ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
Edited by Stefania Baroncelli, Ian Cooper, Federico Fabbrini, Helle Krunke *and* Renata Uitz

DIFFERENTIATED GOVERNANCE IN THE BANKING UNION: SINGLE MECHANISMS, JOINT TEAMS, AND OPTING-INS

CHRISTY ANN PETIT*

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ABSTRACT: This *Article* examines differentiated governance across and within the existing pillars of the Banking Union (BU): the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). Governance covers the decision-making rules, institutional apparatus, and processes – taking due account of the issues created by the incompleteness of the BU. In the daily supervisory and resolution actions, joint teams constitute a significant progress for cooperation, exchange of information and coordination of the work carried in the BU at an operational level, which plays an integrative factor in the systems' governance. Moreover, differentiated governance exists within the systems for banking supervision and bank resolution, but also in its immediate surroundings, that is the consideration for the "ins", "outs", and "opting-ins" Member States that are joining the BU through close cooperation.

KEYWORDS: Banking Union – cooperation – differentiation – Economic and Monetary Union – governance – joint teams.

I. INTRODUCTION

The Banking Union (BU) is the most significant advancement in European integration[1] in the last two decades and its completion features among the priorities of the 2022 French

* Assistant Professor, Dublin City University (DCU) and DCU Brexit Institute, christy.petit@dcu.ie. The author is grateful for the comments on an earlier version of this paper at the occasion of the BRIDGE network conference on "Differentiated Governance in the Post-Crises EU" hosted by the DCU Brexit Institute on October 11-12, 2021, and wishes to thank Federico Fabbrini, Ian Cooper, and Goran Dominioni for helpful feedback.

[1] S Grundmann and HW Micklitz (eds), *The European Banking Union and Constitution: Beacon for Advanced Integration or Death-Knell for Democracy?* (Bloomsbury Publishing 2019); PG Teixeira, *The Legal History*

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presidency of the Council of the European Union.[2] Yet, seven years after the operations of the BU officially started, there is still a divide within EU-27 between the 19 "ins", the two states with ongoing "close cooperation" (Bulgaria and Croatia), and the six "outs", which brings differentiation across several groups of Member States within the European Union (EU).[3] In particular, institutional differentiation and differentiation in governance, as by-products of differentiated integration,[4] are all at odds with the Banking Union project and creation. This discrepancy is evident considering the BU objectives, based on the adoption of common institutions, single rules and common European approaches.

The creation of the BU addresses the failures observed during the financial, banking, and sovereign debt crises (all captured under the term "great financial crisis"), with the objectives of preventing the doom-loop between banks and sovereigns, avoiding massive bailouts through taxpayers' money, and managing banking crises and failing banks in an orderly manner. As per its institutional and legal foundations, the BU follows a three-pillar structure for the euro area, including a supervisory pillar (the Single Supervisory Mechanism, "SSM"), a resolution pillar (the Single Resolution Mechanism, "SRM"), and a common deposit insurance pillar (European Deposit Insurance Scheme "EDIS", which is not yet achieved). The missing third pillar creates asymmetries in the current BU,[5] not only in terms of the differentiated governance that exists across pillars, but also the acute problems this incompleteness raises within each pillar's remit of action. With the lack of common deposit insurance at the EU level, remaining national divergences mean there is an uneven playing field, with differences that are exacerbated when facing troubled credit institutions (failing or likely to fail), whether on the supervisory and/or resolution

of the European Banking Union: How European Law Led to the Supranational Integration of the Single Financial Market (Hart Publishing 2020); C Zilioli and K Wojcik (eds*), Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021); St Grundmann and Others, 'Editorial' (2017) 18 European Business Organization Law Review 391.

[2] B Le Maire, 'FT Future of Europe: Strengthening Europe's Financial Sector' (21 September 2021) Financial Times europefinance.live.ft.com.

[3] F Schimmelfennig, 'A Differentiated Leap Forward: Spillover, Path-Dependency, and Graded Membership in European Banking Regulation' (2016) 39 West European Politics 483. For a general analysis of several groups' features and dynamics, see in this *Special Section* I Cooper and F Fabbrini, 'Regional Groups in the European Union: Mapping am Unexplored Form of Differentiation' (2022) European Papers www.europeanpapers.eu 951.

[4] F Schimmelfennig and T Winzen, 'Grand Theories, Differentiated Integration' (2019) 26 Journal of European Public Policy 1172, 1190; I Pernice and others, 'Challenges of Multi-Tier Governance in the European Union. Effectiveness, Efficiency and Legitimacy' (2013) European Parliament's Committee on Constitutional Affairs – Compendium of Notes 8.

[5] C Brescia Morra, 'The Third Pillar of the Banking Union and Its Troubled Implementation' in MP Chiti and V Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Springer International Publishing 2019) 393.

side (e.g., national frameworks in insolvency proceedings, and conditions to access national Deposit Guarantee Schemes).[6]

Differentiated governance raises several issues in the BU, including the general risk to damage the "singleness" of each pillar despite their respective names. Concretely, this undermines the unity of the common policy and measures adopted within each pillar, and eventually is detrimental to the achievement of its objectives – namely, to contribute to the "stability of the financial system within the Union and each Member State",[7] to make banks safer and sounder, and to prevent and manage future crises at bank level (and ultimately, to alleviate banking sector crises at a systematic level). This wording reflects the uneasy compromise between the Union-wide ambition of the BU project and the still significant national realities in its construction. Furthermore, such differentiated governance may jeopardise the uniform application of rules, their interpretation by administrations, their interpretation by courts, their enforcement, and their understanding by the directly concerned entities subject to common supervision and resolution actions.

Nevertheless, differentiated governance may bring some flexibility to the broader BU construction substantively, institutionally and procedurally, in application of so-called multi-speed approach in theories of European integration,[8] which gives a pathway for an integrated core, towards a gradual integration process for the "outs". One key constraint, substantively and procedurally for the BU operations, results from the fact that we do not have yet a single set of rules, despite the "Single Rulebook" in Banking and Financial Regulation.[9] The main issues concern the existence of options and discretion in the Capital Requirements Regulation and Directive and remaining national powers within both pillars to be considered, interpreted and eventually applied by the European bodies.[10] As far as resolution is concerned, the framework lives besides a legal corpus fragmented

[6] O Capolino, 'The Single Resolution Mechanism: Authorities and Proceedings' in MP Chiti and V Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Springer 2019) 247.

