



# **Constitutional constraints on the establishment of Single European Supervision and Resolution Mechanisms**

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# A house *with* legal constraints...



# ... a house *without* legal constraints



# EU Banking Union

- Single Supervision Mechanism (SSM)
- Single Resolution Mechanism (SRM)
- EU substantive law (Single Rulebook)



# The primary EU law

- Treaty on European Union (TEU)
- Treaty on the Functioning of the European Union (TFEU)
- The EU Charter on Fundamental Rights



# Types of constraints

- Stemming from the *legal basis*
- Related to the *institutional set-up* of the EU
- Due to the nature of *EU law*
- Taking into account the *system of judicial control* in the EU



# Legal basis limitations (1)

- SSM: specific legal basis: Article 127(6) TFEU.
- A clearly defined mandate (*“the Council... may confer specific tasks upon the ECB concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings”*) circumscribed to Member States whose currency is the euro.
- Was nevertheless not uncontroversial politically.



# Legal basis limitations (2)

- SRM: general internal market legal basis: Article 114 TFEU.
- May be used only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market and does not confer upon the Union legislature a general power to regulate the internal market.



# Legal basis limitations (3)

- However, in a series of cases, the Court has established that Article 114 TFEU can serve as the basis for:
- measures directly addressed to market operators, in a situation where a previous process of harmonisation proved to be inefficient in avoiding the divergences between national laws (*“Vodafone”*);
- a Union centralised process of decision whose application would bring about the approximation of the laws of Member States (*“Smoke flavourings”*);
- the creation of an EU agency, in so far as its objectives and tasks are closely linked to the subject matter of existing harmonising legislation, and are "likely to facilitate" the application of the harmonising legislation by supporting and providing a framework for its implementation (*“ENISA”*).



# Legal basis limitations (4)

- The very adoption of resolution decisions and actions by the SRM could therefore be regarded itself as a harmonising measure in the sense of Article 114 TFEU.
- Substantive difference between SSM and SRM: the SRM Regulation contains material law on resolution, while the SSM Regulation merely created a mechanism for the enforcement of EU legislation enacted in other instruments.



# Legal basis limitations (5)

- Budgetary sovereignty constraint: Article 114 TFEU cannot be used to compel directly or indirectly Member States to make further contributions to the budget of the Union or of any of its bodies beyond the system of own resources of the Union, as laid down in Article 311 TFEU and the own resources decision.
- Scope of competence constraint: the Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund - the intergovernmental method may complement the EU legislative process.



# Constraints on the institutional structure (1)

- Article 13(2) TEU: principle of conferral (“*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them*”).
- The institutions cannot change the competences conferred on them under Treaties by way of secondary law.



# Constraints on the institutional structure (2)

- The case of the SSM: the impossibility to alter the structure of the ECB by consecrating the Supervisory Board as a decision-making body, since the Council did not have the mandate to alter primary law.
- But nothing prevents the use of EU institutions for the fulfilment of tasks related to instruments adopted outside of the framework of the Treaties (the SRM (Commission) will apply the Intergovernmental agreement on the transfer and mutualisation of contributions to the SRF).



# Constraints on the institutional structure (3)

- The *Meroni* doctrine:
  - 1) no delegation can be presumed and thus an explicit decision to delegate must be taken;
  - 2) a delegation of powers cannot be excluded even in the absence of a specific basis for it in the Treaty;
  - 3) any delegation of powers where the conferred powers are broader than those of the delegating authority is unlawful;
  - 4) a delegation involving “*discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy*” would imply an illegal transfer of responsibility by substituting the choices of the delegator by those of the delegate and by altering the balance of powers thus doing away with the guarantee granted by the Treaty to undertakings; and
  - 5) powers to carry out assessments under own authority should be subject to precise rules in order to avoid arbitrary results and to make review of those assessments possible.



# Constraints on the institutional structure (4)

- The case of the SRM: a body or agency created by an act of secondary legislation may be empowered to adopt legally binding measures of an individual scope as long as its powers are not discretionary, in the sense that the exercise of those powers must result from the application of a given set of well defined legal rules to a particular factual situation.



# Constraints on the institutional structure (5)

- The case of the SRM: the Resolution Board is endowed with the resolution executive technical tasks, which it exercises in accordance with the policy parameters fixed by the SRM Regulation or by the Commission itself.
- The Commission and the Council, as political institutions, hold the power to give effect, at last instance, to the decisions of the Board.



# Constraints on the institutional structure (6)

- The EBA cannot substitute itself for the Commission in its quality of resolution authority or for the ECB as a supervision authority.
- But, conversely, there is no legal obstacle as such for the Commission or the ECB to be bound by decisions of an agency, where such decisions do not have a policy making character.



# Limitations due to the nature of EU law: substantive rules

- The ECB has to apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives, including the options available to Member States.
- The Commission (SRM) will also apply substantive EU law contained in the SRM Regulation.



# Limitations due to the nature of EU law: geographical scope (1)

- As a matter of principle, EU law applies uniformly to all the 28 Member States.
- This is especially the case of EU regulations, which have general application and are binding in their entirety and directly applicable in all Member States.



# Limitations due to the nature of EU law: geographical scope (2)

- Derogations: in order to *"take into account the extent of the effort that certain economies showing differences in development will have to sustain for the establishment of the internal market"*, Article 27 TFEU allows derogations from internal market measures. However, these derogations *"must be of a temporary nature and must cause the least possible disturbance to the functioning of the internal market."*
- Exemptions: options, waivers or exemptions may be provided for only insofar as their scope and nature is described by way of a general rule defining objective criteria for their application. Exemptions drafted in this way would not constitute a derogation within the meaning of Article 27 TFEU.



# Limitations due to the nature of EU law: geographical scope (3)

- The SSM is limited geographically by definition, by virtue of its legal basis.
- However, non-euro Member States participate on a voluntary, contractual basis, by the juxtaposition of two unilateral acts: initial request by the Member State and unilateral decision by the ECB.
- Thus, there is no scope for infringement proceedings under Article 258 TFEU: non compliance simply terminates the participation.



# Limitations due to the nature of EU law: geographical scope (4)

- Supervision and resolution action are two complementary aspects of the internal market in the field of banking: the SRM is limited to all Member States participating in the SSM.
- The SRM does not contain derogations in respect of individual Member States.
- The SRM is limited to the entities being subject to the SSM and this distinguishes them in an objective and characterised manner from the rest of credit institutions.



# Availability of judicial control (1)

- Article 263 TFEU: the Commission and the ECB are subject to the exclusive judicial review by the European Court of Justice.
- However, *“acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies.”*



# Availability of judicial control (2)

- Thus, the administrative board of review in the SSM is a purely internal body and cannot replace the ECJ.
- While, in contrast, the appeal panel in the SRM is a genuine review instance (the Board being an agency).



# Availability of judicial control (3)

- The control by the ECJ encompasses all acts of the institutions, including when acting under the Intergovernmental Agreement.
- The EBA has a limited role vis-à-vis the ECB and the Commission in terms of the establishment of a breach of Union law under Article 17 EBA Regulation.



# Conclusion (1)

- The current EU primary law has proven sufficiently versatile to address all the policy choices related to the SSM and the SRM.
- The legal constraints have impacted the design and the details but not the structure and the fundamentals.



# Conclusion (2)

- Questions as to the future of this approach.
- A full revision of the Treaties might accommodate pretty much every desired base for policy action.
- A simplified revision procedure would need to comply with the conditions set out in Article 48(6) TEU and *Pringle*.





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