justice and control by the Court of Auditors. Finally, it is evident that it was not the intention of the Treaty draftsmen to shield the ECB from any kind of legislative action taken by the Community legislature, as is clear from, inter alia, Article [127(6) TFEU], Article [129(3) and (4) TFEU] and Article [132(1), first indent, and (3) TFEU], which are cited by the Commission."*

The independence of the ECB must be seen through the prism of its *telos.* The ECB is independent because it has specific tasks conferred upon it by the Treaties, and the independence assures that that those tasks are fulfilled professionally. Therefore, the ECB cannot benefit from its independence outside of its tasks and cannot shield itself from any unwanted EU control. There is much more to be said regarding the independence of the ECB, however it goes outside of the scope of this thesis.

Independence does not mean *isolation* from other EU institutions. In this regard, many independent bodies are accountable before the public, usually before a representative body of the citizens, such as the parliament. As a counterweight to its independence, the democratic accountability of the ECB is examined next.

2.1.3 Democratic accountability of the ECB

Because the ECB was created as a hyper-independent central bank with a narrow mandate to maintain price stability, democratic accountability was not given particular attention at the time of its creation. Also, as stated in the previous point, the ECB has not only instrument, but also goal independence. The latter makes it even harder to assess the ECB's work, since a tangible, quantified objective is missing in the Treaties. Instead that objective is set by the ECB

[66] With Lisbon Treaty renumbering and changes in terminology.

itself. Because of this, the accountability of the ECB plays a subsidiary role in its functioning.[67] Nevertheless, this could have been justified when the ECB's role in the Union was strictly technical and confined by the narrow Treaty-given mandate.

However, this changed with time and the need for an accountable ECB increased. Firstly, the ECB acquired powers going far beyond its initial narrow mandate and today, as will be seen in point 2.3 of this thesis, is one of the *most influential institutions* in the Union. Having this in mind, the principle of rule of law requires that EU institutions are accountable and transparent in their work.[68] Therefore, a situation where an EU institution receives additional powers while the level of accountability of that institution remains the same, undermines the principle of rule of law. Secondly, the accountability of the ECB is a source of *democratic legitimacy*, which the ECB clearly lacks. This is because the ECB is a technical institution i.e. an institution consisted of experts.[69] On the contrary, other EU institutions are consisted either of national representatives chosen through national election[70] or of EU representatives chosen through EU election.[71] Either way, the involvement of the citizens though elections provides for the democratic legitimacy of these institutions.[72] In this regard, accountability seen as a dialogue between a technical institution such as the ECB and the democratically elected institutions, is the only mechanism for ensuring the democratic dimension of the ECB.[73] Because of these reasons, the accountability of the ECB is more important today than ever before.

The regulation of the ECB's accountability in primary EU law has remained the same since its establishment. Formerly Article 113(3) TEC and now Article 284(3) TFEU require the ECB to submit an annual report on the activities of the ESCB to the Parliament, Council, Commission, and European Council. Special accent is put on the report before the Parliament and Council, as the President of the ECB itself presents that report to them and afterwards a general debate may be held on that basis. This Article also provides for the possibility of participation of the President of the Council and a Member of the Commission in meetings of the General Council of the ECB. In addition, all the members of the ECB Executive Board may be heard by the Parliament, on their own initiative or on the request of the Parliament. The ESCB Statute, on the other hand, provides for stricter reporting obligations. Apart from the annual report, the ECB is to publish quarterly

[67] F. Amtenbrink, The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank (Hart Publishing, 1999) p. 359.
[68] I. Österdahl, Transparency as Part of a European Rule of Law in W. Schroeder (ed.), *Strengthening the Rule of Law in Europe From a Common Concept to Mechanisms of Implementation* (Hart Publishing, 2016), p. 93.
[69] See Article 283(2) TFEU. Also, see point 2.1.2 of this thesis regarding their personal independence.
[70] See Article 15(2) and 16(2) TEU – members of the European Council and Council of the EU are national representatives. See also, Article 17(7) and 19(2) TEU - members of the Commission and the CJEU are not national representatives, but are nevertheless proposed by national governments.
[71] European Parliament, see Article 14(2) and (3) TEU.
[72] Nevertheless, some authors claim that the EU as a whole lacks democratic legitimacy. See *inter alia,* W. Sadurski, Democratic Legitimacy of the European Union: A Diagnosis and Some Modest Proposals in *Polish Yearbook of International Law 32* (2012), p. 21.
[73] Chiara Zilioli, The Independence of the European Central Bank and Its New Banking Supervisory Competences, p. 8 in D. Ritleng*, Independence and Legitimacy in the Institutional System of the European Union* (Oxford, 2016).

reports on the activities of the ESCB[74] and a weekly consolidated financial statement of the ESCB.[75] Furthermore, Article 263 TFEU provides for the jurisdiction of the Court of Justice and Article 287 TFEU for the jurisdiction of the Court of Auditors, even though the latter's jurisdiction is limited by Article 27 ESCB Statute only to examining the operational efficiency of the management of the ECB. In this regard, the ECB considered that there is 'a well-structured and functioning framework for holding the ECB accountable'.[76]

Regarding the regulation of the ECB's accountability in secondary EU law, the SSM Regulation[77] basically brings the supervisory tasks of the ECB within the scope of Article 284 TFEU and goes even further, as it includes the national parliaments of the euro area MS.[78] This Regulation states that the ECB is to submit to the Parliament, Council, Commission, Eurogroup and national parliaments of the euro area MS an annual report on the fulfilment of its supervisory tasks.[79] Before the Parliament and Eurogroup, this report is presented by the Chair of the ECB Supervisory Board. The Chair can also be heard on the execution of its supervisory tasks by the Eurogroup. Moreover, the Court of Auditors takes into account the supervisory tasks of the ECB when examining the operational efficiency of the management of the ECB. Apart from these requirements in law, the ECB has established the practice of publishing the minutes of Governing Council meetings since 2015 and holding a monthly press conference with the ECB President and the Vice-President.[80]

This shows that certain steps have been taken for improving the accountability of the ECB, even if that was done through secondary EU law or voluntarily by the ECB itself. However, it seems that this is not sufficient as there are still concerns about the accountability of the ECB after it has received many new powers during the financial crisis. In this regard, Transparency International EU states that there is much room for improvement of the accountability and transparency of the ECB, especially because the extraordinary crisis measures have stretched 'the ECB's mandate to breaking point'.[81] Moreover, accountability in practise is reduced to answerability, as the ECB's independence and broad mandate prevent the other EU institutions, including the Court, from effectively overseeing or controlling what the ECB does.[82] Particularly the participation of the ECB in the ESM, supplemented by the power of the ECB to stall the ELA increase, has the consequence of the ECB deciding on the country's membership in the euro area.

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[74] Article 15.1 ESCB Statute.
[75] Article 15.2 ESCB Statute.
[76] ECB Monthly Bulletin November 2002, The Accountability of the ECB http://www.ecb.europa.eu/pub/pdf/mobu/mb200211en.pdf (Accessed on 26.04.2017)
[77] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions OJ L 287, 29.10.2013, p. 63.
[78] Article 21 SSM Regulation.
[79] Article 20(2) and 21(1) SSM Regulation.
[80] C. Zilioli, The Independence of the European Central Bank and Its New Banking Supervisory Competences, p. 9 in D. Ritleng*, Independence and Legitimacy in the Institutional System of the European Union* (Oxford, 2016).
[81] Transparency International EU Report, Two sides of the same coin? Independence and Accountability of the ECB (2017), p. 4.
[82] Ibid, p. 42-48.

This is inherently a political decision and needs to be assessed as such, and not as a technocratic decision.[83]

This problem and other problems of insufficient democratic accountability of the ECB are assessed in detail in other points of this thesis, especially the point which examines the roles of the ECB in the financial crisis. It will be seen that many of the powers of the ECB acquired during the crisis, lack not just accountability, but also preciseness and because of this, leave large discretion to the ECB. The only possible justification is that the crisis resolution required swift action and broader discretion in the hands of the ECB. However, it remains to be seen whether these problems will be solved once the crisis is completely over or will the ECB remain a very powerful institution with very little accountability and legitimacy.

The institutional characteristics of the ECB presented above show that the ECB is indeed a unique EU institution. However, that unique status has often been over- or underestimated by academics and in practice. This led to an intense and, at times, personal debate regarding the status of the ECB. Consequently, the status of the ECB is analysed next.

2.1.4 The status of the ECB

The legal status of the ECB has been a particularly debated topic between 1999 and 2002, with distinguished academics and practitioners having diametrically opposite views. Moreover, the debate was not purely academic or terminological, as the ECB itself took a position in the debate and acted accordingly in practice. Such debate resulted in many articles being published, mostly in Common Market Law Review, and one judgment of the Court of Justice. After the Court has given its official view on the status of the ECB, the debate significantly decreased in intensity. However, the financial crisis may have opened the debate once again.

Starting from the establishment of the ECB, there was legal uncertainty regarding its status, as it was not defined in the Treaties until the Lisbon Treaty. The roots of this uncertainty are to be found even before the creation of the ECB. During the Maastricht Treaty negotiations, there were proposals to form another 'fourth pillar' for dealing with economic and monetary matters, in addition to the three existing pillars.[84] In this way, the ECB would have been established with a 'Treaty on EMU' and would have been far more distinct from the EU than now. However, the EMU ended up in the first EC pillar, being regulated in the then newly created TEC and only exceptionally in the TEU. This was indeed, the correct choice, as the first pillar was governed by the Community integration method[85] and was independent from any political influence, unlike the other pillars, which is particularly important for the EMU.

[83] Ibid, p. 53
[84] C. Zilioli and M. Selmayr, The European Central Bank: An Independent Specialized Organization of Community Law in CMLR 37, p. 601.
[85] P. Craig and G. de Burca, *EU Law Text, Cases and Materials* (Oxford, 2015) p. 11.

When the EMU and the ECB were formally created, monetary sovereignty was transferred from national to supranational level, perhaps even 'irrevocably'[86] transferred. In this regard, the question of the status of the ECB is intrinsically linked with the question of the *holder of the monetary sovereignty*. Some consider that the holder of monetary sovereignty is not the ECB, but the Union in the form of the Eurosystem.[87] Because of this, the ECB was considered to be 'an independent agency for the performance of monetary policy attributed to the Community level of government and for the execution of several other tasks within the overall price-stability objective'.[88] According to these views, the ECB is fully subordinated to the EU - the conduct of monetary policy inherently belongs to the EU, but the EU decided to entrust such task to the ECB. This view seems to be extreme, especially today when the ECB is an institution of the Union. Also, as Zilioli rightly points out, delegation of powers means that the principal can always revoke the delegation and can instruct the agent on the execution of its mandate.[89] Clearly, this is not the case with the ECB.[90] Moreover, the tasks and the powers of the ECB are given by primary EU law.[91] Having this in mind, it can hardly be maintained that the EU delegated the conduct of monetary policy to the ECB.

A more moderate view is given by Torrent who states that the ECB is in no way different from other central banks, as many central banks in the world are independent and have legal personality, but are nonetheless central banks of the country in question. [92] Moreover, many bodies within the EU have legal personality, similarly as the ECB. In this regard, the ECB is, in accordance with common sense and legal interpretation, the Central Bank of the EU.[93]

Contrary to this, the view that the MS transferred their sovereignty in monetary matters to the ECB directly, gave rise to the idea that the ECB is a 'Community within the Community'[94] or 'an independent specialized organization of Community law'[95] with Selmayr being the most prominent advocate of such ideas.[96] These views are based on the specific institutional

[86] This term is used by both the TFEU and the ESCB Statute, see Article 140(3) TFEU and Article 46.3 and 49 ESCB Statute.
[87] R. Lastra and L. Satragno, The Role of Central Banks in Monetary Affairs: a Comparative Perspective in T. Cottier, R. Lastra and C. Tietje (eds), *The Rule of Law in Monetary Affairs: World Trade Forum* (Cambridge University Press, 2014) p.98.
[88] R. Smits, *The European Central Bank in the European Constitutional Order* (Eleven International Publishing, 2003) p. 24.
[89] C. Zilioli, The Independence of the European Central Bank and Its New Banking Supervisory Competences, p. 61 in D. Ritleng*, Independence and Legitimacy in the Institutional System of the European Union* (Oxford, 2016).
[90] See point 2.1.2 of this thesis.
[91] Article 127 and 282 TFEU. Also, Article 2 and 3 ESCB Statute.
[92] R. Torrent, Whom is the European Central Bank the central bank of?: Reaction to Zilioli and Selmayr, in CMLR 36 (Kluwer Law, 1999) p. 1234.
[93] Ibid, p. 1231.
[94] C. Zilioli and M. Selmayr, The external relations of the euro area: legal aspects in CMLR 36*,* p. 285.
[95] C. Zilioli and M. Selmayr, The European Central Bank: An Independent Specialized Organization of Community Law in CMLR 37*,* p. 621.
[96] However, not the only one. See, B. Dutzler, *The European System of Central Banks: An Autonomous Actor? The Quest for an Institutional Balance of EMU* (Springer, 2003), p. 70.

characteristics of the ECB, presented previously in this thesis. Also, support for such views can be found in drawing a parallel with the EIB. The status of EIB has also been subject to debate but to a lesser extent than the ECB. In this regard, AG Mancini defined the ECB as 'a specific and autonomous segment of the organizational machinery of the Community'.[97] The ECB is also liable itself for the damage caused in the performance of its duties,[98] which is a consequence of its financial independence. Previously, Article 288(3) TEC was not precise and could be interpreted in such a way that the EU was liable for the damage caused by the ECB. Lastly, the ECB has legislative powers. It can adopt regulations necessary for its tasks, decisions and recommendations and opinions,[99] which is stressed by Selmayr.[100]

In situations such as this, when there are two extreme positions, the objective reality usually is something in between those two positions. This was indeed the case here, as the official position of the Court in the *OLAF* case was that the ECB, even though independent and with separate legal personality,[101] cannot be separated entirely from the EU.[102] Even though the attitude of the Court in *OLAF* was more in favour of those who claim that the ECB is an EU body, the Court however, did not expressly state that the ECB is Central Bank *of the EU,* unlike AG Jacobs in the same case.[103] Moreover, in another judgment delivered on the same day as *OLAF,* the Court explicitly stated that the EIB is 'a Community body',[104] a notion which is not used when it comes to the ECB in the *OLAF* case.

Because of this, even after the judgment in *OLAF,* the academic debate was not settled. Selmayr continued to claim that the ECB is an 'independent specialized organization of Community law' and considered the *OLAF* case to confirm the special status of the ECB.[105] Nevertheless, with the Lisbon Treaty the ECB became a Union's institution, thus it seems that Selmayr's claims of the ECB being an organization can no longer be maintained.

However, as will be seen below, the ECB obtained other roles through the crisis. Because of this, it has become one of the most influential EU institutions, which led some practitioners, especially German, to consider it 'too powerful'.[106] The financial crisis has undoubtedly strengthened the role of the ECB in the EU. Indeed, the actions of the ECB have never before

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[97] AG Mancini Opinion in Case 85/86 *Commission v Board of Governors of the European Investment Bank* [1988] EU:C:1988:110, para. 13.
[98] Article 340 TFEU and Article 35.3 ESCB Statute.
[99] Article 132 TFEU and Article 34.1 ESCB Statute
[100] C. Zilioli and M. Selmayr, The European Central Bank: An Independent Specialized Organization of Community Law in CMLR 37, p. 620.
[101] Case *OLAF* (n 17), para. 130-132.
[102] Ibid, para. 135.
[103] Opinion of AG Jacobs in Case C-11/00 *Commission v ECB* [2002] EU:C:2002:556, para.60.
[104] Case 15/00 *Commission v. EIB* [2003] EU:C:2003:396, para. 75, 98 and 123.
[105] C. Zilioli and M. Selmayr, The constitutional status of the European Central Bank, in CMLR 44, p. 365.
[106] Isabel Schnabel, member of the German Council of Economic Experts (Five Wise Men), stated the ECB has become too powerful http://www.breitbart.com/london/2016/05/15/european-central-bank-powerful-admits-german-economist/ (Accessed on 20.04.2017)

been so important for the EU. However, the rule of law requires there to be limits to every action and that every institution, regardless of its status or importance, is constrained by the law. The rest of this thesis explores if it is so, in the case of the ECB.

2.2 Internal organisation of the ECB

The ECB is composed of four internal bodies. Those are: the Governing Council, the Executive Board, the General Council and the Supervisory board. The last one was established in 2013, when the ECB received new powers under EU law. Today, the ECB has two mutually detached tasks: conducting the monetary policy of the Union[107] and prudential supervision over significant credit institutions.[108] Therefore, the text that follows is divided in two points.

2.2.1 Internal bodies concerned with monetary policy

The main decision-making body in the ECB is the Governing Council. This body conducts the monetary policy of the Union by adopting decisions and guidelines, for example decisions for setting interest rates or minimum reserves. It is composed of the six members of the Executive Board and the governors of the NCB of the 19 euro area countries,[109] who vote according to a rotation system. According to this system, the euro area MS are ranked according to the size of their economies and financial sector.[110] The Governors from countries ranked first to fifth, at the time of the writing of this thesis - Germany, France, Italy, Spain and the Netherlands, comprise the first group and share four voting rights. The others 14 Governors comprise the second group and share 11 voting rights. The monthly rotation is then applied within these two ranked groups of MS. The 6 executive members of the Governing Council always have a right to vote. This system is very similar to the Federal Reserve in the USA.[111] However, the strict voting system is never applied in practice. Instead, the decisions of the Governing Council are taken on consensual basis.[112] The ESCB Statute states that the meetings are confidential, even though they may be made public.[113] In this regard, the ECB started publishing the minutes of Governing Council meetings in 2015 and there is a monthly press conference with the President and the Vice-President.

[107] Article 282 TFEU. The ECB does this together with the NCB of the MS whose currency is the euro.
[108] Article 4 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM Regulation), OJ L 287/63.
[109] Article 10.1 ESCB Statute.
[110] Ibid, Article 10.2.
[111] The Federal Reserve System Purposes & Functions (Federal Reserve publications, 2016) p. 13.
[112] D.J. Powell, *The Trader's Guide to the Euro Area: Economic Indicators, the ECB and the Euro Crisis* Bloomberg Publishing, 2013) p. 84.
[113] Article 10.4 ESCB Statute.

The Executive Board manages the day-to-day business of the ECB and implements the monetary policy, as defined by the Governing Council. It is composed of President, Vice-President and four other members. Regarding the composition of this body, see point 2.1.2 of this thesis.

The General Council is an advisory body, composed of the governors of the NCB of all MS and the President and Vice-President of the ECB. The main purpose of this body is to enable the MS outside of the euro area to participate in the EMU. This internal body will be dissolved once all EU Member States have introduced the single currency.[114]

2.2.2 Internal bodies concerned with prudential supervision

This part deals only with the characteristics of the Supervisory Board. Many issues in this part are further elaborated and supported in the point Supervisory role of the ECB. With the adoption of the SSM Regulation in 2013, the ECB was conferred powers in the field of prudential supervision of credit institutions. For this reason, a Supervisory Board was established, as an internal[115] but independent[116] body of the ECB. Today the ECB, through the Supervisory Board, is a central body in the Single Supervisory Mechanism. Apart from establishing the Supervisory Board, the SSM Regulation also established substantive prudential rules which are enforced by either the Supervisory Board or by the national supervisory authorities. This was intended to be a permanent solution for 'the fragmentation of the financial sector'[117] which threatened the single currency and the internal market. This Board is consisted of Chair, Vice-Chair, four ECB representatives and representatives of national supervisors.