[7] Council Regulation (EU) n. 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (SSM Regulation), art. 1. Similarly, the SRM Regulation refers to different settings, Union-wide, or one or several Member States, see art. 10(5) and (10) of the Regulation (EU) n. 806/2014 of 15 July 2014 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 Resolution Fund and amending Regulation (EU) n. 1093/2010 (SRM Regulation).

[8] S Baroncelli, I Cooper, F Fabbrini, H Krunke and R Uitz, 'Introduction to the *Special Section*: Differentiated Governance in a Europe in Crises' (2022) European Papers www.europeanpapers.eu 857.

[9] Despite further harmonisation with the adoption of the Capital Requirements Regulation, next to the revision of the Capital Requirements Directive in 2013, subsequently revised in 2019, and under review since the October 2021 Banking Package.

[10] G Ferrarini and F Recine, 'The Single Rulebook and the SSM' in D Busch and G Ferrarini (eds), European Banking Union (Oxford University Press 2020) 193; A Witte, 'The Application of National Law by the ECB, Including Options and Discretions, and Its Impact on the Judicial Review' in C Zilioli and K Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021) 236.

along national lines, that is the default national insolvency path (when resolution objectives are not met),[11] and the still existing public aid road, albeit authorised as state aid.[12]

Against this background, this *Article* adopts a contextual approach to reformed EU governance and the new BU institutional and regulatory framework post-euro area crisis. It starts from the observed fact that there is differentiated governance within the BU. Its position within the EU is clear – it is not yet fully a *European* Banking Union. Member States that are not part of the Monetary Union may join under a "close cooperation". Hence, the current participants in BU constitute a "fore-runner" group, which is based on the integrated Eurozone.[13] This constitutes one type of differentiated governance as we will see. My approach to governance in this *Article* is delimited as follows. I will analyse decision-making rules and processes, as well as the legal and institutional framework for the two existing pillars.[14] On the substantive level, BU governance stems from EU primary and secondary law, which include SSM and SRM law (legal corpus formed together with the "Single Rulebook"). A component of the BU stems, however, partly from international law: the Single Resolution Fund (SRF).[15] It is an emergency fund that can be called upon to support the resolution of a failing bank within the BU. This sets a private risk-sharing element in the BU[16] and, in particular, the transfer and mutualisation of contributions to the SRF are foreseen in an intergovernmental agreement (IGA), signed by 26 Member States in 2014.[17]

[11] 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) n. 1093/2010 and (EU) n. 648/2012, of the European Parliament and of the Council Text (BRRD). Recital 45 states "[a] failing institution should in principle be liquidated under normal insolvency proceedings" and along a similar wording, see also SRM Regulation cit., recital 59.

[12] *E.g.*, the cases of the Venetian Banks with aid measures from the Italian State in their liquidation, or the precautionary recapitalisation of Monte dei Paschi di Sienna. For the Venetian Banks, see O Capolino 'The Single Resolution Mechanisms' cit., 265–7.

[13] S Baroncelli, 'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' (2022) European Papers www.europeanpapers.eu 867; E Jones and others, 'Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration' (2016) Comparative Political Studies 1010, 1023.

[14] Governance, as an action of steering and controlling, covers the decision-making rules, processes, practices, and outcomes. See, J Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) EL 1. "'Behaviour" is also relevant within practices and outcomes, but is outside the scope of the legal analysis in this article, see European Commission, *European Governance: A White Paper* eur-lex.europa.eu 8.

[15] F Fabbrini, 'On Banks, Courts and International Law: The Intergovernmental Agreement on the Single Resolution Fund in Context' (2014) 21 Maastricht Journal of European and Comparative Law 444, 452.

[16] PG Teixeira, 'The Future of the European Banking Union: Risk-Sharing and Democratic Legitimacy' in MP Chiti and V Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Springer International Publishing 2019) 142–3.

[17] Without the UK (at that time) and Sweden, see Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund [2014].

Moreover, processes are shaped with secondary law and complemented by an ever-increasing amount of BU soft law – an essential element in the post-crisis reforms within the Economic and Monetary Union (EMU). On the institutional level, the two existing pillars rest upon different legal bases in EU primary law, which have had an impact on their institutional and decision-making features (i.e., the European Central Bank (ECB) – an existing EU institution – hosted the SSM on the basis of art. 127(6) TFEU, while the Single Resolution Board (SRB) is an agency within the SRM, created on the basis of art. 114 TFEU).

Do the two existing BU pillars epitomise differentiated governance? To answer this question, I draw on three categories of differentiated governance in the BU, based on a multilevel approach to the two systems for banking supervision and bank resolution. First, differentiated governance can be understood in a cross-pillar perspective, and, in its geographical scope (i.e., "ins" and potentially "opting-in" Member States). This EU-level type of differentiation concerns the institutional and regulatory architecture within the BU, and the differentiation between euro area and non-euro area Member States. Second, differentiated governance also exists at the local or national level, in particular through diverse national settings and distinct governance models of supervisory and resolutions authorities. Third, the "core" of the BU pillars, examined through "joint teams" that are present in the SSM and the SRM, also contributes to the governance of the systems. In simple terms, those teams virtually bring together supervisors sitting in Frankfurt and resolution actors in Brussels, together with their counterparts at the national level. I argue for that they have an integrative function in the governance of each pillar. The original contribution lies, therefore, in the combined analysis of macro and micro-level governance within the supervisory and resolution systems' governance.

The *Article* proceeds as follows. Section II focuses on governance – in terms of rules, institutions and processes – within the supervisory and resolution pillars. Section III investigates the micro-level contributions of the joint teams in ongoing supervision and resolution, which demonstrate their integrative function in the governance of SSM and SRM. Building on the institutional and legal framework discussed at the macro and micro-level of BU governance, section IV examines the degree of BU differentiated governance when placed in the Union-wide perspective, considering in particular the opting-ins and close cooperation. Namely, the potential participation of non-euro area Member States changes the level of differentiation in BU governance, and in a distinctive manner between the first and the second pillar. This puts in parallel BU participation and euro area membership.

II. Banking Union: supervisory and resolution pillars' governance

This section introduces in general terms the institutional apparatus of the SSM and the SRM, and decision-making rules and processes for each pillar. This short excursus recalls the features of differentiated governance already extensively analysed for the Banking

Union.[18] This lays the foundations for examining the core of supervision and resolution with joint teams in the mechanisms' governance in the following section.

There has been a significant centralisation of competence for European supervision and resolution with the creation of the Banking Union, but the forces at stake are much more nuanced between what is called the "local" and "central" levels in simple terms. Hence, the national competent authorities for supervision in the first pillar, and for resolution in the second pillar, have their part to play within the EU legal and institutional framework. The distinction follows the groups of significant institutions and less significant institutions: these are respectively under the direct supervision of the ECB (115 significant institutions as of November 2021) and of the national authorities (which are counted in thousands).[19] This split is also relevant in the second pillar, with a caveat that the SRB is not only competent for the significant institutions identified by the ECB but also a few "other cross-border groups" that have entities in at least two Member States.[20] In other words, smaller entities that do not have a cross-border presence (and therefore do not represent a systemic risk in principle), remain under the supervision of national authorities and the scrutiny of resolution authorities.

The SSM includes the National Competent Authorities (NCAs) from the participating Member States and the ECB, which form a system for banking supervision in the Banking Union. The SSM, hosted at the ECB, includes decision-making bodies whose functions have been determined by EU primary and secondary law with an institutional apparatus that is considered semi-rigid.[21] The Governing Council, one of the ECB decision-making bodies according to the Treaties, has the final word on supervisory decisions. The Supervisory Board, created by the SSM Regulation, only approves draft supervisory decisions, submitted to the Governing Council for a non-objection procedure.[22] All participating Member States' national authorities (whose membership is mandatory for euro area Member States) vote and participate equally in the decision-making bodies, together with ECB representatives. The Member States opting to join have a transitional arrangement

[18] N Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (2014) CMLRev 1609; G Barrett, 'The European Banking Union and the Economic and Monetary Union – A Re-Telling of Cinderella with an Uncertain Happy Ever After?' in G Lo Schiavo, *The European Banking Union and the Role of Law* (Edward Elgar Publishing 2019) 10; F Schimmelfennig, 'A Differentiated Leap Forward' cit. 483.

[19] ECB, *List of Supervised Entities* www.bankingsupervision.europa.eu. Apart from some circumstances in which an LSI is brought under the direct supervision of the ECB, and *vice e versa*, a significant institution is considered an LSI under particular circumstances and remains under the supervision of the national authority.

[20] SRB, *List of Other Cross-Border Groups* www.srb.europa.eu.

[21] CA Petit, 'The SSM and the ECB Decision-Making Governance' in G Lo Schiavo (ed.), *The European Banking Union and the role of law* (Edward Elgar Publishing 2019).

[22] The rules and processes for decision-making are determined in SSM Law, the SSM Regulation and SSM Framework Regulation together, in addition to some guidance in institutional documents from the ECB *e.g.*, the Supervisory Manual.

between their national authorities and the ECB that operate through a close cooperation agreement, which leads to some differentiated governance (see section IV).

The SRM includes the National Resolution Authorities (NRAs) from the participating Member States and the Single Resolution Board (SRB) created by secondary law[23] with an agency status (in line with the Meroni doctrine).[24] It forms a rather differentiated system for bank resolution in the BU with several layers of complexity (beyond the scope of this article).[25] The decision-making process is triangular: in addition to the SRB, the European Commission and the Council of the EU are involved for some procedures and decisions in the SRM, in particular the dimensions of resolution related to state aid (for the Commission), and after the adoption of a resolution scheme by the SRB.[26] Both the European Commission and the Council of the EU are key actors that can potentially object to a resolution scheme.[27] Despite the complexity, all institutions and the SRB aim at applying "uniform rules and a uniform procedure" for resolution.[28] Overall, the SRB is responsible for decision-making with different formats, via its plenary and executive sessions.[29] Depending on the case, relevant NRAs' board members are taking part, and, on an *ad hoc* basis, observers from relevant resolution authorities of non-participating Member States may also take part in such session if the group at stake has subsidiaries or significant branches in those non-participating Member States.[30] Finally the European Commission and the ECB have some observers in all meetings of the SRB, while the SRB attendance as observer on the supervisory side has developed in practice. The participating Member States' NRAs vote and participate equally in the SRB, together with SRB representatives. In contrast with the first supervisory pillar, the Member States' authorities under close cooperation join the SRB under the same footing as with all other members (see section IV).

The SRB is also responsible for the SRF, which has a special position within the BU framework. As said in the introduction, an IGA – an international legal act outside the EU legal order – pools resources from the national to the Union level. The SRF would be used

[23] SRM Regulation cit., art. 42.

[24] D Busch, 'Governance of the Single Resolution Mechanism', in D Busch and G Ferrarini (eds), *European Banking Union* (Oxford University Press 2020) 394–5; with a different view on the implications of the Meroni doctrine, see P Lintner, 'De/Centralized Decision Making Under the European Resolution Framework: Does Meroni Hamper the Creation of a European Resolution Authority?' (2017) European Business Organization Law Review 591.M Patrin, 'Meroni Behind the Scenes: Uncovering the Actors and Context of a Landmark Judgment' (2021) European Papers www.europeanpapers.eu 539, 543.

[25] D Busch 'Governance of the Single Resolution Mechanism' cit.; O Capolino 'The Single Resolution Mechanism' cit. 248–251.

[26] D Busch 'Governance of the Single Resolution Mechanism' cit. 394.

[27] SRM Regulation cit., art. 18(7).

[28] *Ibid*. art. 1.

[29] The rules for decision-making and processes are determined in SRM Law, including the SRM Regulation, the BRRD, and some institutional guidance from the Single Resolution Board, *Introduction to Resolution Planning* www.srb.europa.eu.