However, the ECB through the Supervisory Board supervises only significant credit institutions, the significance of a bank being defined by various criteria, most importantly the value of the bank's assets.[118] This is a result of a German-French compromise in the drafting of the Regulation, with Germany preferring to keep the supervision over its local banks.[119] The ECB currently supervises 126 credit institutions[120] and the total number of credit institutions in the euro area is 5002.[121] Those 126 banks, however, cover 85% of the total banking assets in the euro area.[122]

[114] Article 141(1) TFEU.
[115] Article 26(1) SSM Regulation.
[116] Ibid, Article 19.
[117] Recital 2 SSM Regulation Preamble.
[118] Article 6(4) SSM Regulation.
[119] J. Schild, Leading together or opposing each other? Germany, France and the European banking union (2015) Paper presented for the 14th Biennial Conference of the European Union Studies Association, Boston, p.17.
[120] Full list of supervised entities (as of 15 November 2016 - December update), available at www.bankingsupervision.europa.eu
[121] Number of monetary financial institutions (MFIs) in the euro area: February 2017, available at www.bankingsupervision.europa.eu
[122] EU regulatory outlook (PricewaterCoopers, 2014) p. 1.

The adoption of common prudential rules and the creation of a centralised body which would apply those rules was an imminent step in the process of harmonisation of the internal market for financial services. The SSM undoubtedly reduces the systemic risk and the likelihood of bank failure due to reckless investments. However, there are problems with how the decision-making process is carried out.

Firstly, it is the Governing Council of the ECB which formally adopts the supervisory decisions. The Supervisory Board can only propose draft decisions.[123] However, supervision is supposed to be always separated from monetary policy.[124] For this purpose, there are 'strictly separated meetings and agendas' of the Governing Council[125] where supervisory issues are discussed. Thus, the Governing Council, the same body with same composition as in monetary policy, is to adopt supervisory decisions, setting any monetary policy concern aside when doing so. It seems that this concept is impossible to materialize in practice.

Secondly, the Governing Council of the ECB adopts the supervisory decisions by applying 'reverse majority voting'[126] - the decision is adopted as long as the Governing Council does not object to its adoption by simple majority.[127] In practice this means that many decisions proposed by the Supervisory Board will be "rubber stamped" by the Governing Council, since there is no formal voting requirement for their adoption. Such a procedure of *tacit approval* is clearly at odds with Article 10.2 ESCB Statute, which states that 'save as otherwise provided for in this Statute, the Governing Council shall act by simple majority of the members having a voting right'. The ESCB Statute does not provide for exemptions regarding the adoption of supervisory decisions. This makes the SSM Regulation, as secondary EU law, in contradiction with an act of primary EU law. Thus, the principle of rule of law, which requires every act to be based in law and in accordance with the higher legal norms, is undermined.

Thirdly, the Supervisory Board as an integral part of the ECB and national supervisory authorities comprise the Single Supervisory Mechanism. As mentioned previously, whether one national bank is supervised by the ECB on European level or by the national supervisor on national level depends on the 'significance' of that bank. Nevertheless, there must be no difference in the treatment of banks, irrelevant of the level on which they are supervised. Contrary to this, the functioning of the SSM in practise has shown that there is indeed a difference in treatment between banks supervised on national level and those supervised on European level.[128] In addition to this, there is an increased risk of fragmentation of the financial market between the banks in- and outside of the euro area.[129]

[123] Article 26(8) SSM Regulation.
[124] Ibid, Article 25.
[125] Ibid, Article 25(4).
[126] Paul Weismann, *European Agencies and Risk Governance in EU Financial Market Law* (Routledge 2016), p. 197.
[127] Article 26(8) SSM Regulation.
[128] For a detailed analysis of this problem, see p. 32 of this thesis.
[129] R. M. Lastra, Banking Union and Single Market in *Fordham International Law Journal 36* (2013), p. 1190–1224.

For these reasons, even though the SSM was required both for further integration and for more stable internal market, the way in it materialized in practise is arguable. Some of those problems are of constitutional nature, which makes them particularly alarming. For now, it remains to be seen whether the question on the validity of individual decisions of the ECB, acting on behalf of the SSM, is going to arise before the Court of Justice, so there would be an official position on these issues.

2.3 Role of the ECB in the financial crisis

The ECB has been and still is a central actor in the financial crisis and its resolution. It has been involved, directly or indirectly, in all the steps taken to counter the crisis – crisis management, substantive law reform and structural changes in the EU. Moreover, the ECB is not only important for the resolution of the present crisis, but also for preventing any possible future crises of this kind. This is because, during the crisis years, the ECB has received permanent powers and responsibilities which aim at making it capable of tackling any problem at an early stage, before it turns into a EU-wide crisis.

The ECB's contribution to the resolution of the crisis is *undeniable*. Nevertheless, that does not make it *unquestionable*. Indeed, the ECB may have played a more important role in the financial crisis than the Treaties allow, thereby undermining the principle of rule of law. Many of its actions were contested before the Court. Also, many scholars and academics criticised its actions both from legal and economic perspective. On the other hand, the ECB seemed to be concentrated only on 'saving the euro'[130] and convinced that its policies would bring prosperity and growth once again. If anything, the ECB was always consistent in its actions and left nothing to chance. Due to the importance of the actions of the ECB and the vagueness of its policies, this part is divided in four points - the first and the last focus on the monetary role of the ECB, and two in between them focus on the supervisory role and the broader, economic role.

2.3.1 Monetary role of the ECB before *Gauweiler*

With the creation of the EMU, there was a need for a centralized body, which would define and implement the monetary policy of the Union. Such task was given to the ECB with its creation. However, the ECB, together with the EMU, has evolved throughout the years. It been assigned new roles, but also its old role in monetary policy has changed. Because of this, the monetary role of the ECB for the purposes of this thesis is divided in two sections, the split point being the ground-breaking and highly-criticized *Gauweiler* case.[131] Since the tasks of the ECB are

[130] Speech by Jörg Asmussen, Member of the Executive Board of the ECB, The Economist's Bellwether Europe Summit, London, 25 April 2013 https://www.ecb.europa.eu/press/key/date/2013/html/sp130425.en.html (Accessed on 20.04.2017)

[131] Case C-62/14 *Gauweiler* [2015] EU:C:2015:400.

dependant of the constellation of the EMU, this section begins with a presentation on the creation of the EMU.

After a failed attempt by the *Werner Report*,[132] political will for the creation of the EMU was clearly expressed in the preamble of the Single European Act.[133] However there were two different views as to how the EMU should be created, known as 'monetarist' and 'economist' view.[134] The monetarist view supported the idea of monetary union as a starting point of a fully integrated EMU – a single currency and common monetary policy would facilitate and lead to the further political and economic integration. On the other hand, the economist view advocated the creation of a political and economic union as a precondition for a single currency – they claimed that only in this way the stability of the single currency would be guaranteed.[135] In order to settle this debate and to offer an expert opinion on how the EMU should be created, a special committee was established, chaired by Mr. Jacques Delors - the former President of the Commission. The product of the work of this committee was a report, known as the *Delors Report*.[136] In point 18 of this Report, the need to Treaty change, which would provide for the legal basis for EMU, is stressed. In its next point, the monetarist view is essentially endorsed. It suggested for the creation of the EMU to be carried out in three stages. [137] These suggestions were accepted and expressed in the Maastricht Treaty, which provided for the legal basis for the EMU.[138] The first stage was closely related to the completion of the internal market and the European Exchange Rate Mechanism which were the preconditions for the creation of the EMU. This was achieved with the signing of the Maastricht Treaty, which provided for the second stage to begin in 1994. The design of the EMU, created in Stage 2, was based on a division of competences between the economic and monetary policies, which is largely the case today – in accordance with the monetarist views. However, economist views were also present, as the Maastricht Treaty provided for convergence criteria to be fulfilled in order for a MS to be part of the EMU[139] – hence there was some form of economic harmony within the common currency area. The main challenge in Stage 2 was the creation of the EMI and the ECB, which were predominantly influenced by the German ordoliberal thought. The main ideas of the Freiburg school were *independent* central bank, which was governed by *experts* and had a narrow

[132] Report to the Council and the Commission on the realization by stages of Economic and Monetary Union in the Community, Luxembourg 8 October 1970.
[133] See preamble of the Single European Act OJ L 169/1 29.06.1987.
[134] J. Pissani-Ferry, Only One Bed for Two Dreams: A Critical Retrospective on the Debate over the Economic Governance of the Euro Area (2006) JCMS Volume 44, p. 824.
[135] K. Tuori, European Constitutionalism (Cambridge, 2015) p. 184.
[136] Report on economic and monetary union in the European Community by the Committee for the study of Economic and Monetary Union (EC Commission, 1988).
[137] F. Snyder, EMU Revisited: Are We Making a Constitution? What Constitution Are we Making, in P. Craig and G. de Burca, *The Evolution of EU Law* (Oxford, 1999) p.421-424.
[138] Article 2 TEC Consolidated version 1992.
[139] Articles 109j and 109k TEC Consolidated version 1992. See also, Protocol on the convergence criteria referred to in Article 109j of the Treaty establishing the European Community. MS not fulfilling these criteria are regarded as 'Member States with a derogation'.

mandate to preserve *price stability*. The Bundesbank itself owes its success to the application of these ideas. This was also applied to the ECB and enshrined in the Treaties and the ESCB Statute. In this regard, point 2.1.2 is dedicated to the independence and point 2.2 with the expert governance of the ECB. Because of these characteristics, the ECB was given a narrow mandate of preserving the price stability which is today expressly stated in Article 127 TFEU.[140] Stage 3 of EMU began in 1999, as suggested by the Delors Report and finalized the EMU, as the MS who met the criteria became formally part of the euro area. Stage 3 was mostly concerned with supervising how the MS and the EU implemented the novelties from Stage 2, for example whether MS made their NCB independent and how the newly-created ECB functions and prepares for the first issue of the euro banknotes.

Nevertheless, the EMU was not permanently fixed with the end of Stage 3. Changes in the EMU and in the functioning of the ECB followed even after all the stages were completed. However, one thing remained unchanged - the ECB from its establishment until today is the main actor in the Union's monetary policy, as it is the only body in the Union which can set the key interest rate[141] and can issue euro banknotes.[142] These prerogatives enable the ECB to define and implement the monetary policy. On the other hand, the NCB are acting as agents, as they implement on national level the monetary policy as defined by the ECB, and the ECB for this purpose can give instructions to the NCB.[143] Thus, the ECB and the NCB are in a vertical position, where the ECB is the central bank of the Union and the NCB are its agents when they implement the Union's monetary policy.[144] However, when performing tasks unrelated to the ESCB, they are acting as independent national agencies.[145] Therefore, with the creation of the EMU the NCB of the MS of the euro area gained a 'dual nature'.[146]

As mentioned previously, not all the MS are part of the euro area. Clearly, they conduct their own national monetary policy and the ECB decisions of the ECB concerning the common monetary policy are not legally binding for them.[147] Still, those MS need to cooperate with the ECB and treat its exchange-rate policy as a matter of common Union interest[148] and ideally, aim to reach the convergence criteria for entering the EMU.[149] Also, the MS outside of the EMU are part of the General Council of the ECB.[150]

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[140] K. R. McNamara, The Forgotten Problem of Embeddedness p. 24, in M. Matthijs and M. Blyth, *The Future of the Euro* (Oxford, 2015).
[141] Article 12 ESCB Statute.
[142] Article 128 TFEU and Article 16 ESCB Statute.
[143] Article 12.1 ESCB Statute.
[144] Ibid, Article 14.3.
[145] Ibid, Article 14.4.
[146] B. Scouteris, P. Athanassiou, National Central Bank Tasks and the Boundaries of the ECB Governing Council's Powers under Article 14.4 Of the Statute: State of Play and Future Prospects (2015) SSRN Research Paper, p. 9.
[147] Article 139 TFEU.
[148] Ibid, Article 142.
[149] Ibid, Article 140.
[150] See point 2.2.1 of this thesis, Internal bodies concerned with monetary policy.

The primary objective of preserving price stability was particularly important in times of financial crisis. The ECB has successfully held the rate of inflation at a low level during the crisis, being above 2% only in 2011 and 2012 and the highest being 3.3% in 2008. On the other hand, deflation is also not desired,[151] which seems to be a bigger problem today than inflation, as the EU economy is stabilizing, but there is no growth as the inflation rate in 2015 and 2016 was 0.0 and 0.2, respectively.[152] This task of the ECB is even more complicated, considering the fact that the transmission mechanism of monetary policy may be defective, as national banks may react belatedly or not react at all to the official interest rate set by the ECB. Thus, a central bank, especially a supranational one like the ECB, can never be sure when and what effect its decision will have on national level in times of crisis. In this regard, the task of maintaining price stability was substantially facilitated and simplified, as it is also a prudential supervisor and plays a role in the economic policy, as will be seen in the next point of this thesis. Hence, the ECB was able itself to remove any obstacles which cause trouble in the transmission mechanism. However, it is questionable whether such concentration of powers poses a threat to the principle of rule of law.

2.3.2 Supervisory role of the ECB

The possibility of prudential supervision being conferred upon the ECB is established in Article 127(6) TFEU, which was added with the Lisbon Treaty amendments. However, it was not until the adoption of the SSM Regulation in 2013 that the ECB was empowered in the field of prudential supervision. It is rather uncommon for preventive measures, like prudential supervision, to be taken in mid-crisis period, because in those times the MS react protectively, reverting to basic ideas of sovereignty.[153] However, the case of prudential supervision is specific because it is part of the broader process of financial market integration.

The integration process in the internal market for financial services began soon after the creation of the EMU. This is logical, since with the creation of the euro as common currency, the functioning of national commercial banks became common concern of the euro area. In this regard, in the USA there is a Division of Banking Supervision within the Federal Reserve System, which supervises individual banks on a central level.[154] Therefore, the process of integration of the financial sector in the EU started as early as 2001, and was known as the *Lamfalussy* process. The Lamfalussy committee and its report are relevant for the establishment of many financial committees and authorities, thus they are presented in part 3.2 of this thesis. For this part, it is important that this committee stressed the need for strengthening the cooperation of national

[151] H. K. Scheller, The European Central Bank - History, Role and Functions (2004) ECB Publication, p. 46.
[152] Eurostat, HICP - inflation rate, http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tec00118 (Accessed on 20.04.2017)
[153] T. Tridimas, Federalization, crisis management, and law reform, in P. Craig, *The Evolution of EU Law* (2011) p. 796.
[154] F. S. Mishkin, Synergies between Bank Supervision and Monetary Policy in *Prudential Supervision: What Works and What Doesn't* (University of Chicago Press, 2001) p. 275.

supervisors on EU level, regarding macro and micro prudential supervision.[155] As shall be seen below, the EU endorsed the proposals in the Lamfalussy report and implemented them in practice. However, as time passed and the economic circumstances worsened, mere cooperation between national supervisors proved to be insufficient. Thus, further integration was required.

The legal basis for such deeper integration was given in the Lisbon Treaty. The first financial difficulties, which were the precursors of the crisis, were felt in 2008. Because of this, even before the entry into force of the Lisbon Treaty, the Barroso Commission started making plans on how to implement its provisions. The main focus was on dealing with the 'obvious mismatch between European and global financial markets and supervision which remains largely national'.[156] Since there was political will for financial integration, it remained for concrete proposals to be made. For this reason, a High Level Expert Group on EU financial supervision was set up by the Commission. Due to its chair, this group is known as the *de Larosière group*. Its task was to give expert opinion and recommendations on how to strengthen the European supervisory arrangements. This task is clearly similar to the one of the Lamfalussy committee. However, there is one fundamental difference - the Lamfalussy committee was requested in order to complete the integration of the financial market, unlike the de Larosière group was the result of the global financial crisis, which was expected to strike Europe very soon. The product of the Group's work was the Report of the de Larosière group issued in February 2009. There were two main recommendations: reform in the macro-prudential supervision[157] and reform in the micro-prudential supervision[158]. Both are highly relevant for this thesis and are therefore discussed in separate parts, concentrating on what was *recommended* by de Larosière group and what was *implemented* by the EU. Unlike the changes in macro-prudential supervision, the changes in micro-prudential supervision have attracted quite criticism. Due to this, part on micro-prudential supervision is considerably longer.

A) Macro-prudential supervision

Macro-prudential supervision is aimed at limiting the distress of the financial system *as a whole,* which is caused not by an individual bank but by the flaws of the financial system. Such flaws, if not addressed at an early stage, can be detrimental. Central banks are in the best position for macro supervision, as they have all the relevant data: inflation, credit expansion, interest rates, etc. Macro prudential supervision identifies any imbalance and acts accordingly, or if it is outside of its competences, issues an early warning to the competent authorities. This type of supervision particularly has been a problem in the EU.[159]

For this reason, the de Larosière Report, in its Recommendation 16, proposed the establishment of a European Systemic Risk Council, as a European body entrusted with carrying

[155] Lamfalussy Report, p. 17.
[156] European Commission Press Release IP/08/1679, Brussels, 11.11.2008.
[157] De Larosière Report p. 44.
[158] Ibid, p. 46.
[159] Ibid, p. 39.

out macro prudential supervision on EU level. In this regard, the European Systemic Risk Board was created in 2010.[160] Also, the Chair of this Board is the President of the ECB,[161] which ensures the involvement of the ECB in this process. National central banks are also involved[162] and the cooperation and exchange of information between the Board, national and European supervisory authorities is expressly mentioned.[163] Thus, the legislator recognised the link between different types of supervision. Moreover, this Board has the power to issue warnings and recommendations for remedial actions, such as legislative initiatives[164] which is in accordance with the Report. A good example of the work of the Board is given in its report 'Is Europe Overbanked?'. Through this report, the ESRB firstly establishes the problem of bank expansion in Europe, then it determines the causes of the problem and in the end, offers solutions to it. Thus, the macroeconomic proposals in the de Larosière Report were fully acknowledged and entirely implemented in practice.

On the other hand, the ESRB is composed of many members – representatives of ECB, NCB, Commission, European Supervisory Authorities and Committees. Hence, its functioning may be difficult and its decisions may be largely a result of a compromise. Also, the impact of the ESRB has not been particularly evident, since it only received advisory and not regulatory powers. The body relies mostly on its expertise and reputation in order to influence national and European policies.

Nevertheless, with the creation of the ESRB, the ECB undoubtedly received an extended role in the field of macro-prudential supervision. The ECB is the main actor within the ESRB, as the president of the ECB chairs the ESRB but furthermore, because the ECB can influence NCB as part of the ESCB when pursuing its policies within the ESRB. As stated above, the ECB has the most relevant monetary data in order to assess the situation. On the other hand, the involvement of the NCB, the Commission and micro-prudential authorities within the ESRB constrains the ECB and ensures that the most appropriate action will be taken. All of this is supported by the de Larosière Report, which perhaps is the reason for the lack of criticism from legal practitioners and academics regarding this extended macro-economic role of the ECB. The ESRB by fulfilling its tasks makes another crisis less probable and, at the same time accelerates the way out of the current crisis.