[30] SRM Regulation cit., art. 53(1).

after the shareholders, and then the creditors of the credit institution under resolution have borne the first losses, as per the bail-in provided in the resolution framework.[31] Its aims are to support the efficient application of resolution tools and exercise of resolution powers, in line with the objectives of the BU, that is, through the mutualisation of contributions of the banking sector, to avoid the recourse to taxpayers' money and break the link between sovereigns and banks.[32] In fact, the contributions of banks and certain investment firms established within the 21 BU participating Member States are for now compartmentalised (with contributions collected by the NRAs).[33] The contributions reached, in the course of 2021, 52 billion euros with a funding capacity that will nearly double from 2022[34] with the expected entry into force of the common backstop to the SRF – should the latter not be enough to finance the resolution of a failing bank or several banks in trouble.

Those SRF features create some differentiation from the standpoint of the jurisdictions and administrations involved with the already introduced asymmetry between Union-wide and euro area setting (i.e., the SRF exists beside NRAs/national resolution funds across the EU).[35] There is nevertheless a specific treatment for the resolution of smaller entities. Indeed, within the scope of the BU, for those "smaller" entities that are put under resolution, if the resolution action necessitates the use of the SRF, the SRB will be responsible for the resolution schemes of less significant institutions (which are normally under the remit of NRAs).[36]

Another level of differentiation relates to the legal framework as some rules remain outside EU Law with the SRF IGA (amended and signed, but not yet fully ratified).[37] However, this differentiation may be temporary: a review, expected within ten years of entry into force of the SRF IGA, may lead to the incorporation of the substance of the Agreement into the EU legal framework. This is similar to the as-yet unsuccessful proposal put forward in 2017 by the European Commission to bring the European Stability Mechanism (ESM, which is an intergovernmental organisation with responsibilities for banks' recapitalisation during and after the crisis) into the EU legal framework as a "European Monetary Fund".[38]

[31] Arts 15 and 2 of the SRM Regulation cit. There is a bail-in condition of at least 8 per cent of total eligible liabilities.

[32] Recital 19 and art. 67 of the SRM Regulation cit.

[33] Art. 100 of the BRRD cit.

[34] Single Resolution Board, *Single Resolution Fund grows by €10.4 billion to reach €54 billion* www.srb.europa.eu, and for the backstop, see European Council, *Statement of the Eurogroup in inclusive format on the ESM reform and the early introduction of the backstop to the Single Resolution Fund* www.consilium.europa.eu.

[35] Including in non-euro area Member States as per the BRRD, see MMT Thijssen, 'Judicial Review of the SRB's Contributions and Fees Decisions' in C Zilioli and K Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021) 444–5.

[36] Art. 7(3) and Recital 28 of the SRM Regulation cit.

[37] European Council, *Agreement amending the Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund* www.consilium.europa.eu.

[38] Proposal COM/2017/0827 final of the European Commission of 6 December 2017 for a Council Regulation on the establishment of the European Monetary Fund.

But, beyond institutional and substantive law differentiation, the SRF administration hosted by the SRB, has a role in ensuring a "uniform administrative practice" in resolution financing as well as preventing national divergences.[39] Furthermore, with the latest amendments to the ESM Treaty, the BU has been further completed in resolution funding with the adoption of a common backstop. The common backstop strengthens and complements the second pillar of the BU.[40] The ultimate goal of mutualisation, with one per cent of the amount of covered deposits by 2023, and the presence of an SRF common backstop could ease decision-making in the governance settings of both the SSM and SRB. At the same time, the SRF common backstop operates through an ESM revolving credit line under which loans can be provided,[41] which clearly remains in the hands of the 19 Member States that are parties to the ESM Amending Agreement, which is intergovernmental. And, in the event of the use of contributions from the SRF prior to the backstop, the Council has a veto power, namely it can object to the resolution scheme and to a material modification of the amount of the Fund.[42] Therefore, those intergovernmental features lead to a political choice that is deeply linked to the willingness of Member States to keep their fiscal responsibilities and budgetary sovereignty.[43]

At a distinct level from the decision-making bodies and resolution financing, an additional layer of differentiated governance is found in the counterparts within the pillars, i.e. the national authorities. Considering the number of national settings with authorities involved in the mechanisms, the argument is a general one here. Each system relies on an interplay with national authorities that have themselves diverse national settings (based on a sectoral, functional, or integrated model, whether for supervision and resolution or more broadly for horizontal financial supervision and central banking). This brings further differentiation to some extent with a treatment of cases in a national reality that can be in dissonance with the EU legal framework (e.g., the European resolution regime on one hand, and the liquidation and insolvency procedures in national laws, on the other hand).[44]

Nevertheless, an integrative element can be identified in the mandate given to the members "from" the national settings who contribute to the European supervision/resolution level. Indeed, a representative from national authorities sits in the SSM/SRM decision-making-bodies: the representatives must act and contribute to decision-making in

[39] Recital 19 of the SRM Regulation cit.

40 J Aerts and P Bizarro, 'The Reform of the European Stability Mechanism' (2020) Capital Markets Law Journal 159, 164.

[41] Art. 18a of the Agreement amending the Treaty establishing the European Stability Mechanism [2021].

[42] Art. 18(7)(3) of the SRM Regulation cit.

[43] PG Teixeira, 'The Future of the European Banking Union' cit. 143.

[44] LS Morais, 'Lessons from the First Resolution Experiences in the Context of Banking Recovery and Resolution Directive' in MP Chiti and V Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Springer International Publishing 2019); O Capolino 'The Single Resolution Mechanism' cit. 259–260; L Janssen, 'The EU Bank Resolution Rules and National Insolvency Law' in M Haentjens and B Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar Publishing 2019).

the interest of the Union as a whole (SSM legal framework)[45] or in the general interest (SRM legal framework).[46] This obligation to act in the general interest/interest of the Union as a whole can be considered as an integrative factor – in the sense of steering supervision and resolution policies in the same direction in the whole system. It leads to an obligation to disregard national interests and change the perspective with the general interest and the interest of the Union as a whole.