B) Micro-prudential supervision

Micro-prudential supervision is aimed at preventing *individual banks* from taking up risky investments or carrying out any unsound action. It is a fact that banks, driven by profit motives,

[160] Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331, 15.12.2010, p. 1–11.
[161] Ibid, Article 5.
[162] Ibid, Article 6.
[163] Ibid, Article 15.
[164] Ibid, Article 16.

may pursue dangerous policies and end up failing, thereby endangering the whole financial system. Because of this, banks and their functioning are regulated by rules, the compliance of which is overseen by an official authority.

The de Larosière Report recognised the importance of micro prudential supervision in the EU and moreover that the mechanisms existing at that time were insufficient. In this regard, it proposed the creation of a European System of Financial Supervision – a decentralised network of three new European Authorities with enhanced supervisory powers, replacing the than-existing committees. Such powers include increased coordination of national supervisors, taking part in on-site inspections carried out by national supervisors, adopting standards and legally binding interpretation of financial rules, binding mediation decisions for solving disputes between national supervisors, etc.[165] It also proposed colleges of supervisors within this network, which would supervise all major cross-border credit institutions.[166] Nevertheless, day-to-day supervision should remain on national level, as national supervisors are closest to the markets and credit institutions under supervision.

On the other hand, the de Larosière Report expressly states that the Group does not support any role whatsoever for the ECB in the field of micro-prudential supervision.[167] Conferring on the ECB such powers would have several negative implications for the ECB itself and for the Union. Firstly, the primary objective of the ECB as part of the ESCB is to maintain price stability. Giving the ECB the task of supervising banks directly could impinge on this fundamental objective – the focus of the ECB would be shared between the monetary and supervisory objective which is contrary to the intention of the creators of the ECB.[168] Secondly, the ESCB/ECB does not have competences outside of the euro area and the ECB would not be able to supervise banks in those MS. Thus, the ECB as supervisor could not establish an integrated system of supervision within the EU. Thirdly, the members of the ECB may not have the required expertise for supervisory matters. Lastly and most importantly, the ECB in times of crisis would have to interact with the ministers of finance or other competent authorities of the MS, as supervisors are necessarily involved in the process of providing financial support. Such a process is highly-politicized and involves dealing with tax-payers money and/or structural reforms in the economy of the MS. This in turn increases peer pressure on the participants in the process, which could significantly undermine the constitutionally-protected independence of the ECB. Today this is indeed the case, as shall be seen below, because the ECB is one of the main actors within another international organization, the ESM.

The main opponent and critic of conferring the ECB supervisory powers is Germany. During the planning of the SSM, German Chancellor Angela Merkel questioned the capacity of

[165] De Larosière Report, p.52.
[166] Ibid, p.48.
[167] Ibid, p.43.
[168] See part 2.3.1 of this thesis, Monetary role of the ECB.

the ECB to supervise banks in the EU.[169] However, Germany is one of the few MS whose national supervisory authority is legally and technically subject to the Finance ministry.[170] Taking this into consideration, the motives of such German resistance become obvious.

Nevertheless, conferring supervisory powers to body, office or agency of the EU, as suggested by Germany and the de Larosière Report may be in contradiction with the *Meroni*[171] doctrine. Prudential supervision necessarily entails a certain amount of discretion which makes it problematic for being conferred on a EU body not expressly mentioned in the Treaties. In this regard, assigning the ECB as prudential supervisor is preferred.

In addition, it is worth mentioning that there is academic literature that supports the juncture of monetary and supervisory functions in the hands of central banks.[172] Also, several national central banks, *inter alia,* Nederlandsche Bank[173] and Bank of France[174], are responsible for supervision, in addition to conducting monetary policy. In this regard, the benefit of vesting both powers in the ECB would be access to better information and better crisis resolution. Since the ECB is *de facto* lender-of-last resort, being able to judge the credit worthiness of the bank in question would help it assess the situation better.[175] Moreover, it could conduct the monetary policy better, as it could remove itself the obstacles in the monetary transmission mechanism caused by individual banks, by using its supervisory powers.[176] This is even more true in times of crisis, when flawed and/or aggressive individual banks can weaken the transmission mechanism, by not reacting properly to the official interest rate set by the ECB. Nevertheless, even though the ECB may benefit from being the main actor in both monetary policy and prudential supervision in times of crisis, its independence could suffer in the long term.

Taking all these issues and arguments into consideration, the EU legislator in 2013 in accordance with the special legislative procedure adopted the SSM Regulation, thereby conferring micro-supervisory tasks to the ECB. Nevertheless, the de Larosière-suggested European Supervisory Authorities were also created, but with significantly smaller micro-supervisory role than the ECB. They will be examined in part 3.2 of this thesis. The purpose of the SSM and the ECB as central to it, is to ensure the safety and soundness of credit institutions which

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[169] http://www.helsinkitimes.fi/finland/finland-news/politics/3588-rehn-schedule-for-single-supervisory-mechanism-feasible.html (Accessed on 20.5.2017).

[170] Chiara Zilioli, The Independence of the European Central Bank and Its New Banking Supervisory Competences, p.32 in Dominique Ritleng, *Independence and Legitimacy in the Institutional System of the European Union* (Oxford, 2016).

[171] Case 9/56 *Meroni* [1958] EU:C:1958:7, p. 140.

[172] P. Schioppa, EMU and Banking Supervision in C. Goodhart (ed.), *Which Lender of Last Resort for Europe?* (2000), p.15-29.

[173] F. Amtenbrink, *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank* (Hart Publishing, 1999) p. 100.

[174] Ordonnance no 2010-76 du 21 janvier 2010 portant fusion des autorités d'agrément et de contrôle de la banque et de l'assurance, JORF no 18 du 22 janvier 2010, p. 1392, NOR ECEX0929065R.

[175] T. Beck and D. Gross, Monetary Policy and Banking Supervision: Coordination instead of separation (Centre for European Policy Studies, 2012) p. 5-6.

[176] ECB Monthly Bulletin July 2000, Monetary policy transmission in the euro area, p. 50

are essential for the stability of the financial system of the Union.[177] Therefore, the SSM is there to prevent bank failure from occurring at the first place, by overseeing the banks' compliance with prudential rules, *inter alia,* capital requirements or 'fit and proper' manager requirements. If a bank is in breach of such rules there are penalties[178] and other supervisory powers,[179] which can be used against it.

The creation of the SSM was justified and in accordance with the principles of subsidiarity and proportionality.[180] First, the two main reasons of bank failure are *inadequate corporate governance* and *weak risk management*.[181] Crucial for both is a strong and independent supervisory authority, which would sanction every breach of the prudential rules. However, different MS had different prudential rules and banks established themselves, according to the freedom of establishment, in those MS with the most lenient rules. This led to a '*regulatory race to the bottom*', with MS adopting lower standards to attract banks. Basically, the MS with the lowest prudential standard in the EU was setting the EU-wide standard. With the adoption of the SSM Regulation such practises are eliminated, as now there is one prudential standard which applies throughout the whole EU. Moreover, large banks, whose stability is crucial for the overall financial are supervised directly by the ECB.

Second, after the creation of the common monetary policy and currency, the prevention of bank failure is not only a national concern, but a common concern of the whole euro area. National commercial banks are part of the European EMU and are interconnected with banks in other MS. Those banks are, moreover, an essential source of funding for businesses that are active throughout the EU internal market. Therefore, when one bank fails, it has repercussions in other sectors of the economy, which in turn affects the overall financial stability of the EU. The Court has recognised this phenomenon in the *Kotnik*[182] case, as a 'negative spill-over effect', and later used it in its reasoning in other cases.[183]

It is important to note that the SSM Regulation created a *novel situation* in EU law – the ECB, an EU institution, can apply provisions of national law and can base its supervisory decisions on such provisions.[184] This is because of the following. Many of the powers of the ECB given in the SSM Regulation are broad and for that reason, conditional on a directive, which defines those powers more precisely.[185] However, an EU directive must be transposed in the legal system of the MS is order to be given full effect. An EU directive can only in exceptional cases be relied on

[177] Recital 30 SSM Regulation Preamble.
[178] Article 18 SSM Regulation.
[179] Ibid, Article 16.
[180] Article 5 TEU.
[181] S. V. Ragalevsky and S. J. Ricardi, Anatomy of a bank failure (2009) 126 Banking Law Journal, p. 869.
[182] Case C‑526/14 *Kotnik* [2016] EU:C:2016:570, para. 50.
[183] Joined Cases C‑8/15 P to C‑10/15 P *Ledra Advertising v Commission and ECB* [2016] EU:C:2016:701, para 72.
[184] Article 4(3) SSM Regulation.
[185] The reason for regulating this field of law through directives is that the MS could not reach a consensus in the Council regarding the standards of supervision. Thus, many prudential requirements were left to the discretion of the MS.

directly,[186] such as against the state,[187] an emanation of state,[188] in conjunction with general principles of EU law,[189] etc. Thus, for unobstructed fulfilment of its day-to-day supervisory tasks, the ECB needed to be able to rely on *national law transposing relevant directives.* That national law precisely defines the circumstances under which the ECB can act.

Because of the uniqueness of the situation where an EU institution bases its actions on national law, there is are some questions that arise. Firstly, what would happen if the MS failed to transpose the directive after the time-limit for implementation has passed? The ECB could benefit from the *Viamex*[190] case, which established that the provisions of that directive may be applicable when provisions of a regulation are conditional on compliance with that directive. Since many of the powers of the ECB are indeed conditional on directives, the ECB could rely on those directives directly. On the other hand, the principles of rule of law and legal certainty may prevent the ECB from acting in such a case, thereby preventing the ECB from supervising banks in MS which have not transposed the relevant directives. This second outcome seems more reasonable as the SSM Regulation states that the ECB can apply either the provisions of a *regulation* or the provisions of *national law* transposing relevant directives i.e. it cannot apply a directive directly. Moreover, the principle of legal certainty requires that private parties are able to 'ascertain unequivocally what their rights and obligations are',[191] which seems troublesome when such rights and obligations are given in a non-transposed EU directive. Therefore, when there is no transposing national law, the ECB will most likely be precluded from acting.

Secondly, does the Court retain exclusive jurisdiction over acts of the ECB based purely on national law, or do national courts have a role to play also? The Court held in *Foto-Frost*[192] that it has sole jurisdiction over acts of EU institution, and subsequent cases[193] proved that the Court is not willing to allow national courts to rule on the validity of EU measures, since that would undermine the effectiveness of EU law. Moreover, the exclusive competence of the CJEU to review acts of the ECB is confirmed in the ESCB Statute[194] and SSM Regulation.[195] However, the Court does not have jurisdiction to review national law under Article 263 TFEU,[196] and a

[186] P. Craig and G. de Burca, *EU Law Text, Cases and Materials* (Oxford, 2015) p.220-224.
[187] Case 152/84 *Marshall* [1986] EU:C:1986:84, para. 35.
[188] Case C-188/89 *Foster* [1990] EU:C:1990:313, para. 22.
[189] Case C-144/04 *Mangold* [2005] EU:C:2005:709, paras. 76-77. Also, Case C-555/07 *Kücükdeveci* [2007] EU:C:2010:21, para. 56.
[190] Joined Cases C-37 and 58/06 *Viamex* [2008] EU:C:2008:18, para. 28.
[191] Case C‑345/06 *Heinrich* [2009] EU:C:2009:140, para. 44.
[192] Case C-314/85 *Foto-Frost* [1987] EU:C:1987:452, paras. 15-17.
[193] Case C-50/00 P *Unión de Pequeños Agricultores* [2002] EU:C:2002:462, para. 40; Case C-362/14 *Schrems* [2015] EU:C:2015:650, para. 61; Case C-370/12 *Pringle* [2012] EU:C:2012:756, para. 39. See also, M. P. Maduro, L. Azoulai, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty'*(Hart Publishing, 2010), p. 194.
[194] Article 35.1 ESCB Statute.
[195] Recital 60 SSM Regulation Preamble.
[196] Case C-50/00 P UPA [2002] EU:C:2002:462, para. 43; C-263/02 P Commission v Jégo-Quéré [2004] EU:C:2004:210, para. 33; Case C-64/05 P *Sweden v Commission* [2007] EU:C:2007:802, para. 91; Case C-562/12 *Liivimaa Lihaveis* MTÜ [2014] EU:C:2014:2229, para. 48

decision based on national law might as well be considered an act of national law in its substance. Thus, there may be a claim that national courts, and not the CJEU, are competent in such a case. Moreover, the SSM Regulation does not expressly state that only the CJEU has jurisdiction to review ECB decisions based on national law. It only timidly mentions Article 263 TFEU without further elaboration, in one recital of the preamble. On the other hand, the Article 13(2) SSM Regulation clearly confirms the sole jurisdiction of the Court to review the lawfulness of the ECB supervisory decisions regarding on-site inspections. Presumably, such a confirmation of the CJEU's jurisdiction over ECB decisions based on national law is missing, because the EU legislator itself was uncertain regarding it. Nevertheless, it appears more likely for the Court to look at the *institutional nature* of the decision i.e. who adopted the decision, instead of looking at the *law applied* therein, and eventually to decide that it has exclusive jurisdiction to review an ECB decision based purely on national law, under Article 263 TFEU.

These questions will unavoidably come before the Court at a certain point in time. It remains to be seen whether the Court through its case-law, will grant even broader discretion to the ECB in the field of prudential supervision, so it can fulfil its tasks without obstructions from the MS. However, aside from such compelling questions, there are unfortunately real difficulties in the way the SSM functions. Here a reference is made to the problems stated at page 21 of this thesis. This part builds on those problems.

Firstly, the ECB may have a conflict of interests. As responsible for both monetary policy and prudential supervision, the ECB could be inclined to use its supervisory powers to achieve monetary objectives, and vice versa. For example, the ECB may require banks to reduce the risk of their activities or to impose liquidity requirements[197] in order to allegedly protect the soundness of the banks in question. However, the real purpose behind such measure could be to reduce inflation, which is a monetary policy objective. This constitutes *misuse of powers*: a measure has been 'taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case'.[198] This is one of the grounds for review and annulment under Article 263 TFEU, however a claim of misuse of powers is rarely accepted by the Court. Misuse of powers requires the subjective intention or even the 'moral obligation'[199] of the institution in question to be ascertained, which is particularly troublesome for the applicant to prove in court proceedings. Therefore, it is highly unlikely that a measure of the ECB, as the one mentioned in the example above, is going to be annulled on the basis of misuse of powers, even if in reality it is so. In practice, the ECB has at its disposal both monetary instruments and supervisory powers when pursuing certain objective and, even though this is prohibited under the Treaties, the ECB can go unsanctioned by the Court.

[197] These supervisory powers are given in Article 16(2) SSM Regulation.
[198] Case C-331/88 *FEDESA* [1990] EU:C:1990:391, para 24; Case C-146/13 *Spain v Parliament and Council* [2015] EU:C:2015:298, para. 56.
[199] Case 105/75 *Giuffrida* [1976] EU:C:1976:128, para. 17.

This next point is related to the first. It is very hard to isolate prudential supervision from monetary policy when both are vested in the same body. However, such separation is expressly referred to multiple times in the SSM Regulation.[200] It seems that the EU legislator was trying to reconcile the de Larosière recommendation of separate European supervisor with the views of some MS to give supervisory tasks to the ECB. As seen above, the end-result was an internal but detached body of the ECB. This endangers the independence of the ECB in conducting monetary, as supervisory tasks are necessarily more 'politicized'.[201] This is because supervision is crucial for placing an entity under resolution, and resolution can in turn lead to bail-in with private funds and ultimately, bail-out with public funds. This means that the ECB supervisory decisions have long-term effects on the economy of the MS in question and because of this the ECB may need to communicate with other bodies, or even governments of the MS. This inevitably undermines the independence of the ECB as a whole.

Thirdly, the SSM distorts the level-playing field within the internal market for financial services. The SSM Regulation states that it is 'based on equal treatment of credit institutions with a view to preventing regulatory arbitrage'.[202] Contrary to this, there is *de facto* different treatment of credit institutions supervised on national level and those supervised on EU level. This can be supported with the following example - the power of the ECB to remove members of the management board of a bank which are not 'fit and proper', given in Article 16(2)(m) SSM Regulation, is conditional upon transposition of the CRD.[203] This is because the 'fit and proper' requirements are not defined by EU law. In this case, the ECB must apply the provisions of national law which transpose the CRD and which define what 'fit and proper' means. This basically means that the ECB acts in the same way as the national supervisory authorities.

However, the ECB seems to have only received the powers to apply national law, without receiving the corollary obligations that fall on the national authorities. Here a reference is made to obligations established in the case-law of the Court, particularly the *Costanzo*[204] and the *Wells*[205] case, which established: in the case of non-transposition or improper transposition of a directive and after the time-limit for transposition has passed, the national competent authorities are under the obligation to apply the provisions of that directive directly and refrain

[200] Recital 65, 66, 73, 55 and Article 25 SSM Regulation. See also, Interview with Danièle Nouy, Chair of the Supervisory Board of the Single Supervisory Mechanism, published on 7 June 2015 https://www.bankingsupervision.europa.eu/press/interviews/date/2015/html/sn150607.en.html (Accessed on 19.04.2017). According to this interview, the separation goes so far that apparently, a bank can be *insolvent* for monetary policy concerns, and at the same time *solvent* for supervisory concerns.

[201] S. Baroncelli, 'The Independence of the ECB after the Economic Crisis' in M. Adams, F. Fabbrini, and P. Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014), p. 141.

[202] Article 1 SSM Regulation.

[203] Directive 2013/36/EU 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338–436 (Capital Requirements Directive – CRD)

[204] Case 103/88 *Costanzo* [1989] EU:C:1989:256, paras. 31-33.

[205] Case C-201/02 *Wells* [2004] EU:C:2004:12, para. 70.

from applying provisions of national law which are contradictory to that directive. If this rule is applied to the example stated above, a national supervisor would have no problem to remove members of a management board of a bank under its supervision, *even when there is no national law* which defines the 'fit and proper' requirements. The ECB, however, cannot do so, because 'the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to which it is addressed''.[206] Therefore, as stated above, the ECB cannot act when there is no national law transposing the CRD, whereas national supervisors can – a clear discrimination between banks supervised by national supervisors and those supervised by the ECB.

This can be resolved by *expanding* the *Costanzo* and *Wells* doctrines, so they would apply to all authorities, national and European, who have the power to apply provisions of national law. In this way, the ECB would as well have the obligation and possibility to set aside contradicting national provisions and apply the directive directly. Nevertheless, this is in contradiction to the previously cited paragraph from *Marshall* and moreover contrary to Article 288 TFEU. Not to mention the consequences that this would have on the cherished distinction between a regulation and a directive when it comes to direct effect.[207] Another solution would be to define the powers of the ECB and the conditions under which they can be used in directly applicable EU law, such as a regulation.[208] This would, of course, require complicated negotiations between the MS in the Parliament and Council, but nevertheless seems more reasonable than constitutional changes and overruling case-law. Until then, there will be different treatment of credit institutions, which goes contrary to the very purpose of the SSM Regulation.

To sum up, supervision on European level brings many benefits, both to the stability of the individual MS and the stability of the EU. The SSM was established when the time was ripe for deeper integration, even if this was mid-crisis period. However, there are problems when it comes to the functioning of the SSM which can undermine the rule of law or other established principles. It remains to be seen whether those problems will be fixed, either through legislative action or judicial review.

2.3.3 Broader, economic role of the ECB

As the crisis worsened, there was political will for certain mechanisms to be established which would preserve the financial stability. Since there was no legal basis in the Treaties for the

[206] Case 152/84 *Marshall* [1986] EU:C:1986:84, para. 48. Also, Case C‑425/12 *Portgás* [2013] EU:C:2013:829, para. 22.
[207] Opinion of AG Slynn in Case 152/84 *Marshall* [1985] EU:C:1985:345, p. 734.
[208] In this regard, see Impact Assessment of the CRD, SEC(2011) 952 final, p. 146. The Commission had plans to introduce *enhanced* "fit and proper" test, which would be included in Binding Technical Standards developed by the EBA. However, the MS did not accept this reform. At the time of the writing of this thesis, there is not EU consensus on what 'fit and proper' means.

creation of such mechanisms, the MS had to act through Intergovernmental Agreements. Nevertheless, the presence of the EU and its institutions in this field has increased as time passed.

Firstly, in 2010, a European Financial Stability Facility was created by the MS through the Council.[209] This was a temporary solution which would offer financial relief to the MS which were worst hit by the crisis. Among those were Greece, Ireland and Portugal. The procedure was the following: a euro area MS had to submit a request for financial assistance to the EFSF. Then the so-called Troika - the Commission, in liaison with the International Monetary Fund and the ECB, negotiated a Memorandum of Understanding with that MS, which had to be approved by the Eurogroup.[210] Thus, the Eurogroup, consisted of all the finance ministers of the euro area MS, and the Commission had the main role in the EFSF.

Such a temporary mechanism was indeed necessitated by the crisis and mitigated its negative consequences. However, it proved to be insufficient and there was a need for a permanent firewall for the Eurozone which would be always functional and prepared to act at an early stage.

For this reason, the European Stability Mechanism was established in 2012 as a body of public international law.[211] It is an international organization with legal personality and is currently separated from the EU. This is notwithstanding the fact that firstly, the Commission and the ECB are entrusted with carrying out the core tasks of the ESM,[212] secondly, the purpose of the ESM is to safeguard the financial stability of the euro area as a whole[213] and thirdly, membership in the ESM is conditional on being a euro area MS of the EU.[214] The ESM took over the tasks of the EFSF and the EFSM, thus today all new financial assistance programmes are granted and covered by the ESM. Similarly as the previous mechanism, financial assistance granted through the ESM is subject to conditionality, *inter* alia, structural and macro-economic reforms, as agreed with the MS in a MoU. The main decision-making body of the ESM is the Board of Governors, consisted of representatives of the ESM MS.[215] This body must approve the MoU, prior to its signing.

The establishment of this new permanent mechanism was authorized under EU law by Article 136(3) TFEU. This paragraph of Article 136 TFEU was added with the European Council Decision 2011/199,[216] which amended the TFEU by using the simplified revision procedure.[217] As

[209] Extraordinary Council meeting 9596/10 (Presse 108)
[210] EFSF Framework Agreement 6.7.2010 (amended with effect from the Effective Date of the Amendments), p. 5
[211] Treaty establishing the European Stability Mechanism (ESM Treaty) T/ESM 2012-LT 2012.
[212] Ibid, Recital 10 and Article 13.
[213] Ibid, Article 3.
[214] Ibid, Article 2.
[215] Ibid, Article 5.
[216] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91/1 6.4.2011 p. 1.
[217] Article 48(6) TEU, as introduced by the Lisbon Treaty.

seen below, this Decision was challenged in the case of *Pringle,*[218] a seminal case which has been adjudicated by a Full Court.[219] This case demonstrated the Court's view on the division between monetary and economic policy in the EU. Moreover, the Court decided whether the ESM Treaty increased the competences of the EU and whether ESM interferes with the monetary policy of the Union. Another point in *Pringle* - whether the ESM infringes Article 123 and 125 TFEU is examined in point 3.3 of this thesis. Thus, the text that follows focuses firstly, on the division of competences within the EMU and secondly, on the competences of the ECB within this rather unique EU constellation of separate monetary versus separate economic policy, as explained by the Court in the *Pringle* case.

A) The division between monetary and economic policy in the EU

Currently there is a division of competences in the EMU – monetary union is exclusive competence of the EU, whereas economic policy is left to the MS. Even though the Treaties provide for *clear delineation* of competences between monetary and economic policy, they do not provide for *clear definition* of these policies. Because of this, it was just a question of time when a situation of uncertainty regarding the nature of the measure, and in turn, uncertainty regarding the competence to adopt the measure would arise. This was the subject matter of the *Pringle* case. Before discussing *Pringle*, it is important to note that some academics and economists blame exactly this division of competences for the crisis, stating that it is one of 'the most unnecessary crisis [they] have ever seen'.[220] In this regard, the lack of a 'transfer union' in addition to the monetary union, made fiscal transfers between the MS which would mitigate the differences in national income within the euro area impossible. Those differences in national income and economic development in the euro area caused financial imbalances,[221] which were exacerbated by the global financial crisis.

Coming back to the reality in the EU*,* the Court in *Pringle* stated that there are three relevant criteria for classifying a measure as economic or monetary: the objectives of the measure, the instruments provided in order to achieve those objectives and the link between that measure and other economic or monetary measures.[222] Regarding the first criterion, the objective of the Union's monetary policy, as implemented by the ESCB, is to maintain price stability i.e. low inflation.[223] Contrary to this, the objective of the ESM is to preserve the financial stability of the euro area as a whole.[224] Thus, the Court held that the ESM and the ESCB pursued

[218] Case C-370/12 *Pringle* [2012] EU:C:2012:756.
[219] Article 16 Protocol (No 3) on the Statute of the Court of Justice of the European Union. For other cases decided in Full Court, see Case C-200/02 *Zhu and Chen* [2004] EU:C:2004:639 and Case C-222/02 *Paul and Others* [2004] EU:C:2004:606
[220] David J. Powell, *The Trader's Guide to the Euro Area: Economic Indicators, the ECB and the Euro Crisis* (Bloomberg Press, 2013) p. 111.
[221] T. Mayer, *Europe's Unfinished Currency: The Political Economics of the Euro* (Anthem Press, 2012) p.75.
[222] Case *Pringle* (n 218), para. 60.
[223] Article 127(1) and 282(2) TFEU.
[224] Case *Pringle* (n 218), para. 56.

different objectives. However, in doing so, the Court seems to have adopted a narrow interpretation of the monetary policy of the Union and consequently, narrow interpretation on the mandate of the ECB, which is visible from para. 56 from *Pringle*:

> *"Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro. [Reiterated in para. 97 Pringle] As is apparent from paragraph 56 of this judgment, any effect of the activities of the ESM on price stability is not such as to call into question that finding. Even if the activities of the ESM might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted."*

Indeed, the role of a central bank is supposed to be defined narrowly[225] and focused on price stability,[226] especially when it comes to the ECB, whose status as independent expert body is stressed. This is also in accordance with the intentions of the creators of the ECB in Maastricht, as seen above in point 2.3.1 of this thesis. Such view of the Court makes it possible for the ESM to exist in parallel with the Union's exclusive competence in monetary policy. On the other hand, this view may have repercussions on the functioning of the ECB. It may prevent the ECB from claiming that a certain measure interferes with price stability, thus falls within the ECB's mandate. For example, the ECB's power to stop the provision of national Emergency Liquidity Assistance, which is not part of monetary policy[227] but only indirectly affects price stability, may fall within economic policy and outside of the mandate of the ECB. Nevertheless, the ECB may be enjoying broad discretion under Article 14.4 ESCB Statute[228] when it comes to stalling NCB measures, even though the Court still has not interpreted that Article. In any way, the Court's narrow definition of monetary policy as a policy concerned with price stability and the definition of economic policy as a broader policy concerned with the overall financial stability seems reasonable and well-founded.

Regarding the second criterion, the instruments of monetary policy are setting the key interest rates for the euro area and issuing euro currency.[229] On the other hand, the grant of financial assistance to a MS, as envisaged by Articles 14 to 18 ESM Treaty, clearly do not fall within monetary policy, according to the Court.[230] Again, the Court adopts a restrictive interpretation

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[225] A. Hinarejos, Institutional Responses to the Crisis p.4 in A. Hinarejos*, The Euro Area Crisis in Constitutional Perspective* (Oxford University Press, 2015).
[226] K. Tuori, *European Constitutionalism* (Cambridge University Press, 2015) p. 174.
[227] Article 2(29) of European Parliament and Council Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L173/190. See also, W. Buiter, J. Michels, E. Rahbari, 'ELA: An Emperor without Clothes?' (2011) Global Economics View, p. 4.
[228] B. Scouteris, P. Athanassiou, National Central Bank Tasks and the Boundaries of the ECB Governing Council's Powers under Article 14.4 Of the Statute: State of Play and Future Prospects (2015) SSRN Research Paper, p. 2.
[229] Case *Pringle* (n 218), para. 96.
[230] Ibid, para. 57.

on which instruments fall within monetary policy, making the ECB's broad perception of Article 14.4 ESCB Statute questionable. The ECB has several times interfered with national measures which fall outside of monetary policy, such as ELA or NCB's own investment operations and even though such decisions are undisclosed, they are most likely based on Article 14.4 ESCB Statute. If a person affected by such decision brings an action before the Court and the Court decides to follow its *Pringle* reasoning, it is very likely that such a decision would be annulled as *ultra vires*. This is because, according to *Pringle,* the burden of proof falls on the ECB, which would have to show that the NCB's measure has more than mere 'indirect effects on the stability of the euro'.[231]

The last criterion for classification of a measure as economic or monetary is the link between on the one hand, the measure in question and on the other, the Treaty provisions and the provisions of the EU regulatory framework. This criterion need to be assessed individually in each case. In the case of ESM, the Court held that that mechanism is closely linked to Articles 120 to 126 TFEU and to the so-called regulatory 'six pack' for strengthened economic governance of the Union. The close link between these provisions of EU law and the ESM is that the EU provisions are *preventive*, as they reduce as far as possible the risk of public debt crises, whereas the ESM is *proactive*, as it regulates the management of financial crises which, notwithstanding the preventive efforts, might nonetheless occur.[232]

The *Pringle* case is the first case to offer some criteria which shed light on the division between monetary and economic policy, and thus reduce the clash of competences between the MS and the EU. In the end, it may be said that the *Pringle* criteria are, in a way, stringent, since they reduce the scope of monetary policy. Because of this, they are unlikely to be applied in the same strict way again, at least not until the crisis completely ends. In this regard, it seems that the first qualification of the *Pringle* criteria happened in the *Gauweiler* case,[233] presented below.

B) The competences of the EU and the ECB before vs. after the creation of the ESM

One of the questions referred by the Irish Court concerned whether Decision 2011/199, which provided for the compliance of ESM with EU law, increased the competences of the Union. If the decision did so, it would contravene Article 48(6) TEU and would be invalid. However, the more substantial question is whether the tasks conferred on the EU institutions by this mechanism influence their tasks conferred by the Treaties. The Court firstly held that the Decision itself did not create new legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the Decision,[234] thus it was within the limits of Article 48(6) TEU.

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[231] This was the subject matter of the *Alcimos* case, see *infra note* 364. The applicant claimed that the amount of ELA is insignificant and cannot affect price stability. However, the General Court did not go to the substance, as the case was dismissed as inadmissible.

[232] Ibid, para. 58-59.

[233] Case *Gauweiler* (n 131).

[234] Ibid, paras. 71-76.

Regarding the more substantial question of the role of EU institutions within the ESM, the Court reiterated that the MS are entitled to entrust tasks to the institutions, outside the framework of the Union,[235] provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and the Treaties.[236] The Court established that the role of the ECB within the ESM is in line with the TFEU,[237] particularly Article 282(2) TFEU, which states that the ESCB 'shall support the general economic policies in the Union in order to contribute to the achievement' of monetary policy objectives. The conclusion to be taken from *Pringle* is that the involvement of EU institutions within the ESM is not in any way an impediment for their EU tasks. It is instead beneficial, as their participation ensures that the actions of the ESM are consistent with EU law.

However, such conclusion is questionable. The EU institutions fulfil the *main tasks* of the ESM and are the main actors in the procedure for granting stability support, as regulated in Article 13 ESM Treaty. More particularly, the role of the ECB within the ESM is to: assess the urgency of requests for stability support,[238] participate in the meetings of the Board of Governors and the Board of Directors as an observer,[239] assess requests for stability support,[240] negotiate a MoU,[241] and monitor compliance with the conditionality attached to the financial assistance.[242] It should be noted that the ECB does not fulfil these tasks alone, but as part of the Troika. The roles of the ECB within the ESM are examined separately, as follows.

Firstly, the ECB has the discretionary power to decide that a decision to grant or implement financial assistance must be granted urgently, if the economic and financial sustainability of the euro area is threatened. The word 'discretionary power' is used, as the procedure for assessing the threat posed to the stability of the euro area by a defaulting MS is defined nowhere. Considering that the main decision-making body of the ECB is the Governing Council, it is most likely this body that can adopt such a decision. However, as stated in point 2.2.1, the votes in the Governing Council rotate, and currently the 19 euro area Governors share 15 votes, whereas the 6 executive members of the Governing Council have 1 vote each. Since the Governing Council adopts decisions with simple majority, the executive members would need only 5 more votes from the Governors, to initiate the emergency voting procedure for granting financial support by the ESM to a MS. Under this ESM emergency voting procedure, a qualified majority of 85% of the votes cast in the ESM Board of Governors is required in order to provide financial support by the ESM or to give mandate to the Commission and the ECB to negotiate the economic policy conditionality attached to each financial assistance. Contrary to this, under the

[235] Ibid, para. 158. See also, Joined Cases C‑181/91 and C‑248/91 Parliament v Council and Commission [1993] EU:C:1993:271, para. 22.
[236] Opinion 1/09 of the Court [2011] EU:C:2011:123, para. 75.
[237] Case *Pringle* (n 218), para. 165.
[238] Article 4(4) ESM Treaty.
[239] Ibid, Articles 5(3) and Article 6(2).
[240] Ibid, Article 13(1).
[241] Ibid, Article 13(3).
[242] Ibid, Article 13(7).

ESM regular voting procedure, the previous two decisions require unanimity in the ESM Board of Governors.

Secondly, the president of the ECB may participate in the meetings of the ESM Board of Governors as observer. It is clear that observers do not have a right to vote, as voting rights are calculated based on the shares of the MS in the ESM.[243] However neither the ESM Treaty nor the Rules of Procedure of the Board of Governors[244] prohibit the president of the ECB from speaking in the debate on the matters under consideration, before the official voting takes place. This enables the ECB to influence the Governors in the Board of Governors. The ECB has the relevant data regarding the monetary situation in the euro area and moreover, has banking sector information, as it is a prudential supervisor. Because of this, the opinion of the president of the ECB is seen as reliable and valuable and seems unlikely to be opposed by a Governor of a MS. Thus, the ECB, even though formally not part of the voting process, has its say in the ESM.

Thirdly, the ECB assesses the request for financial support. This is a three-part assessment: the existence of a risk to the financial stability of the euro area, the sustainability of the public debt of the MS and the actual or potential financing needs of the MS. Undoubtedly, this is one of the few, if not the only task where participation of the ECB in the ESM is *justified*. This is because the ECB is best placed to decide on these technical financial matters. As seen in point 2.3.2 of this thesis, the ECB has the relevant macro-economic data, such as the public debt or the budget deficit, from the ESRB. Also, the ECB, as prudential supervisor for significant banks, has information regarding the liquidity needs of the banks and the real value of their assets. The IMF also has a role to play in the assessment of the public debt, because it has the expertise and data on global imbalances, such as balance of payments.[245] The ECB, as a central bank close to the national and the EU internal financial market, and of the IMF, as actor in the global financial market, complement each other so that a well-supported and thorough examination of the MS in question can be carried out.

Fourthly, the ECB is part of the negotiation process for a MoU. This is the most problematic role of the ECB within the ESM. Exactly as the de Larosière Report warned, the ECB's involvement in the process of providing financial support can be detrimental to its Treaty-protected independence. Participating in the negotiation process means that ECB and the Commission, on the one hand, and the MS concerned, on the other, will define firstly, the financial assistance *instrument to be provided* and secondly, the *conditionality attached* to that assistance. The former can be in the form of cash or cashless disbursement, and the latter in the form of reforms in the banking sector, public finances and markets. The process of negotiating a MoU is highly sensitive both for the one granting the loan and for the one receiving it.

[243] Ibid, Article 4(7).
[244] Article 5 European Stability Mechanism Rules of Procedure of the Board of Governors, 8 October 2012.
[245] X. Miranda, Role of the IMF in the Global Financial Crisis (2011) Cato Journal, Vol. 30, No. 3, 2010, p. 483. Available at SSRN: https://ssrn.com/abstract=2254002

This is because the ESM's capital stock is divided into paid-in shares and callable shares.[246] The paid-in capital comes from the MS participating in the ESM i.e. from their budgets. Even though the ESM Board of Governors makes the final decision, it is the ECB and the Commission that negotiate the amount and the type of financial support to be provided to the troubled MS. On the other hand, the ECB and the Commission negotiate the structural reforms to be carried out by the MS in its economy, as reciprocity for the loan granted. Such reforms can have different form, but the practical result is almost always the same - decreasing public expenditure and increasing public revenue. In the short term, this has the effect of lowering the income of the citizens of the MS concerned. Because of this, protests and civil unrest often follow the signing of a MoU.[247] Thus, the ECB and the Commission have at their disposal tax-payers' money and decide under which conditions that money can be given to a MS. Admittedly, the ECB has information regarding the flaws in the economy of the MS and can offer solutions for such problems, however direct involvement in the negotiations is not necessary.

Instead, such direct involvement of the ECB has several consequences. Most importantly, the independence of the ECB may be jeopardized and its mandate breached. Article 130 TFEU does not apply to the tasks of the ECB within the ESM and clearly, the ECB when fulfilling its tasks within the ESM has to take into consideration the requests of the MS of the ESM and be aware of the political circumstances. On the other hand, that Article applies when the ECB is carrying out the tasks conferred upon it by the Treaties and the ESCB Statute, and requires that the ECB is not influenced by any external body when conducting the monetary policy of the Union. However, it is hard to maintain that the tasks of the ECB within the ESM do not have any repercussions on the conduct of monetary policy. It can be reasonably claimed that the ECB pressured MS, such as Portugal and Spain, into seeking financial assistance from the ESM, by using monetary policy instruments.[248] This, of course, undermines the valued principle of central bank independence and significantly exceeds the narrow mandate of preserving price stability. The high concentration of powers in the hands of the ECB makes it a powerful negotiator within the ESM, but apparently, the price for that power is the undermining of the independence of the ECB in monetary policy. Moreover, the reputation of the ECB and the trust in it as an independent EU institution suffer from such interference with the national fiscal or economic policy. The more an expert body, such as the ECB adopts features of a stakeholder or a politician, the more it will lose credibility.[249]

The final task of the ECB within the ESM is to monitor compliance with the MoU. Again, the ECB is in a dominant position as it has at its disposal a wide range of powers. Using the monetary prerogatives granted by the Treaties for the purposes of the ESM must not be allowed,

[246] Article 8 ESM Treaty.
[247] In this regard see, anti-austerity movements in Greece and Spain.
[248] T. Beukers, The new ECB and its Relationship with the Eurozone Member States: Between Central Bank independence and Central Bank intervention (2013) in CMLR 50, p. 1595.
[249] K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014), p. 221.

but it is tolerated in practice.[250] Similarly as stated in the previous paragraph, there were cases where the ECB decided to repeal the suspension of the Eurosystem's minimum requirements for credit quality thresholds[251] or to decide to stall the national ELA[252] unless the MS complies with structural reforms in the economy as requested by the signed MoU. Such use of monetary powers in order to coerce a MS into complying with its obligations in the ESM is somewhat justified by the legitimate aim of 'breaking the vicious circle between banks and sovereigns'.[253] National banks buying government bonds in order to prevent sovereign default of the MS, then the government, through the NCB, giving ELA to the same national banks in order to keep them liquid is one of the most aggravating short-term measures to be taken and of course, needs to be stopped. Nevertheless, the ECB and the Court have so far not provided any limit to the means for achieving such aim, even though the rule of law requires for every action to have its limits.