But, this could still face some hurdles in pragmatic terms, such as coalition-building in the Boards and divergences that can result from differing national contexts, let alone to mention the damages caused in consensus building due to the missing third pillar and the shortcomings in the progressively built up SRF. The question is then whether the decision-making processes and governance form a sum of national interests to achieve European banking supervision and resolution objectives or go beyond this mere aggregation to truly achieve a general interest in common supervision and resolution, which ultimately represents the *singleness* of each mechanism.

Differentiated governance is, therefore, found in both pillars, due to the institutional apparatus, some decision-making rules, and the remaining unharmonised substantive laws existing in both supervision and resolution. Some elements in pillars' governance are still playing a somewhat integrative force (such as the duty of decision-makers to act in the general interest or the interest of the Union as a whole), as is now further demonstrated with the setting of joint teams present in the two pillars.

III. Single supervision and resolution: the integrative factor of joint teams

This section examines internal core governance elements of the SSM and the SRM through the setting of joint supervisory teams (JSTs)[47] and internal resolution teams (IRTs), operating within the first and second pillar, respectively. I elaborate on joint teams' contributions to on-going supervision and resolution as an integrative factor in the governance systems for banking supervision and bank resolution within the BU. The use of common methodology, approaches, and a diffusion within each mechanism and across mechanisms contributes to integrating governance, albeit the teams are organised

[45] Arts 19(1) and 26(1) of the SSM Regulation cit. va for the Supervisory Board; art. 26(10) for the Steering Committee, and art. 4(3) of the Regulation (EU) 673/2014 of the ECB of 2 June 2014 concerning the establishment of a Mediation Panel and its Rules of Procedure.

[46] Art. 47 of the SRM Regulation cit. Note the SRB representatives and its chair should act independently and objectively in the interest of the Union as a whole, and Recital 32 of the SRM Regulation cit.

[47] Note that joint structures exist with the same spirit for "more targeted" ongoing supervisory work, for example with on-site inspection teams (OSI) and crisis management teams. OSIs are provided for in art. 12 of the SSM Regulation cit., the second stems from practice. OSI teams are responsible of the field work in comparison with the JSTs that operate offsite.

diversely in terms of size, composition and workflows.[48] In essence, the composition and rationale of those joint teams is intended to prevent national biases, supervisory/regulatory captures, and even some of the supervisory and regulatory failures observed during the crises in some jurisdictions. In spite of their rather remote and virtual character,[49] those teams constitute a significant progress for cooperation, exchange of information and coordination of the work carried in the BU, in comparison with the prior state of affairs with only Colleges for supervision and resolution.

The joint teams contribute to decision-making in banking supervision and resolution. In particular, they contribute to the preparation necessary prior to decision-making proper in banking supervision and resolution. It means JSTs prepare draft supervisory decisions before their submission to the Supervisory Board for approval and the ECB Governing Council for a non-objection procedure. The adopted decisions are addressed to significant institutions under the direct supervision of the ECB. IRTs are established to support the SRB in the assessment of recovery plans and in the drawing up of resolution plans[50] and prepare decisions for the SRB extended executive sessions. In other words, they support the execution of SRB's resolution tasks with regard to entities or groups under the direct responsibility of the SRB (significant and cross-border banks that are less significant).[51]

The rationale of joint teams is evident in different parts of the legal framework of each pillar. The important features are to combine expertise and diversity and to carry out their daily work in cooperation and good faith. In the SSM constitutive Regulation, despite the absence of the terminology "JST", the rationale of their creation is to ensure "geographical diversity with specific expertise and profile".[52] Those teams include supervisors from ECB staff and NCAs' staff, who are responsible for the supervision of a significant institution.[53] In contrast, IRTs do not find their purpose expressly framed in the SRM Regulation.[54] Nevertheless, the participation of observers from non-participating Member States is stressed[55] and, as we will see, it is a distinctive feature of IRTs in comparison

[48] The *Article* does not compare the specific organisational setting of those teams due to their evolutive and dynamic character which follows inter alia some regular rotations of their members, and the changes operated in the banking corporate governance of the supervised entities.

[49] Decision (EU) 2017/274 of the ECB of 10 February 2017 laying down the principles for providing performance feedback to national competent authority sub-coordinators and repealing Decision (EU) 2016/3 (ECB/2017/6).

[50] Decision of the Single Resolution Board (SRB) of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the SRB and National Resolution Authorities, art. 24(4)(a) and (c).

[51] *Ibid*. art. 24(1). Set for all banks subject to the SRB.

[52] Recital 79 of the SSM Regulation cit.

[53] European Central Bank, *SSM Supervisory Manual. European Banking Supervision: Functioning of the SSM and Supervisory Approach* www.bankingsupervision.europa.eu 118.

[54] Recital 37 of the SRM Regulation cit. echoes the relevant provision from the Regulation, *i.e.*, art. 83 of the SRM Regulation cit.

[55] *Ibid*. Recitals 37 and 117, and art. 83(3).

with the JSTs. The decision framework for the cooperation within the SRM and between the SRB and the NRAs gives more insights on their rationale. Namely, IRTs "act as the main forum of day-to-day cooperation",[56] and they strive to work on the basis of consensus and in good faith among the members of the IRTs.[57]

The composition is quite similar, with one exception related to the observers present on the SRM side. The teams' composition is introduced for each pillar and is only briefly compared, as I focus here on their functions within the two mechanisms. Each JST in the SSM includes a coordinator from the ECB's staff, together with supervisors from the ECB and the NCAs, and sub-coordinators that are from NCAs. NCAs' staff members are appointed by the respective NCAs.[58] It is important to note that the coordinator of the JST cannot be from the Member State where the significant institution is established[59] (in the spirit of avoiding national biases) and is rotated regularly across JSTs (avoiding leniency or forbearance). On the SRM side, IRTs may be established by the SRB,[60] and as with the SSM, it is composed of SRB staff and staff of the NRAs. NRAs' staff members are appointed by the respective national authority.[61] They may include observers from NRAs of non-participating Member States, where appropriate.[62] The novelty is indeed found in those observers from non-BU authorities which account for the cooperation in European Resolution Colleges, in a Union-wide setting. IRTs include a coordinator from the SRB and some sub-coordinators (one per NRA), in a quite similar vein to their supervisory counterparts. Sub-coordinators, who are affiliated to the national authorities in both mechanisms, operate as "transmission chains"[63] between the local environment and the team members sitting in Frankfurt or Brussels.