To sum up, the creation of the ESM and the involvement of the ECB in it, undoubtedly increased the power of the ECB. It is true that a monetary expert body such as the ECB, must have a role to play within an organization the purpose of which is to safeguard the financial stability of the euro area. However, such role of the ECB should be limited to what is truly necessary. Nevertheless, it seems that the new economic role of the ECB fits it well and the results are obvious as the crisis is coming to an end, but the repercussions of such new roles to the monetary policy are yet to be seen.

2.3.4 Monetary role of the ECB after *Gauweiler*

Apart from assuming supervisory and economic role, the monetary role of the ECB has also evolved with time. It evolved in sense that the ECB today can act in the field of monetary policy in a way in which was impossible before the crisis. The scope of the monetary policy has significantly broadened during the crisis. Here a reference is made to the *Gauweiler* case,[254] where the Court held, in a very controversial and criticized judgment, that the ECB Outright Monetary Transactions programme falls within monetary policy and thus, within the mandate of the ECB. The OMT programme includes purchasing bonds in secondary sovereign bond markets without any restrictions regarding the quantity or the quality of those bonds. The only condition is that the MS must respect the macroeconomic adjustment programme as agreed within the EFSF or ESM. The aim of such a programme is to safeguard the monetary policy transmission and

[250] A. Hinarejos, Institutional Responses to the Crisis p. 6 in A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford, 2015).
[251] Decision (EU) 2016/457 of the European Central Bank of 16 March 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus (ECB/2016/5) OJ L 79/41 30.3.2016.
[252] Governing Council decision on Emergency Liquidity Assistance requested by the Central Bank of Cyprus (Press release, accessed on 07.05.2017). https://www.ecb.europa.eu/press/pr/date/2013/html/pr130321.en.html (Accessed on 20.04.2016).
[253] Draghi says EU bank union to break 'vicious' circle - https://euobserver.com/economic/118553 (Accessed on 20.04.2017). Also see, P. de Grauwe, Design Failures in the Eurozone - can they be fixed?, European Commission Economic Papers 491 (2013), p. 9.
[254] Case C-62/14 Gauweiler [2015] EU:C:2015:400.

the singleness of the monetary policy.[255] This is clearly a broader aim than the one assigned to the ECB by the Treaties - maintaining price stability. Because of this, the German Constitutional Court for the first time decided to refer a question to the Court regarding the validity of the OMT programme. Even though the BVerfG is a court 'against whose decisions there is no judicial remedy under national law',[256] this case cannot be seen as a long overdue normalisation of the relations between the Court and the BVerfG.[257] On the contrary, this case further deepens the troublesome relationship, as it is worded less like a question and more like a statement from the BVerfG. The wording is strict and the claims are well-supported, which makes the Court's task particularly hard, if it is to disagree with the BVerfG. On the other hand, the OMT programme was announced in a press release, which had repercussions on the admissibility of the case.[258] Aside from these specific aspects, the *Gauweiler* case dealt with important substantial issues for the EMU. The main concerns were whether the OMT programme falls outside of the mandate of the ECB and whether the OMT programme is compatible with Article 123 TFEU.

Firstly, the Court held that the OMT programme falls within the mandate of the ECB, as it is part of the monetary policy of the Union. It defined monetary policy in accordance with the *Pringle* judgment,[259] by referring to the objectives and instruments of that policy. As mentioned previously, the OMT programme has the objective of safeguarding two elements: the singleness and the transmission of monetary policy. Both of them, even though linked to price stability, are necessarily broader that it. Nevertheless, the Court established that in accordance with Article 119(2) TFEU monetary policy must be 'single', hence the first objective of the OMT programme fell within monetary policy.[260] Even though, such reasoning seems to be tautological and insufficient, the substantial broadening of the ECB's mandate is seen in paragraph 50 *Gauweiler:*

> *"The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the 'impulses' which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB's decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission*

[255] ECB press release, Technical features of Outright Monetary Transactions, https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (Accessed on 20.5.2017)
[256] Article 267(3) TFEU.
[257] For the relations between these two courts, see BVefrG [1974] 2 CMLR 540 (*Solange I*); BVerfG [1987] 3 CMLR 225 (*Solange II*); BVerfG [1994] 1 CMLR 57 (*Maastrich* rulling); 2 BvE 2/08, 30 June 2009 (*Lisbon* rulling); BVerfG, 2 BvR 2661/06, 6 July 2010 (*Honeywell)*.
[258] Case *Gauweiler* (n 254), para. 23.
[259] See point 2.3.3 of this thesis.
[260] Case *Gauweiler* (n 254), para. 48.

mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU."

According to this paragraph, the ECB is able to intervene *in any part of the transmission mechanism*, including the lack of confidence in the markets or the stagnating market for financial services. Such an interpretation of Article 127(1) is clearly at odds with the ordoliberal views according to which the ECB was created and the narrow mandate accorded to it by the Maastricht Treaty. The Court continued by stating that any effect of the OMT programme on the stability of the euro area is 'indirect',[261] even though it may 'increase the impetus to comply with the ESM adjustment programmes'.[262] Thus, in the light of its objectives, in the Court's view the OMT programme falls within monetary policy and within the mandate of the ECB. Moreover, in the light of its instruments, the OMT programme also falls within monetary policy. This is notwithstanding the fact that when the ESM uses the *same instrument* i.e. buying government bonds on the secondary market subject to compliance with the MoU, it acts within the economic policy. Admittedly, Article 18.1 ESCB Statute enables the ECB and the NCB to 'operate in the financial markets by buying and selling outright marketable instruments in euro' and the Court has stressed this in paragraph 54 of *Gauweiler.* The Court distinguished between the ECB and the ESM, again, in light of the different objectives they pursue,[263] thereby giving excessive weight and importance to the objective pursued. As mentioned on page 31 of this thesis, it is hard to determine the objective of a certain measure in court proceedings, thus most of the time the applicant will not succeed in proving the pursue of different objective than the one stated in the measure.

Secondly, regarding the prohibition of monetary financing contained in Article 123 TFEU, the Court established that there are sufficient safeguards built into the OMT programme that ensure it is in accordance with Article 123 TFEU. The purpose of this Article, seen from its *travaux préparatoires* is to encourage the MS to follow a sound budgetary policy,[264] not allowing a common EMU to lead to 'moral hazard' i.e. not to allow the MS to have unsound and reckless budgetary policy, with hope that the Union will bear the cost of such policy. The Court held that the OMT programme does not go against such purpose of Article 123 TFEU. The ECB is free to decide if and when to buy government bonds on the secondary markets. It is also free to decide how much it will buy and when to resell those bonds. All this prevents the MS and its creditors to know *with certainty* that the ECB will buy their bonds.[265] Also, the OMT programme applies to the MS which are undergoing a structural adjustment programme. This means that its scope is *restricted* which minimizes the impact on the financial situation in the euro area.[266] The fact that

[261] Ibid, para. 52.
[262] Ibid, para. 58.
[263] Ibid, para. 64.
[264] Draft Treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, p. 24 and 54
[265] Case *Gauweiler* (n 254), para. 107.
[266] Ibid, para. 116.

ECB ensures a minimum period between the issue and the purchase on the secondary market also helps in this regard.[267]

Thus, the Court, despite the pressure from the BVefrG, decided that the OMT programme is compliant with Union law. It is true that the reasoning in *Gauweiler* may be flawed, however thus must not undermine the fact that the OMT programme *literally ended the downward spiral* in the EU economy. The famous 'whatever it takes' speech by Mario Draghi and the announcement of the OMT programme increased confidence in the markets and practically gave them what they wanted to hear.[268] It basically bought time for the troubled MS to reform the economies and become competitive again. With the OMT programme the ECB handled the financial crisis similarly to the Federal Reserve in the USA. In this regard, the Federal Reserve immediately in 2008 announced its Troubled Asset Relief Programme amounting to 700 billion dollars.[269] This calmed the market and made the crisis less severe. In the EU, however, the OMT programme was announced in 2012, when the crisis was starting to threaten the survival of the euro.

After *Pringle* - where the ECB's participation in the ESM was approved, after *Gauweiler* - where the ECB's mandate was extended, and after the SSM Regulation - where the ECB received supervisory powers and tasks, it started to look more like the Banque de France, than the Bundesbank. The initial influence from the ordoliberal ideas, which required that the only task of a central bank is to preserve price stability and act fully independently, seems to have weakened. Today, the ECB is driven by the need for sound economic policy and prudent banking sector, in addition to ensuring a stable monetary policy. Even the scope of monetary policy is broader than before. Even though this is not necessarily bad, the fact that such shift occurred as a result of a financial crisis and without much institutional debate can be problematic.

[267] Ibid, para. 106.
[268] H. Kalimo and M. Jansson, *EU economic law in time of crisis* (Edward Elgar Publishing, 2016) p. 23.
[269] A. D. Lefebvre, Government Bailout: Troubled Asset Relief Program (TARP) (Nova Science Publishers, 2010) p. 38. See also, N. Jabko, The Elusive Economic Government and the Forgotten Fiscal Union p. 9, in M. Matthijs and M. Blyth, *The Future of the Euro* (Oxford, 2015).

3. Other EU bodies and institutions

The ECB, even though the most important actor in the crisis, is not the only actor. Almost every EU institution has acted, within the sphere of its competences, in order to mitigate the consequences of the crisis, but also in order to prevent another crisis like this from occurring. Their actions can be classified, according to the instruments they use and the aims they pursue, in three broad groups of actions: crisis management measures, measures for regulatory reform and measures from institutional reform.

Firstly, crisis management measures are measures with immediate effect and serve short-term interests, such as allowing the economy and the markets to continue to function during crisis times by introducing favourable measures. These measures are exceptional and need to be modified or revoked according to the circumstances in the economy. Because of this, they require close monitoring of the markets and acting swiftly and accordingly. In this regard, there are doubts whether the EU, as a supranational entity, is in a good position to adopt crisis management measures. Such measures require clear competence, wide executive discretion and high expertise. The EU lacks at least the first two elements, thus it better equipped to contribute to law reform than crisis management.[270] However, the Commission has proved that this is not entirely true. It constantly followed the situation in the markets and adopted measures, most notably in the field of state aid for banks and winding up of credit institutions.[271]

Secondly, measures for regulatory reform are measures intended to help with the current crisis, but at the same time make the Union more resistant to future crises of this kind. Again, the Commission was the institution most involved in such a process. Of course, unlike crisis measures, the Commission when adopting measures for substantive law reform is dependent on Council and Parliament consent. The EU is well equipped for such a task as it can assess the systemic flaws in the economy and can enact measures that erase those flaws. Some of the measures falling in this category are the previously mentioned SSM Regulation or CRD.

Lastly, measures that reform the institutional architecture of the EU are closely linked to the measures that reform the substantive law. This is because any institutional change, to some extent, changes the substantive law or adapts it to the new architecture. The Commission proposed measures like this as well. However, as it does not have the required expertise in this field, it appointed expert groups, such as the Lamfalussy Committee or the previously commented de Larosière group.[272] After these expert groups gave their opinion, the Commission (mostly) followed that opinion and acted accordingly. Nevertheless, this type of measures are

[270] T. Tridimas, Federalization, crisis management, and law reform, in P. Craig, *The Evolution of EU Law* (2011) p.796.
[271] See most recently, Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (Banking Communication) OJ C 216/1 30.7.2013.
[272] See point 2.3.2 of this thesis.

contentious and criticised, because they create new bodies and often centralise a certain field of law on EU level. Moreover, this occurs without Treaty changes – such changes are brought about through secondary EU law, such as EU regulations. Because of this, the validity of these measures is frequently challenged before the CJEU.

Apart from the Commission, whose work will be assessed in the next point, other institutions will be examined as well. Among those are the ESM, the various European agencies, and the CJEU. A separate point in this chapter is reserved for each of these institutions and bodies.

3.1 European Commission

The Commission, as Guardian of the Treaties,[273] has a special role to play in every field of EU law. Especially in times of crisis the role of the Commission to adopt crisis measures and to adapt the EU legal order to the crisis, is crucial. Indeed, the Commission in light of the financial crisis, has lived up to its expectations. The work of the Commission concerning the legal and institutional reform has been incorporated in different points of this thesis,[274] therefore this part focuses on the crisis management measures.

Even at the outset of the financial crisis in 2008, the Commission has adopted the first 2008 Banking Communication[275] which had the aim to safeguard the stability of the financial system by setting a framework, within which the MS can adopt necessary measures to help the financial institutions.[276] This measure has been specifically taken from the crisis, and presents the view of the Commission regarding the application of Article 107(3)(b) TFEU[277] in times of financial crisis, when there is increased need for recourse to state aid exceptions. When assessing state aid exceptions in normal circumstances, another Guidelines from 2004[278] apply. Thus, the crisis Communication from 2008 increased the scope of Article 107(3)(b) and adopted a less restrictive interpretation of that state aid exception. This is notwithstanding the statement of the Commission that the interpretation of Article 107(3)(b) remains restrictive.[279] Afterwards, the Commission adopted the Recapitalisation Communication,[280] the Impaired Assets

[273] Article 17(1) TEU.
[274] See points 2.3.1, 2.3.2 and 2.3.3, but also 3.2 and 3.3 of this thesis.
[275] Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis OJ C 270/8 25.10.2008.
[276] Ibid, recital 4.
[277] At the time of the adoption of the Communication, it was Article 87(3)(c) TEC.
[278] Communication from the Commission - Community Guidelines on State Aid for rescuing and restructuring firms in difficulty OJ C 244/2 1.10.2004.
[279] Communication from 2008, see *supra* note 275, point 8.
[280] Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition OJ C 10, 15.1.2009, p.2.

Communication[281] and the Restructuring Communication.[282] They dealt with specific types of state aid which fell under the exception, and applied in addition to the Banking Communication.

After the adoption of these Communications, the Commission kept monitoring the market and the financial circumstances. This is because the Communications were temporary in nature and would not apply once the crisis has ended. This was stressed in the 2010 Prolongation Communication,[283] point 17 of which stated that starting from 2012 a gradual transition to a more permanent regime of State aid guidelines would take place. This proved to be optimistic as there was, after this period, still a need to help the banks financially. Because of this, two more Banking Communications were adopted, the 2011 Prolongation Communication[284] and the latest Banking Communication.[285] Analysis of the substance of all of these Communications is outside of the scope of this thesis, therefore in the next paragraphs, only the latest Banking Communication from 2013 is going to be analysed.

The Banking Communication from 2013, as the previous Communications from the Commission, is giving the view of the Commission regarding the application of Article 107(3)(b) TFEU which allows for aid in order to remedy a serious disturbance in the economy of a MS. The legal nature of the Banking Communication was given by the Court in the *Kotnik* case,[286] where the validity of the Communication was challenged. The Court held that the Banking Communication is *not binding* on the MS or on EU institutions, except on the Commission. The Commission, by the adoption of the Banking Communication, which lists the conditions for the application of Article 107(3)(b) TFEU, limited its discretion when it comes to that Article. This is because, such a document created legitimate expectations for the persons concerned, which require, together with the principle of equal treatment, that the Commission follows the conditions stated therein.[287] Thus, when state aid fulfils the conditions in the Communication, the Commission must authorize that aid. On the other hand, when state aid does not fulfil those conditions, the Commission cannot *a priori* prohibit that aid, but must examine the specific exceptional circumstances in that particular case.[288] According to this, through the Banking

[281] Communication from the Commission on the treatment of impaired assets in the Community financial sector OJ C 72, 26.3.2009, p. 1.
[282] Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules OJ C 195, 19.8.2009, p.9.
[283] Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis OJ C 329, 7.12.2010, p.7.
[284] Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis OJ C 356, 6.12.2011, p.7.
[285] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') OJ C 216/1 30.7.2013 p.1.
[286] Case C‑526/14 *Kotnik* [2016] EU:C:2016:570.
[287] Ibid, para. 40.
[288] Ibid, para. 43.

Communication, the Commission informs the MS of its interpretation of Article 107(3)(b) TFEU in times of crisis, so that the MS know beforehand what to expect.

Regarding the substance of the Banking Communication, the most important feature is the requirement of burden-sharing, as a prerequisite for authorizing state aid under Article 107(3)(b) TFEU. This requirement is in place to counter the problem of *moral-hazard.* [289] The very fact that state aid is given more often than usual and moreover, that the Commission recognizes the need for the MS to finance the economy in crisis times, can encourage individuals to engage in risk-taking, believing that the possible negative consequences of such actions will be borne by the community. The Banking Communication makes clear that the loses of a financial institution are first to be absorbed by equity, then by hybrid capital holders and lastly by subordinated debt holders.[290] Only after such internal contributions, known as bail-in, have taken place, there can be external contributions from the budget of the State, known as bail-out. This is also in accordance with the requirement to keep state aid and distortions of competition between banks and across Member States to the minimum.[291] This burden-sharing requirement was challenged by several individuals, whose deposits were seized i.e. bailed-in, in order for that bank to be eligible for state aid, in accordance with the Communication. This is assessed in part 3.3 of this thesis.

Another important point of the Banking Communication is the one relating to the provision of dedicated support by the NCB to commercial banks, known as Emergency Liquidity Assistance. Even though usually the activities of NCB do not fall within the scope of state aid rules, the provision of central bank money to a credit institution[292] may constitute state aid and therefore, needs to be assessed by the Commission. The conditions stated in point 62 of the Banking Communication are the following: firstly, the credit institution must be temporarily illiquid, but solvent at the time of the liquidity provision, secondly, the facility must be fully secured by appropriate collateral, thirdly, the central bank must charge a penal interest rate to the beneficiary and lastly, the measure must be taken at the central bank's own initiative. If these conditions are fulfilled, the Commission can accept that ELA is notified after its approval on national level.[293] In this case, ELA will be assessed subsequently as part of the restructuring plan.[294] As mentioned in point 2.3.3 of this thesis, ELA also falls within the competence of the ECB under Article 14.4 ESCB Statute. Because of this, there may be *clash of competences* between the Commission and the ECB, when it comes to the approval of ELA. In order to avoid such a clash, it is important that each of these institutions assesses ELA from different aspects. The

[289] Point 15 and 40 Banking Communication.
[290] Ibid, point 41.
[291] Ibid, point 7.
[292] ELA definition, found in 'the procedures underlying the Governing Council's role pursuant to Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank with regard to the provision of ELA to individual credit institutions' p. 1.
[293] Point 56 Banking Communication.
[294] Ibid, note 20.