All in all, joint teams may have different sizes, compositions (in terms of quantity of staff members), and organisation, which reflect the diversified business models of the banks and banking groups under assessment. And yet, this organisational difference across team is outweighed by the common functions they have within the governance of the mechanisms.

[56] Art. 24(2) of the SRB Decision 2018, n 50 cit. Note this paragraph was added: this SRB decision amends the prior and first SRB Decision publishing the cooperation framework in June 2016.

[57] *Ibid*.

[58] Art. 4(1) of the Regulation (EU) n. 468/2014 of the ECB of 16 April 2014 establishing the framework for SSM cooperation between the ECB, the national competent authorities and the national designated authorities (SSM Framework Regulation). Note that the ECB and NCAs consult with each other and agree on the use of NCAs resources, see art. 4(5).

[59] European Central Bank, *Guide to Banking Supervision* www.bankingsupervision.europa.eu 14.

[60] IRTs exist for cross-border banking groups with legal entities in two different participating Member States. See SRB Annual Report 2018 (2019), 71.

[61] Art. 25(3) of the SRB Decision 2018, n 50 cit. Like the first pillar, the SRB and NRAs consult each other and agree on the use of NRA resources, see art. 25(2) cit.

[62] Art. 83(3) of the SRM Regulation cit.

[63] For the SSM, see E Chiti and F Recine, 'The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position' (2018) EPL 101, 110.

There are some bridges between the two mechanisms, including at the level of those joint teams, also when early signs of concerns arise for some institutions. The coordinator of an IRT (affiliated to the SRB) plays the role of single point of contact between the IRT and the JST and has a special duty to establish a "regular collaboration and information exchange"[64] among the two teams. This constitutes another virtual common forum where the core of the first and second pillar come together, albeit in an informal way. This channel is particularly relevant when the operations for a bank crisis management starts at institution-specific level.

Therefore, the differentiated governance analysed in section II should fully account for the contributions of core elements within the systems for banking supervision and bank resolution. The setting of joint teams is admittedly one piece of the overall institutional and governance puzzle. It is necessary to acknowledge other actors than the decision-making bodies contributing to processes of ongoing supervision and resolution in each pillar. Notwithstanding imperfect harmonisation, there are common methodologies and approaches, developed from so-called "horizontal functions" in the organisation of the ECB and the organisation of the SRB.[65] Those common approaches constitute a supporting element of the joint teams' integrative function in the governance of each mechanism, at an instrumental level. Again, joint team members come from the NCAs staff and the NRAs staff, and through their potential multiple affiliations to different teams (a possibility acknowledged without exact data available to assess those cross-affiliations),[66] they also contribute to common approaches and diffusion of common methodologies in supervision/resolution. For instance, a supervisor from the French *Autorité de Contrôle Prudentiel et de Résolution (ACPR)* will be in JST 1 and 2, and a resolution staff from the Central Bank of Ireland will be in IRT A and IRT B.

However, this dual or multiple affiliation may raise issues of multiple lines of command for some of the teams' members. The integrative function might suffer some limitations with regard to the staff members of the joint teams that are under two sources of managerial control from the ECB/SRB and the NCAs/NRAs. Should some incompatibility or dissonance arise, this may partly impair the integrative force joint teams can play in the governance of the mechanisms. Put simply, the two hats of national supervisors sitting in joint teams mean that they carry their work within the BU and the responsibilities attached to their NCAs/NRAs affiliation. But, this limit is only meant to be temporary, until the common methods and approaches are widely adopted and accepted at the level of significant and less significant institutions for both systems, and ultimately with a truly *Single* Rulebook and European culture for supervision and resolution.

[64] Art. 26(7) of the SRB Decision 2018 n 50 cit.

[65] Formerly DG MS IV, now horizontal line supervision, and for the SRB, directorate for resolution policy and cooperation.

[66] Art. 25(4) of the SRB Decision 2018 n 50 cit. and art. 4(2) of the SSM Framework Regulation cit.

Through their composition, joint teams benefit from the local informational advantage and knowledge. This ensures continuity in bank supervision and resolution and conformity with remaining specificities of national laws and powers (e.g., fit and proper assessment, unharmonised insolvency laws). Schematically, this leads to integrating approaches in (a given) differentiated environment. There are other important elements for integrating the processes and preparatory work prior to the decision-making itself, which pertain to common culture and human resources aspects, the mobility of the actors, and their socialisation across the systems. They are beyond the scope of the legal analysis in this *Article*.

IV. Banking Union "waiting room": from differentiation to integration

Different phases to join the BU create some differentiation in the pillars' governance, which stem from the legal framework itself. As I will argue in this section, this differentiation might be alleviated with the (quasi) simultaneous membership of the euro area. This accounts for the BU layer added to the EMU construction. To be sure, with the status of new participating Member States, the new "ins" are in a sort of "waiting" room before their full integration into the BU. There is some differentiation as to the voting rules and governance arrangements across the two pillars during close cooperation. The JSTs are also established in case of participating Member States under close cooperation.[67] Once the participating Member States have joined the euro area, this entails the full integration into the BU and the Monetary Union.

Three stages can be identified for the Member States joining the Banking Union. Those three stages correspond to the following phases: pre-joining (the Member States outside the Banking Union and the euro area), close cooperation as a participating Member State in the Banking Union, and full integration in the Banking Union once the Member State is also a member of the euro area. Therefore, each phase entails a specific form of differentiated governance that is now further described. Prior to joining, the governance is surely differentiated as Member States are outside the mechanisms (also designated as "outs"). When Member States gain the status of participating Member States, their competent authorities have established a close cooperation with the ECB, which results in a partly differentiated governance, due to unequal participation in decision-making and governance. Lastly, once they have joined the euro area, the governance can be considered fully integrated ("ins" in both supervisory and resolution pillars).

The focus is on the second and third stage which have already seen some evolutions in the Banking Union. In contrast, the first stage is a rather static observation that six Member States are for now outside the Banking Union strictly (i.e., Czech Republic, Hungary, Poland, Romania and Sweden, and a Member State with an opt-out, Denmark). The

[67] Art. 115(3) of the SSM Framework Regulation cit. At the time of writing those new teams are only freshly established, with no public information available.

second and third stage have been partly undertaken by two non-euro area Member States at the time of writing, Bulgaria and Croatia.[68] The competent authorities of Bulgaria and Croatia joined the SSM and the SRM formally as of 1 October 2020.[69] In the abstract, a non-euro area Member State can request the establishment of a close cooperation between its competent authority and the ECB to join the SSM,[70] which leads to joining the second pillar – the SRM – as a "participating Member State".[71] Hence, "participating Member State" designates both the Member States whose currency is the euro (and that joined the Banking Union with a mandatory participation from the start) and the Member States whose currency is not the euro which have established a close cooperation. They are forming a "fore-runner" group, as highlighted in the introduction of this article.

The second stage reflects a process of integrating the BU with some differentiation in the first pillar and across pillars. On the SSM side, the Member State that benefits from the establishment of a close cooperation does not have full rights of participation in terms of decision-making and governance arrangements. Its competent authority has a member sitting in the Supervisory Board, but it does not yet have a Governor sitting in the ECB Governing Council (formerly adopting supervisory decisions under the non-objection procedure). Hence the differentiation results from constraints at EU primary law level which consecrates the Governing Council as one of the decision-making bodies of the ECB with membership restricted to euro area Member States. The Supervisory Board is based on secondary law and only approves draft decisions then proposed to the Governing Council (in which the non-euro area members do not have a seat). On the SRM side, the voting rights are full, with no special arrangements provided in the legal framework. The drawback of the agency form examined above may in this way turn into an advantage. Indeed, the Bulgarian and Croatian National Banks (NRAs in the two new participating Member States) have representatives in the SRB's plenary session and extended executive sessions with the same rights and obligations as other members.[72] The arrangements in the first pillar result in a less than ideal outcome for non-euro

[68] Decision (EU) 2020/1015 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Българска народна банка (Bulgarian National Bank) (ECB/2020/30); Decision (EU) 2020/1016 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Hrvatska Narodna Banka (ECB/2020/31); MJ Nieto and D Singh, 'The Path to Euro Area and Banking Union Membership: Assessing the Incentives for "Close Cooperation" and Adherence to the Exchange Rate Mechanism II' (2021) SUERF Policy Brief.

[69] Single Resolution Board, *Bulgaria and Croatia Set to Join the Single Resolution Mechanism* www.srb.europa.eu.

[70] Art. 7(2) of the SSM Regulation cit., and art. 5 of the Decision ECB/2014/5 cit.

[71] Art. 2(1) of the SSM Regulation cit., and art. 4(1) of the SRM Regulation cit.

[72] Single Resolution Board, *Bulgaria and Croatia Set to Join the Single Resolution Mechanism* cit.

participating Member States, of an "expedient"[73] nature, with unequal participation. On the front of the SRF, and the access to the common backstop discussed above, the non-euro area Member States that have established a close cooperation with the ECB/SSM have parallel credit lines for the SRF alongside the ESM.[74]

Moreover, banking supervision led under close cooperation raises some adjustments of the powers held by the ECB in accordance with the SSM legal framework. In general terms, the relationship between the ECB and the NCA under close cooperation is more distant, with specific actions and procedures required for steering and guiding the new counterparts in the system. Importantly, the ECB does not have directly applicable powers over the significant and less significant institutions established in the Member State who joined in close cooperation.[75] Nevertheless, a warning mechanism at the initiative of the ECB may lead to the suspension or the termination of the close cooperation.[76] Those governance arrangements shed light on the specificities of close supervisory cooperation, the "waiting room" to the first pillar.

However, they are some safeguards for the competent authority of the Member state in close cooperation to express its voice. This is possible at different levels of the decision-making process when opposing a draft decision (both Supervisory Board and Governing Council), but it may intervene at high costs. A real opposition may lead to a termination of the close cooperation with immediate effect so that the competent authority is not bound to the contested decision.[77] This outcome would be a high price to pay for expressing disagreement. After this it would be impermissible to enter into a new close cooperation during the three years following the termination's publication in the Official Journal.[78] Those provisions are for now theoretical, and it is doubtful that only one decision would create such an escalation during the period of close cooperation. A termination would be symptomatic of much deeper disagreement on a set of issues rather than one single decision submitted to the SSM decision-making process.

It is important to note that the SSM Regulation itself indicates the imperfection of the governance arrangements in its Recital 85: "[a]rticle 127(6) TFEU could be amended [...] to eliminate some of the legal constraints it currently places on the design of the SSM". But changes of the Treaties require unanimity (the same voting rule that was applied for the adoption of the SSM Regulation under a special legislative procedure) and would necessarily lead to a review of the SSM legal framework at secondary level.

[73] E Ferran, 'European Banking Union and the EU Single Financial Market: More Differentiated Integration, or Disintegration?' in B de Witte and Others (eds), *Between Flexibility and Disintegration : the Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017) 263.

[74] See Recital 9a of the Agreement amending the ESM Treaty cit.

[75] Hence it used instructions, art. 7(1) of the SSM Regulation cit., and general instructions in respect of less significant institutions.

[76] Art. 7(5) of the SSM Regulation cit.

[77] *Ibid*. art. 7(8).

[78] *Ibid*. art. 7(9).

In light of this, the simultaneous joining of the euro area and the Banking Union would address some of the limits examined above. It would remove the two-tier system existing for NCA under close cooperation, and lead instead to a more integrated decision-making governance, with a governor in the Governing Council and a member sitting in the Supervisory Board. But this practical solution is only feasible if associated with political willingness. Indeed, the more or less extended transitory period of the close cooperation is a consequence of the rules and the result of decision-makers and politicians involved in the respective negotiations. In accordance with the legal framework, as soon as a Member State joins the euro area, the close cooperation ends on that very same date the derogation is abrogated (as per arts 139 and 140 TFEU).