Commission needs to assess ELA from a *competition aspect* i.e. whether the grant of ELA is compatible with the internal market, whereas the ECB needs to assess ELA from a *monetary aspect* i.e. whether the grant of ELA affects price stability. This can be achieved if both the ECB and the Commission state clearly, in their decisions assessing ELA, the reasons for adopting the decision. Otherwise, they risk having their decisions annulled as *ultra vires.*

Lastly, state guaranties are treated in the Banking Communication similarly as liquidity assistance and can be notified to the Commission after their implementation. The most important condition is that only senior debt can be guaranteed and must be given to banks which have no capital shortfall.[295] This is again, to prevent moral hazard.

The crisis communications and guidelines adopted by the Commission certainly provided for relief in times of crisis. They made the procedure for approving state aid faster and simpler, which made it possible for the distressed economy to continue to function. However, these is not the only measures taken by the Commission.

In addition to this, in 2010, the Commission initiated a separate emergency funding programme - the European Financial Stabilisation Mechanism.[296] Through this mechanism the Commission provided financial support to MS experiencing severe financial difficulties by using bonds issued on behalf of the EU.[297] Greece, Ireland and Portugal were given financial support through the EFSM, conditional on the implementation of reforms. The EFSM today remains in place for specific tasks such as the lengthening of maturities for loans to Ireland, Portugal or Greece and monitor the previously approved loans to them. The Commission also plays an important role in the process of granting loans from the EFSF and the ESM.

3.2 Agencies of the European Union

As part of the integration process of the market for financial services, many European agencies were created. Also, as seen in point 2.3.2 of this thesis, already existing EU institutions acquired new tasks in the financial market. The Commission's role in the establishment of these agencies is crucial. It proposes the regulatory framework for the agencies to the Parliament and Council, having previously obtained the opinion of committees and expert groups on the matter.

In this regard, the Committee of wise men on the regulation of European securities markets, chaired by Mr. Alexandre Lamfalussy and composed of distinguished economists, was one of those committees. It was given the task of proposing how financial market integration in the EU should be carried out. The report of this Committee, which was subsequently endorsed

[295] Ibid, points 58 and 59.
[296] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, 12.5.2010, p. 1–4.
[297] Ibid, Article 2.

by the EU, recommended four level regulatory approach to be established.[298] Level 1 encompasses the framework principles formulated through regulations or directives adopted through the ordinary legislative procedure by the Parliament and the Council. Level 2 measures are implementing the details, but always remain within the Level 1 framework. These implementing measures are to be drafted by a European Securities Committee[299] and adopted by the Commission. Level 3 measures are guidelines and common standards adopted by different committees of national supervisors. There were three such committees: Committee of European Banking Supervisors (CEBS),[300] Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS)[301] and Committee of European Securities Regulators (CESR).[302] In their respective fields of competence, this committees also advised the Commission in the adoption of level 2 acts. At level 4, the duty of the Commission, as guardian of the Treaties, is stressed. In this regard, the Commission is to enforce the rules and monitor the regulatory system. In short, the EU legislature was concerned only with the essential issues and the Commission implemented them in practice by adopting the measures of expert committees. This benefit of such regulatory approach is speeding up the integration process, but at the same time keeping it democratic and transparent.[303]

However, the crisis necessitated deeper integration in the financial market than the one provided by the Level 3 committees. Because of this, and in accordance with the de Larosière Report, the Level 3 committees were replaced by new European Supervisory Authorities with increased powers of supervision. They are going to be assessed separately below.

Also, a complete Banking Union is composed of firstly, single supervisory mechanism, secondly, single resolution mechanism and thirdly, a single deposit guarantee scheme. Single banking supervision was achieved with the SSM Regulation and empowering the ECB, whereas single banking resolution with the SRM Regulation and the creation of the SRB.[304] The single deposit guarantee scheme remains still at national level, with a Directive[305] harmonising this field. Therefore, the SRM Regulation and the SRB are going to be examined below as well.

[298] Lamfalussy report, p.20.
[299] Commission Decision of 6 June 2001 establishing the European Securities Committee 2001/528/EC, OJ L 191, 13/07/2001, p. 0045 – 0046.
[300] Commission Decision of 5 November 2003 establishing the Committee of European Banking Supervisors 2004/5/EC, OJ L 003, 07/01/2004, p. 0028 – 0029.
[301] Commission Decision of 23 January 2009 establishing the Committee of European Insurance and Occupational Pensions Supervisors 2009/79/EC, OJ L 25, 29.1.2009, p. 28–32.
[302] Commission Decision of 5 November 2003 amending Decision 2001/527/EC establishing the Committee of European Securities Regulators 2004/7/EC, OJ L 003, 07/01/2004 P. 0032 - 0032
[303] Lamfalussy report, p. 24.
[304] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 OJ L 225/1 30.7.2014 p. 1.
[305] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes OJ L 173/149 12.6.2014 p. 149-178.

3.2.1 European Supervisory Authorities

There are three ESAs: The European Banking Authority,[306] the European Securities and Markets Authority[307] and the European Insurance and Occupational Pensions Authority.[308] They function within the European System of Financial Supervision and in parallel with the ECB as prudential supervisor. Before discussing the functioning of the EBA, an examination of the legal basis of the ESAs is required.

The ESAs establishing Regulations are based on *Article 114 TFEU*. This Article provides for the adoption of measures for the approximation of laws which have as their object the establishment and functioning of the internal market. The Court has held that, under Article 114 TFEU, the EU legislature enjoys discretion in choosing the most appropriate harmonization technique,[309] Accordingly, that Article can constitute a legal basis for the establishment of a Union body, such as an agency,[310] provided that the tasks conferred on such a body are closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the MS.[311]

This is a change from the previous practise of establishment of agencies, as in the past the most common legal basis for the establishment of agencies was *Article 352 TFEU* (then Article 308 TEC).[312] This Article as well, provides for internal market harmonization measures, but specifically where the Treaty has not provided for the necessary powers. Because of this, a measure based on Article 352 TFEU requires unanimity in the Council and moreover, approval from the Parliaments of some MS.[313] Therefore, it seems strategically better for the EU to base its measures on Article 114 TFEU. However, this did not go unnoticed by the MS, especially the UK, which challenged many of these measures. Most relevant for this thesis is the *ESMA* case.[314] In this case, there were two main issues: firstly, whether Article 114 was the correct legal basis and secondly, whether the body established through secondary EU law was *Meroni*-compliant.

[306] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC OJ L 331/12 15.12.2010, p. 12.
[307] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC OJ L 331, 15.12.2010, p. 84.
[308] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC OJ L 331, 15.12.2010, p. 48.
[309] Case C-66/04 *UK v European Parliament and Council* [2005] EU:C:2005:743 (*Smoke flavourings*) para. 45-46.
[310] Case C-217/04 *UK v European Parliament and Council* [2006] EU:C:2006:279 (*ENISA)* para. 62.
[311] Ibid, para. 45.
[312] Communication from the Commission - The operating framework for the European Regulatory Agencies COM(2002) 718 final, p. 7.
[313] See, UK European Union Act 2011, 2011 c. 12, part 1 section 8.
[314] Case C‑270/12 *UK v European Parliament and Council* [2014] EU:C:2014:18 (*ESMA)*.

Regarding the first issue, the Court examined whether the two conditions of Article 114 TFEU were fulfilled, namely whether the ESMA Regulation comprises measures for the approximation and whether it has as its object the establishment and functioning of the internal market. The UK contended that, if Article 28 ESMA Regulation provided for the adoption of individual measures directed at natural or legal persons, it is *ultra vires* Article 114 TFEU, because such individual measures cannot be regarded as harmonisation measures.[315] The Court dismissed this claim by stating that even individual measures, if necessary, may constitute 'measures for approximation'.[316] However, the Court stressed that under Article 28 ESMA Regulation measures of general application are adopted as a rule, whereas individual measures under that Article can be adopted only 'as a last resort and in very specific circumstances'.[317] According to this, Article 28 ESMA Regulation was found to be directed at the harmonisation of the Member States' laws, regulations and administrative provisions. Furthermore, the Court established that, in accordance with recitals 2 and 33 in the preamble of the ESMA Regulation, the purpose of Article 28 ESMA Regulation is to improve the conditions for the establishment and functioning of the internal market in the financial field.[318] Thus, Article 28 ESMA Regulation is correctly based on Article 114 TFEU.

Regarding the second issue, the Court held that Article 28 is in accordance with the *Meroni*[319] doctrine. The Court, however, seems to have deviated from one of the requirements of *Meroni*: the prohibition of delegation of discretionary powers. It stated that ESMA's discretion was circumscribed, thereby implicitly suggesting that ESMA indeed possesses discretionary powers, however its use is controlled by Article 28(2) and (3).[320] Moreover, in its conclusion the Court states that ESMA is not vested with a 'very large measure of discretion' that is incompatible with the FEU Treaty,[321] thereby modifying the *Meroni* prohibition – from prohibition to delegate *discretionary powers,* to prohibition to delegate *very large measure of discretion.* The difference is obvious and substantial. This led some authors to consider the *ESMA* case as the *Meroni* doctrine revisited.[322]

The ESAs establishing Regulations also state that they comply with the principles of subsidiarity and proportionality.[323] Indeed, as the crisis occurred notwithstanding the supervisory committees and the respective de Larosière recommendations, the supervisory objectives cannot be sufficiently achieved by the MS.[324] Furthermore, the ESAs can only adopt individual measures as a last resort, only when the national competent authority does not act or acts

[315] Ibid, para. 90.
[316] Ibid, para. 106.
[317] Ibid, para. 108.
[318] Ibid, para. 114-116.
[319] Case 9-56 *Meroni* [1958] EU:C:1958:7, para. 150-152
[320] Case *ESMA* (n 314), para. 45.
[321] Ibid, para.54.
[322] P. Weismann, *European Agencies and Risk Governance in EU Financial Market Law* (Routledge, 2016) p.32.
[323] Recital 66 of the respective Regulations establishing ESAs, see *supra* notes 306, 307, 308.
[324] Article 5(3) TEU.

improperly.[325] Such *ultima ratio* powers comply with the requirement not to exceed what is necessary to achieve the objectives.[326]

The EBA, as the other ESAs, is a Union body with legal personality.[327] It replaced the Committee of European Banking Supervisors, as suggested in the de Larosière Report. Its tasks are, *inter alia,* to contribute to the establishment of high-quality common regulatory and supervisory standards and practices and to the consistent application of legally binding Union acts.[328] The EBA does so, by adopting guidelines and recommendations, but also by submitting draft regulatory and implementing technical standards to the Commission, when the Commission has been delegated powers pursuant to Articles 290 and 291 TFEU. The EBA also adopts guidelines addressed to the MS and national competent authorities, especially for areas regulated by a directive, for example the CRD.[329] Such guidelines suggest the way in which the directive should be transposed on national level and are soft law i.e. not binding on the MS. However, if the MS do not comply with the guidelines of the ECB, they need to state reasons why. This is known as the 'comply or explain' principle. [330] Nevertheless, most of the time the MS comply with the EBA guidelines and transpose the directives in the light of those guidelines.[331]

Apart from this, the EBA can conduct stress tests on European banks in order to identify systemic risk in the banking sector of the EU.[332] The power of the EBA to adopt individual decisions addressed to financial institutions is limited only to the cases when national supervisors do not act in compliance with the decision of the EBA in the first place.[333]

The EBA functions in parallel with the ECB which is, as previously stated, the prudential supervisor for significant credit institutions. Unlike the ECB, the EBA has mostly powers to propose legislation and adopt non-binding technical standards, so the ECB and the EBA supplement each other in the field of banking supervision. Nevertheless, the far-reaching supervisory powers of the ECB may have led to the *marginalisation* of the EBA.[334] This is problematic as the EBA is the *only EU-wide authority* in supervision and its marginalisation can increase the risk of fragmentation between the MS within the SSM and those outside of it.

[325] Article 18 of the ESAs Regulation.
[326] Article 5(4) TEU.
[327] Article 5 EBA Regulation.
[328] Ibid, Article 8.
[329] For example, Guidelines on the assessment of the suitability of members of the management body and key function holders EBA/GL/2012/06, 22 November 2012
[330] Article 16(3) EBA Regulation.
[331] Compliance Table EBA/GL/2012/06, EBA BS 2012 215 Annex 1.
[332] Article 23 EBA Regulation.
[333] Article 17(6), Article 18(4) and Article 19(4) EBA Regulation. In this case, the Commission can also initiate proceedings against the MS under Article 258 TFEU.
[334] E. Ferran and V. SG Babis, The European Single Supervisory Mechanism (2013) 13 Journal of Corporate Law Studies p. 253–283.

3.2.2 Single Resolution Board

The second pillar of the Banking Union, the single resolution mechanism, is regulated by the SRM Regulation. Before the adoption of the SRM Regulation, this pillar of the Banking Union was regulated by the Bank Recovery and Resolution Directive.[335] As any directive, the BRRD was applied in practice by the national resolution authorities, which commonly are the NCB of the MS. However, this Directive provided for minimum harmonization,[336] which proved to be insufficient in times of crisis. The MS, by using the discretion that a directive leaves to them, transposed the BRRD differently in their national legal systems and because of this, the national resolution authorities were adopting substantially different decision. Because of such discrepancies in the resolution practices in the MS, there an unlevel-playing field was created within the euro area.[337]

Another flaw of the BRRD was the complicated and ineffective system regarding cross-border banking groups.[338] Group recovery and resolution plans, under the BRRD, were reviewed, assessed and approved by joint decision of all group supervisors, in the absence of which the consolidating supervisor decides on consolidated basis, subject to referral to the EBA by other group supervisors.[339] Because of this, the MS and the national resolution authorities were unable to cope with failing cross-border banks.[340] This is also visible in the SRM Preamble.[341]

In order to correct these problems, the SRM Regulation was adopted only two months after the adoption of the BRRD. The SRM Regulation provided for a uniform procedure for resolution and most importantly, established the SRB. The SRB is a Union body with legal personality which applies the uniform resolution rules set out in the SRM Regulation and the BRRD. Its scope is the same as the SSM Regulation.[342] According to this, the national resolution authorities still out the resolution procedure, but they do not enjoy the discretion that they used to have under the BRRD. Instead, they must act in accordance with the SRB decision.[343] With this any disparities in the resolution practices in the euro area were removed.[344]

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[335] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council OJ L 173, 12.6.2014, p. 190.
[336] Ibid, recital 10 and 44.
[337] Recitals 3 and 4 SRM Regulation.
[338] V. SG Babis, European Bank Recovery and Resolution Directive: Recovery Proceedings for Cross-Border Banking Groups in European Business Law Review 2014, p. 461.
[339] Article 8 BRRD.
[340] F. Allen *Cross-Border Banking in Europe*, CEPR (2011), point 1.3 p. 40.
[341] Recital 10 SRM Regulation.
[342] Recital 22 and Article 2 SRM Regulation.
[343] Ibid, Article 18(9).
[344] Ibid, recital 2.

During the legislative process for the adoption of the SRM Regulation, the Commission considered that there is no need to conduct a new Impact Assessment. Therefore, in its Proposal for the SRM Regulation, it refers to the IA conducted for the adoption of the BRRD.[345] This is rather unconvincing, as the SRM Regulation is the further step in the process of integration of the financial market and therefore, needs to be justified – the *problem* should be verified, its *underlying cause* should be identified, the *need for EU action* should be assessed and the *advantages and disadvantages* of available solutions analysed.[346] In this regard, it is troubling that the Commission referred to old IA, when it proposed the SRM Regulation.

Like the ESAs, the SRB is also based on Article 114 TFEU. The Commission considered that this Article was the correct legal basis, as the SRM Regulation 'aims to preserve the integrity and enhance the functioning of the internal market'.[347] However, the SRB as a rule adopts individual measures and can *only exceptionally adopt* measures of general application. This is the exact opposite of the ESAs.[348] Moreover, the SRM 'adapts the rules and principles of [the BRRD] to the specificities of the SRM'.[349] According to this, harmonization in the field of resolution of failing banks was carried out by the BRRD, and the SRM Regulation merely centralizes the said field. Because of this, the SRB can hardly be seen as a body 'closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States'.[350]

The analysis done in this thesis concerning ESMA, should apply equally to the SRB. Under Article 114 TFEU, there are two requirements: approximation measures and the functioning of the internal market. Regarding the former, the Court held in *ESMA*, that individual measures can exceptionally constitute measures for approximation of laws.[351] Taking this into consideration, it is hard to see how the SRB, which normally takes individual decisions addressed at individual NCB, approximates the laws of the MS. Admittedly, centralisation and harmonisation are related terms, since harmonisation aims towards centralisation and unification.[352] Nevertheless, the SRB does not seem to fit into the reasoning of the Court in the *ESMA* case.

On the other hand, the SRB seems to satisfy the second requirement. Indeed, it is indispensable for the Banking Union and improves the conditions in the internal market for

[345] Point 2 in 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 COM(2013) 520 final, 2013/0253 (COD) 10.7.2013.
[346] See Commission's Guidelines on Impact Assessment, as part of the Commission's Better Regulation Initiative, http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm (Accessed on 20.04.2017)
[347] SRM Regulation Proposal, see *supra* note 345, point 3.1.
[348] See p. 52 of this thesis.
[349] Recital 18 SRM Regulation Preamble.
[350] Case *ENISA* (n 310), para. 45.
[351] Case *ESMA* (n 314), para. 106-108.
[352] K. Lannoo and J. Casey, EU Financial Regulation & Supervision beyond 2005: An Agenda for the New Commission (CEPS, 2005) p. 9-10.

financial services. The BRRD only provided for minimum harmonisation[353] in the field of bank resolution, which proved to be insufficient in times of financial crisis. Further integration was required in the financial market, which necessarily meant creation of a centralised EU body responsible for bank resolution.

Article 18 SRM Regulation is the main article for the SRB, since it empowers it to adopt resolution schemes and lists the conditions for the use of that power. The purpose of this Article is to make the SRB *Meroni/ESMA-compliant* i.e. that the discretion of the SRB is controlled and circumscribed. For this reason, Article 18(1) SRM Regulation provides for three conditions, which need to be fulfilled, in order for the SRB to be able to act. They are assessed separately below.

Firstly, the entity should be failing or likely to fail. This is an objective assessment normally carried out by the ECB. It consists of evaluation of the assets and liabilities of the bank, taking into account its liquidity and future sustainability.[354] However, this assessment can also be carried out by the SRB itself, subject to the condition that the ECB does not make such an assessment within three days of being informed by the SRB. This points to the fact that the SRB can itself initiate the resolution procedure, without being dependent on the ECB's assessment.

Secondly, there should be no reasonable prospect that any alternative private sector measures or supervisory action would prevent the entity's failure within a reasonable timeframe. This assessment is carried out by the SRB. In normal market circumstances, where bank failure is an "isolated incident", this assessment would indeed be real and substantive. However, looking at the financial crisis, where markets did not trust the credit institutions and public confidence was undermined, it is highly unlikely that that the failure of any bank could be prevented by private sector measures. Therefore, at least while the consequences of the crisis are felt, this condition would remain to be automatic – as soon as a bank is 'failing or likely to fail' no private sector measures would help. Thus, resolution would be the only choice.