It is argued that this phase should be transitional, of a rather short period, and lead to inclusion in the Banking Union insofar as the negotiations to join the euro area have been led in parallel. As a matter of fact, the Bulgarian and Croatian authorities had signalled their intention to join the Exchange Rate Mechanism II (ERM II) and the Banking Union simultaneously, therefore with a view to becoming a euro area Member State and a participating Member State in the SSM with full rights rather rapidly. Moreover, the Eurogroup expressed its political willingness to commit to such approach for a simultaneous membership of non-euro area Member States joining the Banking Union and the Monetary Union in the future (e.g., after Bulgaria, it was reiterated for Croatia). However, this is in practice more delicate as the conditions for joining are assessed under different legal and constitutional frameworks. A strict parallelism for opt-ins is desirable but its practical implementation is not facilitated by the current framework that leads to a certain period of time that is incompressible. Bulgaria and Croatia joined the ERM II in July 2020 and need to stay within it for at least two years before they can join the euro area, with two convergence reports due in the course of 2022.

The new authorities under close cooperation that join the "participating Member States" NCAs gain only partly rights and voice in the SSM governance, while the agency structure of the SRB seems to overcome the inequality of participation in the first pillar. The full integration in the euro area will mark the full participation in the Banking Union.

V. Conclusion

Differentiated governance in the BU exists and will be present for a while. Borrowing from theories of differentiated integration, (temporary) differentiated governance can be a catalyst for reaching integrated governance, ultimately. A fully integrated governance can be an ideal, towards which some steps are already being undertaken to streamline the decision-making process within the crisis management framework review that is ongoing, or with the first enlargement of the BU with new "participating Member States".

Notwithstanding several features of differentiated governance in the SSM and SRM systems, in terms of rules, institutions and processes, I analysed core elements that can and should constitute an integrative factor in the governance of both systems. Namely, joint

teams foster information sharing, facilitate technical and granular assessment in an integrative way in ongoing supervision and resolution actions. Their existence at the core of both mechanisms is instrumental for an informed decision-making governance accounting for the local realities and diversity across the BU. They are an intermediate component that will remain relevant until the EU is able to host real cross-border banking groups and create the conditions for their operations in a truly European banking market, in a Union-wide setting, with a federalised institutional, supervisory and regulatory approach. Those core teams for supervision and resolution (and the ones set for institution specific crisis management, which could not be analysed in the scope of this article) are instrumental in a BU currently set on a rather functional model. They will need to be interwoven with the (long-awaited) third pillar's core governance, once created. The road is still long ahead as special institutions and governance arrangements exist in the BU legal framework and suffer from unharmonised substantive rules applied in ongoing supervision/resolution (that hamper the achievement of the objectives of each pillar and the Banking Union). Yet, the concerns for the unity and integrity of the internal market are omnipresent in both legal frameworks,[79] even though institutionally and in daily supervision and resolution, the reality is, once again, more diverse and sometimes fragmented (as in liquidation, insolvency and some remaining national options and discretion).[80]

Overall, the *singleness* suffers from differentiated governance at different levels, remaining institutional and substantive law differentiation across and within pillars, and the non-existing third pillar. Decision-making process and governance could be considered as achieving a common interest in supervision and resolution. This common interest should represent one of the core features of the singleness of the two existing mechanisms. This approach is generally supported by some provisions found in the EU legal framework. In support of this view, representatives of national authorities sitting in decision-making bodies must act and contribute to decision-making in the interest of the Union as a whole or the general interest (respectively, in the SSM and SRM settings), the concerns for unity and uniformity in both supervision and resolution as emphasised (art. 1 in the SSM Regulation and SRM Regulation), and generally, the existence of different tools and legal solutions to ensure common approaches in supervisory and resolution actions. This approach is also supported by the objectives underpinning the overall BU, i.e. the cross-border dimension and the system approach, which call for going beyond mere national perspectives.

And yet, there are several elements that give rise to an aggregation of national interests within the two mechanisms' governance, especially in instances where the institutions are facing difficulties as in resolution cases or non-resolution cases dealt with at the national level. In the legal framework, some provisions curb a single approach, once again, due to the remaining options and discretion in the hands of the legislators and

[79] *Ibid*. art. 1, and art. 6 of the SRM Regulation cit.

[80] I Angeloni, "Beyond the Pandemic: Reviving Europe's Banking Union' (2020) CEPR Press voxeu.org.

competent authorities, the application of national laws at the EU level, and (national) diverging legal frameworks. How could decision-makers pursue a common interest if the legal and institutional framework still brings them back to national grounds and realities in policy-making?

The national compartments of the SRF will ultimately be replaced with a truly "single" fund,[81] once the nationally-driven calculation approach no longer applies, and the full mutualisation of transferred contributions from banks is reached in 2023. In general, the BU safety nets, until now criticised as insufficient if assessed against the constitutive objectives of the BU, have gained credibility in their scope of action with the forthcoming common backstop, the ongoing review of the resolution framework, provided the third pillar for common deposit insurance is delivered in the near future.

Differentiated governance does not create barriers to entry, provided this is of a temporary nature for the "outs" to be "ins" eventually. The joining of Bulgaria and Croatia as "participating Member States" (at the time of writing in ERM II) show some attractiveness of the BU construction – and progress in convergence criteria, with ultimately a slightly larger core euro area which will be strengthened with the completion of the Banking Union. The expression "participating Member State" itself merits some attention. It combines the notion of participation and membership, which are not equivalent. No one uses participating Member States of the euro area, but members of the euro area. Here this expression accounts for the institutional and governance constraints on the overall Banking Union framework, which exists within a multi-speed EU that has already had the euro area at its core for more than two decades.[82] Developing practice and political will may speed up the participation for a quasi-equivalent membership between the Banking Union and the Monetary Union.

[81] M Thijssen 'Judicial Review of the SRB's Contributions and Fees Decisions' cit. 447.

[82] S Baroncelli, 'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' cit.