Thirdly, the resolution should be necessary in the public interest. Resolution in the public interest is defined as necessary for the achievement of, and is proportionate to one or more of the resolution objectives. Again, this condition seems to be automatic – at least one of the resolution tools[355] will almost always be the public interest, as it ensures the continuity of the bank and minimizes the adverse effects on the financial system.

The Commission controls the fulfilment of these conditions, by receiving the resolution scheme by the SRB, immediately after it is adopted. The Commission can object to the discretionary aspects of the resolution scheme within 24 hours, and can propose to the Council

[353] V. SG Babis, European Bank Recovery and Resolution Directive: Recovery Proceedings for Cross-Border Banking Groups in European Business Law Review 2014, p. 478.
[354] Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) EBA/GL/2014/13, p.157. See also, Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU EBA/GL/2015/07, p. 12.
[355] Article 22 SRM Regulation.

to object particularly to the 'public interest' requirement. This period of 24 hours may seem short, however resolution must be carried out swiftly to avoid market disturbances.[356]

According to this, Article 18 SRM Regulation circumscribes the discretion of the SRB only formally. In practice, the SRB can put a bank under resolution as soon as it declares that bank as failing or likely to fail. This seems to be insufficient for compliance with the *Meroni/ESMA* case-law. If the fact that the SRB adopt mostly individual measures is added to this, it becomes even more troublesome to fit the SRB within the *Meroni/ESMA* framework. Because of this, even though the SRB improves the conditions in the financial market, the rule of law may nevertheless be undermined.

3.3 The Court of Justice

The Court of Justice and the General Court play an important role in protecting the rule of law and fundamental rights in financial crisis. Unlike other EU institutions, which may consider the rule of law less important than saving the Union, the CJEU must always carefully assess the case both from the aspect of the institution and of the individual. In short, the CJEU cannot be affected by the crisis and take sides. Its task is seemingly simple – to ensure that in the interpretation and application of the Treaties the law is observed.[357]

However, in times of financial crisis, this means that the CJEU has to balance on the one hand, the claims of the, at times, encroaching EU institutions, and on the other, the rights of the, at times, pretentious individuals. Therefore, it needs to be assessed how well has the CJEU fulfilled its task. Nevertheless, the CJEU has a role to play even before getting to the substance of the case, by declaring the case admissible or inadmissible. In accordance with this, this last point is divided into two parts: access to justice and substance.

A) Access to justice

Rules on admissibility in the EU judicial system are subject to constant debate.[358] That debate is however, outside of the scope of this thesis. Presently the rules on standing are interpreted strictly and in accordance with text of the respective TFEU articles. In this regard, the Court has held on several occasions that the TFEU has established by Articles 263 and 277, on the one hand, and Article 267, on the other, a *complete system of legal remedies.*[359]

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[356] Moreover, it is preferred that resolution is carried out during the weekend, see The Bank of England's approach to resolution (2014) p. 16.
[357] Article 19 TEU.
[358] C-50/00 P *Unión de Pequeños Agricultores* [2002] EU:C:2002:462, para.44. On the other hand see, Opinion of AG Jacobs in the same case, para. 100-106.
[359] Ibid, para 40. See also, Case C-461/03 *Gaston Schul* [2005] EU:C:2005:742, para. 22; Case C‑72/15 *Rosneft* [2017] EU:C:2017:236, para. 66.

Through Article 263 TFEU a person can institute proceedings against an act addressed to that person or which is of direct and individual concern to them. In accordance with the Lisbon Treaty amendments, a person needs to show only direct concern against a regulatory act that does not entail implementing measures. Contrary to this, the MS can always challenge the validity of an EU measure. The time-limit for this action is two months from the publication of the measure, or from its notification to the plaintiff. Article 263 TFEU establishes a direct action for annulment of an EU measure, however, its strict conditions sometimes prevent individuals from relying on this Article.

The Lisbon Amendments were not very efficient as they were interpreted narrowly. In this regard, a regulatory act is an act of general application other than legislative act.[360] The term implementing measures is, on the other hand interpreted broadly, thereby narrowing the scope of the Lisbon exception.[361] Even more, most, if not all, of the crisis measures are taken in the form of legislative acts or individual decisions. Therefore, individuals could not benefit from this exception in the light of the financial crisis. They have to show direct and individual concern. Direct effect requires that the legal situation of the individual is directly affected and leaves no discretion to the addressee,[362] whereas individual concern requires the individual to be distinguished by reason of his attributes as if he was the addressee.[363] The rules on standing are generally stringent, however their fulfilment is particularly hard when it comes to measures affecting the financial sector.

As seen in the *Alcimos* case,[364] an ECB decision to prohibit an increase in ELA was found not to be of direct concern for the applicant. The applicant failed to prove that the ECB decision left no discretion to the Bank of Greece, by failing to prove the *causal link* between the ECB decision and the Bank of Greece decision to impose bank holiday and capital controls, from which the applicant supposedly suffered damages. The General Court held that the ECB decision left discretion to the addressee, as the Bank of Greece was free to choose measures different from the bank holiday and capital controls[365] and swiftly dismissed the applicant's claim that that discretion was 'purely hypothetical'.[366] Thus, the action was dismissed as inadmissible, without even getting to the assessment of individual concern, which is generally harder to prove than direct concern.

According to this, the demanding rules on standing may constitute an obstacle for access to justice. Apart from admissibility, the substance of the *Alcimos* case was very intriguing, as it opened the question of separation of monetary and supervisory tasks of the ECB, the

[360] Case C‑583/11 P *Inuit* [2013] EU:C:2013:625, para. 58.
[361] Case C‑274/12 P *Telefónica SA* [2013] EU:C:2013:852, para. 35.
[362] Joined cases 41 to 44-70 *International Fruit* [1971] EU:C:1971:53, para. 25-28.
[363] C-25/62 *Plaumann* [1963] EU:C:1963:17, p. 107.
[364] Case T‑368/15 *Alcimos* [2016] EU:T:2016:438, para. 40.
[365] Ibid, para. 38.
[366] Ibid, para. 37.

independence of the ECB and the scope of Article 14.4 ESCB Statute.[367] Unfortunately, the General Court did not go into the substance of the case.

Through Article 277 TFEU, also known as the plea of illegality, an individual may, while challenging the validity of an individual measure affecting him, simultaneously challenge the legality of the act of general application upon which the individual measure is based. However, a precise definition of the plea of illegality cannot be given, as the Court's case-law concerning this Article is somewhat unclear and inconsistent. Firstly, the Court held that the plea of illegality constitutes a general principle of law.[368] It provides the persons 'who are precluded by the second paragraph of [Article 263] from instituting proceedings directly in respect of general acts, with the benefit of a judicial review of them at the time when they are affected by implementing decisions which are of direct and individual concern to them'.[369]

Secondly, in accordance with this definition, the most common use of the plea of illegality is as an additional and incidental plea during an action for annulment under Article 263 TFEU.[370] In this regard, once the applicant initiates an action for annulment under Article 263 TFEU, it can use the plea of illegality before the Court, in support of his claim to annul the contested individual measure.[371] This means that Article 277 TFEU cannot be used independently and cannot in itself bring a person before the Court.[372]

Thirdly, the text of Article 277 TFEU uses the term 'inapplicability of that act'. Strict textual interpretation would mean that the effects of a successful plea of illegality are a declaration of the inapplicability of the general act and the annulment of the individual decision due to the illegality of its legal basis.[373] However, the Court also uses the term 'invalidity' in regard to Article 277 TFEU,[374] which would mean that the effect of the plea of illegality is similar to that of the action for annulment under Article 263 TFEU. Because of this uncertainty surrounding Article 277, it was not used in the cases during the financial crisis, nevertheless, it could be potentially helpful especially for persons seeking to annul a supervisory decision of the ECB based on the SSM Regulation, which seems to have many flaws.[375]

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[367] Application for initiating proceedings between Alcimos and the ECB http://www.alcimos.com/wp-content/uploads/2015/07/ECJ_filing.pdf (Accessed on 20.04.2017)
[368] Case 9/56 *Meroni* [1958] EU:C:1958:7, p. 140; Case 216/82 *Universität Hamburg* [1983] EU:C:1983:248, para.10.
[369] Case 92/78 *Simmenthal* [1979] EU:C:1979:53, para. 41.
[370] Craig and G. de Burca, EU Law Text, Cases and Materials (Oxford, 2015) p. 540.
[371] Case *Inuit* (n 360), para. 93.
[372] However, see case *Universität Hamburg* (n 368), para. 12 where the Court allowed Article 277 TFEU to be used before a national court, and the applicant was enabled to indirectly challenge a measure after the two months' time-limit under Article 263(6) TFEU had passed.
[373] D. Sinaniotis, The Plea of Illegality in EC Law (2001) in European Public Law 7, p. 122. See also, Case 543/79 *Anton Birke* [1981] para. 24 and Case C‑21/14 P *Commission v Rusal Armenal* [2015] EU:C:2015:494, para. 31.
[374] Case C‑343/09 *Afton Chemical* [2010] EU:C:2010:419, para. 18; Also, Case C‑59/11 *Kokopelli* [2012] EU:C:2012:447, para. 34.
[375] See point 2.3.2 of this thesis.

Through Article 267 TFEU, a national court can refer a question to the Court of Justice, relating to the interpretation of primary EU law or the interpretation and validity of secondary EU law. It is arguable whether the preliminary reference procedure can be considered a judicial remedy, because the applicant cannot by itself decide to make a reference and further, this procedure differs from direct challenges under Article 263 TFEU as to the participation of the institutions, the delays and costs involved, the award of interim measures or the possibility of third party intervention.[376] Irrelevant of whether the preliminary ruling is a legal remedy or not, the majority of the cases mentioned in this thesis are indeed preliminary ruling procedures. In this regard, Article 267 TFEU has proved beneficial for ensuring the rule of law in times of crisis.

According to the Court, Article 267 TFEU is part of the complete system of legal remedies. In support of this view of the Court, Article 267(3) TFEU states that when national courts against whose decisions there is no judicial remedy under national law hear cases involving EU law, they must refer the question to the Court. However, this obligation is not absolute. According to the *acte clair*[377] and *acte éclairé*[378] doctrine even national courts against whose decisions there is no judicial remedy may refuse to refer the question to the Court. Also, those courts may consider that the question is irrelevant to the dispute before it and decide not to refer it to the Court.[379] Concerning this, the ECtHR has held that in accordance with the right to a fair trial, as enshrined in Article 6 ECHR, national courts whose decisions were not open to appeal under domestic law are required to give reasons for their refusal to refer a preliminary question to the Court.[380] Therefore, it seems that *most of the time* national courts will refer the question to the Court, if a party in the proceedings requests so.

But even after the national court makes the preliminary reference to the Court, the Court may declare it inadmissible for a number of reasons, most importantly if it considers the question referred not relevant to the resolution of the dispute.[381] However, this is unlikely since all the question referred through Article 267 TFEU enjoy a presumption of relevance.[382] In this regard, the Court in the *Gauweiler* case[383] considered a request for preliminary ruling admissible, notwithstanding the claims of several MS and EU institutions that the press-release and the OMT decision is preparatory and does not have legal effects.[384] Indeed, the Court held in *IBM,*[385] that

[376] Opinion of AG Jacobs in Case C-50/00 *Unión de Pequeños Agricultores* [2002] EU:C:2002:197, p. 102.
[377] When the issue in question is so clear that no reference is required. See Case C-283/81 *CILFIT* [1982] EU:C:1982:335, para. 16-21.
[378] When the Court has ruled previously on the issue in question. See Joined Cases 28, 29 and 30/62 *Da Costa* [1963] EU:C:1963:6, p. 38.
[379] Case *CILFIT* (n 377), para. 21.
[380] ECtHR Judgment of 8/4/2014 – 17120/09 *Dhahbi v. Italy*, para. 31-34.
[381] Case C-18/93 *Corsica Ferries* [1994] EU:C:1994:195, paras 14-15. See also, Case C-83/91 *Meilicke* [1992] EU:C:1992:332, paras 28-29; Case C-309/06 *Marks & Spencer* [2008] EU:C:2008:211, para 21.
[382] Case C‑416/10 *Križan* [2013] EU:C:2013:8, para. 54. Also, Case C‑76/15 *Vervloet* [2016] EU:C:2016:975, para. 57.
[383] Case *Gauweiler* (n 254).
[384] Ibid, para. 23.
[385] Case 60/81 *International Business Machines Corporation* [1981] EU:C:1981:264, para. 9-12.

a provisional decision paving the way for the final decision cannot be reviewed by the CJEU. The Court, however, dismissed such claims on the basis of 'preventive legal protection'[386] and the existence of a dispute in the BVerfG, which made an Article 267 TFEU request for the first time. In reality, the substance of the *Gauweiler* case seemed too important to be declared inadmissible. Part 2.3.4 of this thesis deals with the substance of this case. For the purposes of this part, it is sufficient to show that individuals, unlike MS, may be denied access to justice because of stringent rules on admissibility.

It was held as early as 1963 that subjects of the Union are not only MS, but also their nationals.[387] However, when it comes to admissibility the treatment of individuals differs from that of MS. This is especially true in the financial crisis when the EU measures *per se* affect an open and unspecified group of individuals. Thus, the only way to get before the Court seems to be indirectly through the MS – either through the courts, which can submit a request for preliminary ruling in accordance with Article 267 TFEU or through the governments, which are "privileged applicants" in accordance with Article 263(2) TFEU.

B) Substance

When the actions fulfilled the admissibility requirements, the Court went on to assess the substance of those actions. Among the many cases brought during the financial crisis, most relevant for this thesis are *Pringle,*[388] *Ledra,*[389] *Mallis,*[390] and *Kotnik.*[391] In addition to these cases, a reference is made to *Gauweiler,*[392] *ESMA*[393] and *OLAF,*[394] which have been examined in detail in other parts of this thesis.

Firstly, the *Pringle* case was discussed in part 2.3.3 of this thesis. Here, an analysis is made regarding the compliance of the ESM with Article 123 and 125 TFEU. Article 123 TFEU contains a prohibition on monetary financing, which means that the ECB and the NCB cannot grant overdraft facilities to the MS or the EU. This prohibition includes the direct purchase of EU or government debt instruments by the ECB of the NCB. The question in *Pringle* was whether the ESM Treaty circumvents this prohibition, as the ESM, in which the ECB also participates, can buy government bonds. The Court held that Article 123 TFEU is not addressed to the MS, therefore this Article does not prohibit them from granting financial assistance one to another. In this regard, there is another argument that supports the Court's conclusion. As stated at page 37 of this thesis, the capital of the ESM is composed of paid-in capital of the MS and it is the MS that formally make the decision, in the ESM Board of Governors, to purchase government bonds. Therefore, even

[386] Case *Gauweiler* (n 254), para. 27.
[387] Case 26-62 *van Gend & Loos* [1963] EU:C:1963:1, p. 12.
[388] Case *Pringle* (n 218).
[389] Case *Ledra* (n 183).
[390] Joined Cases C‑105/15 P to C‑109/15 P *Mallis and Others v Commission and ECB* [2016] EU:C:2016:702.
[391] Case *Kotnik* (n 286).
[392] Case *Gauweiler* (n 254).
[393] Case *ESMA* (n 314).
[394] Case *OLAF* (n 17).

though the ECB plays a role in the ESM, its actions cannot be seen as contrary to the monetary financing prohibition in Article 123 TFEU.

The more substantial question is whether the ESM Treaty is in breach of Article 125 TFEU, which contains the 'no-bailout clause'. In the beginning, the Court relied on textual interpretation and concluded that Article 125 TFEU did not prohibit every form of financial assistance between the MS.[395] Next, by relying on the teleological interpretation, it concluded that the objective of Article 125 TFEU is to ensure that the MS follow a sound budgetary policy, thus financial assistance that does not endanger this objective is not prohibited.[396] The Court continued by stating that the ESM does not assume the debts of the recipient Member State, instead it gives a credit to the MS, which the MS is supposed to repay and which is subject to strict conditionality.[397]

The most troubling part seems to be Article 25(2) ESM Treaty. This Article states that a failure of a ESM MS to meet the required payment under a capital call, leads to a revised increased capital call, in order for the other ESM MS to cover for such failure. Thus, the ESM MS are to pay extra, so that the ESM receives the total amount of capital needed. This is exactly opposite of Article 125 TFEU, as it means that other MS assume the obligations of a defaulting MS. The Court saw the justification for this in Article 25(3) ESM Treaty, according to which when the ESM MS eventually pays its debt to the ESM, the excess capital is returned to the other MS. Therefore, the Court considered that it is ultimately the MS that is responsible for its own commitments, even though temporarily the other MS may cover its debts.[398]

This reasoning is virtually on the verge of Article 125 TFEU. The text of this Article does not refer to the temporary nature of the liability of other MS for the debts of a defaulting MS. This no-bailout clause is a constitutional principle, which is a manifestation, a corollary of the fiscal sovereignty of the MS.[399] To put it simply, the MS have the right to define their fiscal policy on their own, but they also have the obligation to bear the consequences of that fiscal policy on their own. If this right is modified, it will have repercussions on the obligation, and vice versa. The MS, with the creation of the ESM, seem to have modified the obligation, by *de facto* assuming the obligations of a defaulting MS. Because of this, the MoU interferes with the fiscal policy of the MS. The Court seems to accept such trade-off and frames it legally in the *Pringle* case, by weakening the prohibition in Article 125 TFEU.

Moreover, the Court in *Pringle* held that the provisions of the Charter do not apply to the MS in the ESM, as in accordance with Article 51(1) Charter, the MS are not implementing EU law when they act within the ESM.[400] Consequently, the MS do not have to comply with the Charter

[395] Case *Pringle* (n 218), para. 130-132.
[396] Ibid, para. 135-137.
[397] Ibid, para. 142-143.
[398] Ibid, para. 144-145.
[399] K. Tuori, *European Constitutionalism* (Cambridge University Press, 2015) p. 181.
[400] Case *Pringle* (n 218), para. 180.

when acting pursuant to the ESM Treaty. This left open the question whether the Charter applies to EU institutions when they act within the ESM framework.[401]

This question came up before the Court in the *Ledra* case. The case concerned the Union's non-contractual liability for the alleged infringement of the right to property of the appellants, as enshrined in Article 17 Charter. The Court first held that the Charter applies to the EU institutions, even when they act outside of the EU legal framework, unlike the MS. Therefore, the Court then conducted the proportionality test, in order to assess whether the Commission, by concluding a MoU with Cyprus, contributed to a sufficiently serious breach of the appellants' right to property. The Court found that bail-in tool prescribed in the MoU, is both appropriate and necessary for the achievement of the legitimate aim of ensuring the stability of the banking system in the euro area. This was supported by the negative spill-over effect, which demands to act swiftly,[402] and the specificities of the bail-in tool, which did not exceed what is necessary to achieve the objective.[403] Therefore, the Union cannot be held liable for the losses of the appellants.

The Court reached the same outcome, however with different reasoning, in the *Mallis* case, which was delivered on the same day as *Ledra.* The appellants in the *Mallis* case sought the annulment of an Eurogroup statement which allegedly led to the bail-in of their deposits. The Court held that, even though the ECB and the Commission participate in the meetings of the Eurogroup, the Eurogroup's statement cannot be seen as an expression of the decision-making power of those two EU institutions.[404] Therefore, there can be no causal link between the Eurogroup statement and the bail-in of the appellants' deposits.

In the *Kotnik* case, the Court held that the burden-sharing measures i.e. bail-in of deposits, provided for in point 40 to 46 of the Banking Communication as a precondition for authorisation of State Aid, are compatible with the right to property. The Court held firstly, that the Banking Communication is not binding on the MS,[405] and as a consequence of this it does not impose any obligation on the MS regarding the form or procedure for the adoption of the burden-sharing measures.[406] In this regard, the requirement of bailing-in the deposits of the subordinated creditors was the most troublesome for the applicants. The Court found that this requirement is justified as subordinated creditors are to contribute to the bail-in only if there is further need of financing after the bank's shareholders and only if there are no other possibilities available to overcome any capital shortfall in the bank. Moreover, the 'no creditor worse off principle' enshrined in point 46 of the Banking Communication, requires that subordinated creditors should

[401] A. Hinarejos, Institutional Responses to the Crisis p.12 in A. Hinarejos*, The Euro Area Crisis in Constitutional Perspective* (Oxford, 2015).
[402] Case *Ledra* (n 183), para. 72.
[403] Ibid, para. 73-74.
[404] Case *Mallis* (n 390), para. 57.
[405] Case *Kotnik* (n 286), para. 45.
[406] Ibid, para. 72.

therefore not receive less, in economic terms, than what their instrument would have been worth if no State aid were to be granted.[407]

Indeed, the Banking Communication leaves discretion to the MS in choosing the form of burden-sharing measures. Nevertheless, if the MS choses to impose a mandatory bail-in, the Banking Communication provides for sufficient safeguards. Therefore, the right to property as enshrined in Article 17 Charter, does not preclude the burden-sharing measures in the Banking Communication.

To sum up, the role of the CJEU in times of crisis is crucial. The CJEU is the last stop for the protection of the principle of rule of law and fundamental rights in the EU. The MS had two choices in the face of the crisis: to further integrate or to test the strength of the existing integration. They evidently chose the former. In this regard, the CJEU has overall fulfilled its task well, even though on some occasions it was influenced by the crisis and tried to support the MS and the EU institutions in their integration efforts or at least not to impede such efforts. Considering that the crisis measures are slowly showing the desired result, it seems that the Court has rightly protected many of those measures against the numerous claims. However, it is a fact that the Court through its judgments has affected the future functioning of the EU and only time will tell if it is for the better.

[407] Ibid, para. 77.

4. Final observations

This thesis assessed and critically analysed the current state of the principle of rule of law in the EU. For this reason, many legal as well as academic texts were presented and discussed. As a result of such analysis, various statements for the present situation in EU law were made, but also claims and views for the future were presented. For the purposes of clarity and conciseness, they are summarised in the first point of this last chapter of the thesis.

Nevertheless, the circumstances under which the EU is functioning are constantly changing. Therefore, it is particularly hard during or shortly after a crisis, to assess the law, as it is constantly evolving. This is all the more true when it comes to EU law.[408] Because of this, a frequent re-examination and reassessment of any analysis is warranted, as new developments need to be taken into account and evaluated accordingly.[409] However, it is impossible to do so in one thesis. What is possible is to include the likely future challenges that the EU will face and to propose suggestions *de lege ferenda* which could provide for better functioning of the EU. This is done in the second point of this last chapter of the thesis.

4.1 Conclusion

Many of the measures relating to the financial sector have relied on the will and the self-discipline of the MS. The financial crisis proved that the Union had too much trust in the MS and was even ignorant to the detrimental negative consequences of a possible crisis. Because of this, the financial crisis has caught the EU and its institutions unprepared and almost resulted in the collapse of the system which was built steadily over the years. Even though the EU reacted as soon as the first signs of a global financial crisis were visible in 2008, that reaction was nevertheless overdue, insufficient and accompanied by panic. Partly to blame for such approach are the biggest MS, Germany and France, which avoided further financial integration until the very existence of the EMU was called into question by the crisis.[410]

As every belated reaction, this one too came at a higher price. It was impossible to continue with the patient and piecemeal integration in the internal market for financial services. Such integration requires time and resources, in order to examine the market circumstances, assess the need for EU action and analyse the advantages and disadvantages of every available solution. Since the beginning of the crisis, both time and resources were lacking. Therefore, the

[408] P. G. Teixeira, The Regulation of the European Financial Market after the Crisis in P. D. Posta and L. S. Talani (eds.), *Europe and the Financial Crisis* (Palgrave Macmillan, 2011), p. 20
[409] Y. A. Monogios and P. G. Korliras, Debt Sustainability Revisited in P. Arestis and M. Sawyer (eds.), *The Euro Crisis* (Palgrave Macmillan, 2012), p. 80.
[410] Franco-German Declaration, Statement for the France-Germany-Russia Summit, 18.10.2010.

EU institutions had basically no choice – they had to act swiftly and vigorously to save the euro and the Union. Any other approach could potentially have devastating consequences. This was indeed what the EU institutions did.[411]

The EMU and the Banking Union as they exist today, are a result of the financial crisis. In this regard, it can hardly be maintained that the crisis, regardless of its severe consequences, was beneficial to the EU because it provided for deeper integration. Deeper financial integration was inevitable and it would have come even without the crisis.[412] The crisis has only accelerated this process, at the expense of the rule of law. As seen in the main part, the main EU institution in the EMU is the ECB, whereas the Banking Union is composed of the SSM, the SRM and the DGS.

The EMU today differs significantly from the EMU before the crisis. The most substantive change is the role of the ECB, which became not only the most influential institution in the EMU, but also in the whole Union. This is because the ECB is active in different fields. Firstly, it defines the *monetary policy* of the EU. Initially, this was the only task of the ECB and it was interpreted narrowly. However, in addition to receiving new tasks, the monetary tasks and powers of the ECB also evolved through the years. The moment when the Court officially sanctioned the *expanded mandate* of the ECB was the *Gauweiler* case. The Court held that the ECB has a mandate not only to define the monetary policy of the EU by setting the official interest rate, but also to intervene in any part of the transmission mechanism. In this way, the buying of bonds on the secondary market by the ECB was seen as falling within the mandate of the ECB. This broad interpretation of the mandate of the ECB will inevitably have an impact of the functioning of the EMU in the future.

Moreover, the ECB plays a role in the *economic policy,* through the ESM. Even though the ECB does not have decision-making powers in the ESM, it is very influential as being part of the Troika. The ECB is responsible for, *inter alia,* assessing the request for financial support and negotiating a MoU. By being part of such a process, the ECB can *de facto* influence the economic policy of a MS i.e. adjust the macroeconomic structure of the MS. Before the crisis, the interference of EU institutions with the economic policy of the MS was practically unthinkable. The ECB is a powerful party in the negotiation process, as it has at its disposal monetary instruments such as stalling the ELA. Such a practise is prohibited under the Treaties as it amounts to misuse of power, however it can rarely be proved in court proceedings.

Lastly, the ECB has supervisory powers in the SSM. This mechanism is flawed both in procedure and in substance. Procedurally, the supervisory decision-making process in the ECB is at odds with primary EU law. There is no exception in the ESCB Statute regarding the adoption of

[411] European Council Report, Towards a genuine Economic and Monetary Union, 5.12.2012.

[412] The EMU was established in accordance with the 'monetarist' approach. Economic convergence was to follow the successful monetary convergence, see p. 22 of this thesis.

supervisory decisions. This means that the adoption of supervisory decisions, according to the ESCB Statute, falls under the general rule of adoption by simple majority. However, according to the SSM Regulation the supervisory decisions of the ECB are adopted by 'reverse majority' voting. Through this adoption procedure, a supervisory decision can be adopted even without voting in the ECB Governing Council. Admittedly, it is unlikely that a draft supervisory decision will be omitted from the agenda of the ECB Governing Council, so it seems that in practise this body will always vote for or against a supervisory decision. Nevertheless, any inconsistency between primary and secondary EU law is a threat to the rule of law.[413]

Substantively, the most troubling aspect of the SSM is the different treatment of banks, which goes contrary to the very purpose of the SSM. This stems from the questionable way in which the ECB was given the power to apply national law, in addition to EU law. This is an unprecedented situation in EU law, and because of this it requires attention and careful regulation. Instead, the SSM Regulation gives the ECB the power to apply national law transposing relevant directives in one single paragraph, without further adjustments or clarifications. What can the ECB do when there is no national transposing law? Is the ECB bound to apply national law which improperly transposes a directive? Who can review the ECB decisions based purely on national law? These questions are left unanswered by the EU legislator, so it is up to academic literature, including this thesis, to offer views and solutions. Because of this, there is uncertainty regarding what the ECB can and cannot do on behalf of the SSM, which weakens the rule of law.

Moreover, the creation of the Supervisory Board within the ECB and the adoption of supervisory decisions by the ECB Governing Council can interfere with the independence of the ECB, which is protected by the TFEU. According to primary EU law, the ECB carries out its tasks independently from the MS and from the EU institutions. The independence of the ECB is given constitutional character, because it is essential for a successful fulfilment of monetary objectives. However, when other tasks are conferred upon the ECB, they necessarily influence the implementation of monetary policy. It is legally and practically impossible to make the ECB independent from itself. On the other hand, it is legally possible, but nevertheless practically impossible to separate one internal ECB body from another, or moreover to distinguish two separate "egos" of the ECB Governing Council. In addition to supervisory tasks, the ECB is given tasks within the ESM, which further undermines its independence. The ECB has exceeded its initial narrow mandate and has correspondingly reduced its independence in monetary policy. The ECB today is a pale imitation of the 1998 ordoliberal ECB, or better said, a paramount version of the original ECB.

[413] Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2, p. 4.

Lastly, the conferral of supervisory tasks and powers to the ECB, in addition to the broad discretion in monetary policy and the involvement in the ESM, gives the ECB a broad spectrum of instruments for achieving its objectives. This high concentration of powers in the hands of the ECB significantly increases the likelihood of misuse of power. Misuse of power is prohibited under the Treaties, nevertheless claims of misuse of power are very rarely upheld by the Court. This is because of the high burden of proof, which includes proving the subjective intent of the institution in question. Considering the detrimental effects of the financial crisis, the Court is even less likely to uphold claims of misuse of power. Therefore, the rule of law concern is obvious.

The SRM also has flaws both in the procedure in which it was created and in its substance. During the creation of the SRM, the Commission relied on the IA carried out for the purposes of the BRRD. The system established under the SRM Regulation differs substantially from the BRRD, because it is centralised on EU level. In this regard, the SRM Regulation is likely to have a significant economic impact, which according to the Commission itself, is a sufficient reason for conducting an IA.[414] More importantly, the main decision-making body in the SRM - the SRB, is at odds with the *Meroni* doctrine. The conditions for conferring powers on agencies were already broadened in the *ESMA* case, however the SRB does not seem to satisfy even those conditions. Article 18 SRM Regulation prescribes three conditions, however in reality they can be fulfilled as soon as a bank is considered 'failing or likely to fail'. This is insufficient, since it does not at all circumscribe the discretion of the SRB.

Also, there are problems with Article 114 TFEU as the legal basis for the SRM Regulation. This Article requires the measure in question to be for the approximation of laws and have as its object the functioning of the internal market. Even though the latter seems to be fulfilled, it is difficult to see how the measures of the SRB approximate the laws in the EU. There is an essential difference between the SRB and the other agencies established under Article 114 TFEU. The SRB is a *resolution authority* and adopts individual decisions containing resolution schemes, whereas ESMA, EBA and other EU agencies are *regulatory authorities* which adopt general measures containing technical standards. What is more, the SRB is subject to these technical standards adopted by other EU agencies.[415] Because of this, the SRB should have been established under Article 352 TFEU, instead of Article 114 TFEU. Nevertheless, this would have been troublesome as Article 352 TFEU requires unanimity in the Council, but Sweden and the UK did not support the funding of the SRB, which is one of the fundamental elements of this agency.[416]

A possible challenge of the legal basis of the SRM Regulation before the CJEU can have two outcomes. The Court may increase the scope of application of Article 114 TFEU, similarly as

[414] Commission's Guidelines on Impact Assessment, see *supra* note 346.
[415] See *inter allia,* Article 5(2) SRM Regulation.
[416] European Commission Statement 14/165, regarding the IGA on the Single Resolution Fund, 21.5.2014.

in the *ESMA* case,[417] so that the establishment of the SRB is justified. On the other hand, the Court may consider the SRM Regulation incorrectly based on Article 114 TFEU, similarly as in the *Tobacco Advertising* case.[418] This second outcome seems to be more in favour of the principle of rule of law. Nevertheless, the UK as a kind of EU Agency-vigilante, presently has more pressing issues to deal with, instead of the legal basis of the SRB. Because of this, it may take some time before the question of validity of the SRM Regulation comes up before the Court.

Lastly, the DGS has not been particularly analysed in this thesis. This is because the DGS remained at national level during the crisis. This field is harmonized through a directive, which requires deposits up to 100 000 euro to be guaranteed at national level. It is worth mentioning that there is Commission's proposal[419] for a Regulation establishing a European Deposit Insurance Fund, which would be composed of the national DGS in the euro area. Since this Regulation is still in legislative procedure, it and other future challenges for the EU are going to be assessed in the next point.

4.2 *De lege ferenda:* Future challenges and suggestions

Even though the negative effects of the financial crisis are fading, there are is still much room for improvement in the EMU and the Banking Union. It seems that presently, when the crisis is coming to an end, is a good time to analyse the measures taken during the crisis. This is because many of the crisis measures had as their primary objective not to *improve the EU,* but instead to *save the EU.* The effectiveness of such crisis measures cannot be disputed, nevertheless the reality is that presently the EMU and the Banking Union are far from perfect.

The ECB is currently a very powerful institution. While this thesis is against revoking the powers that the ECB already has, it supports an increased control and accountability of those powers. Firstly, the *conventional monetary functions* of the ECB i.e. setting the official interest rate and controlling the supply of money in the euro zone, should continue to be carried out independently, in accordance with the primary EU law. On the other hand, *the unconventional monetary functions* of the ECB i.e. bond buying and lending in last resort, should be subject to a stricter proportionality test, unlike currently where the Court applies the same standard of review for both conventional and unconventional monetary functions.[420] In this way, the ECB would have to carry out a more accurate and careful analysis when using unconventional

[417] Case *ESMA* (n 314), para. 117.
[418] Case C-376/98 *Germany v Parliament and Council* [2000] EU:C:2000:544, para. 118.
[419] 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
[420] For the distinction between conventional and unconventional monetary policy, see Keynote lecture at the International Center for Monetary and Banking Studies by L. Smaghi, Member of the ECB Executive Board, 28.4.2009 https://www.ecb.europa.eu/press/key/date/2009/html/sp090428.en.html (Accessed on 09.05.2017)

monetary instruments. This is because unconventional instruments should be used if no other possibility exists.

Secondly, when it comes to *prudential supervision*, the biggest problem is the uncertainty regarding the powers of the ECB to apply national law. It is possible that this is settled through the case-law of the Court, otherwise that can be done through an amendment of the SSM Regulation. Such an amendment can also correct the discrepancy between the ESCB Statute and the SSM Regulation regarding the adoption of supervisory decisions. There is also space for improvement of the accountability and transparency of banking supervision. Unlike monetary policy, prudential supervision needs to be close to the banks and the banks must be aware of the requirements and obligations.[421]

Thirdly, the activities of the ECB *in the ESM* must be separated from the monetary and supervisory activities of the ECB. In this regard, the practice of the ECB to make national ELA conditional upon signing a MoU within the ESM is problematic. The ECB when stalling ELA should only take into consideration monetary issues, namely preserving the price stability. This can only be achieved if the Court examines carefully the reasons for the actions of the ECB. It may sound simple – monetary instruments should be used for monetary objectives, whereas supervisory instruments for supervisory objectives, however in reality it is a difficult task to ascertain this and requires the Court to examine the background of the case more carefully than it does presently. Nevertheless, a less permissive Court is crucial for preserving the rule of law in a situation in which the ECB has broad discretion and an array of available instruments and powers at its disposal in different fields of the EMU and the Banking Union. Also in this regard, the repeated demands of the Parliament for integration of the ESM into the EU framework and its accountability are welcomed and should be acknowledged by the Commission.[422]

The European Commission should continue to closely monitor the financial situation in the MS and the internal market and act accordingly. Firstly, the *Crisis Communications* should be adjusted or revoked once market conditions improve, and they are indeed improving as the statistics show. It is important not to forget that those Communications are extraordinary and temporary measures that can harm the internal market by distorting competition. The Communications are now more than five years applicable and in those five years many things have changed, therefore the Commission should as soon as possible assess the need for such crisis measures.

Secondly, the Commission should continue with its efforts to *harmonize the internal market for financial services*. However, it should also consider the political and economic

[421] This is recognized by the ECB Supervisory Board, see Introductory statement to the press conference on the ECB Annual Report on supervisory activities 2015 by D. Nouy, 23 March 2016 https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160323.en.html (Accessed on 20.05.2017)

[422] European Parliament resolution on strengthening European democracy in the future EMU, 2013/2672(RSP) 10.06.2013, point 10.

situation in the Union. Currently, the main task of the Commission in the financial market is establishing the EDIS and its Fund. In this regard, it must be noted that the legislative procedure for the EDIS is slower than the procedure for the SSM and the SRM. The EDIS proposal comes at a sensitive time with political elections and instability, therefore it may be wise not to urge for further centralisation at EU level. Also, the two other pillars of the Banking Union can be improved, so it is more reasonable to deal with them, instead of building further on a faulty basis.

Thirdly, regarding the establishment of *EU agencies,* the Commission should not view Article 114 TFEU as an 'Article 352 TFEU minus the unanimity'. Even though the Court supports this view as seen by the agency case-law, the MS are eventually left with a feeling that their will is circumvented and it is questionable how longer they can tolerate it. Therefore, in the future, EU agencies should be based on Article 352 TFEU, as they used to be before the crisis. It is undeniable that those agencies provided for the smooth resolution of the crisis, however a democratic system is more about the will of its constituents than about the success of the outcome.[423] Since the financial crisis is ending, from now on there should be more discussion regarding the need for other EU agencies and further EU centralisation.

The Court has on several occasions held that it is not willing to disregard the strict admissibility requirements of Article 263 TFEU. This has been criticized by academics, practitioners and Advocate Generals at the Court, since it may amount to denial of justice or even encourage individuals to break the law in order to have access to the Court. Therefore, the next Treaty amendments should deal with this issue of admissibility of individuals under Article 263 TFEU.[424] Regarding any possible future crisis in the EU, the Court should be wary of the impact of its judgements and the precedent they set for the future functioning of the EU. An ECB with broad mandate may be preferred during a crisis, however it should be borne in mind that the ECB will keep that broad mandate after the crisis. This also applies for the broad application of Article 114 TFEU. In such cases, the Court should stress, if possible, that that situation is a rare exception happening under exceptional circumstances. Indeed, the Court has on several occasions done that during this financial crisis.[425]

[423] For the differences between democratic and technocratic EU, see M. Kurki, Democracy through Technocracy? Reflections on Technocratic Assumptions in *EU Democracy Promotion Discourse, Journal of Intervention and Statebuilding* (Routledge, 2011), p. 227.

[424] Notwithstanding that 'The Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable future…' - Presidency Conclusions 16616/1/07 REV 1, 14.12.2007, point 6.

[425] See *inter alia,* case *ESMA* (n 314), para. 108.

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