

Binder / Gortsos

The European Banking Union

A Compendium

C.H.BECK · Hart · Nomos

Binder / Gortsos
The European Banking Union

The European Banking Union

A Compendium

by

Prof. Dr. Jens-Hinrich Binder, LL.M.
Prof. Dr. Christos V. Gortsos

2016

C.H.BECK · Hart · Nomos

Published by

Nomos Verlagsgesellschaft, Waldseestraße 3-5, 76530 Baden-Baden, Germany,
email: vertrieb@nomos.de

Co-published by

Verlag C.H.BECK oHG, Wilhelmstraße 9, 80801 München, Germany,
email: bestellung@beck.de

and

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom,
email: orders@isbs.com

Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book, Services,
930 NE 58th Avenue, Suite 300, Portland, OR 97213-3786, USA,
email: orders@isbs.com

ISBN 978-3-8487-2401-7 (Nomos, Print)

ISBN 978-3-8452-6527-8 (Nomos, ePDF)

ISBN 978-3-406-68704-4 (C.H.BECK)

ISBN 978-1-50990-453-2 (Hart Publishing)

First Edition 2016

© Nomos Verlagsgesellschaft, Baden-Baden 2016. Printed in Germany.

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically those of translation, reprinting, re-use of illustrations, broadcasting, reproduction by photocopying machine or similar means, and storage in data banks. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to »Verwertungsgesellschaft Wort«, Munich, Germany.

Preface

The creation of the European Banking Union is clearly the most significant step towards financial integration in Europe since the creation of the Monetary Union. With the Single Supervisory Mechanism as the new architecture for the prudential supervision of significant credit institutions in Europe and the Single Resolution Mechanism as the corresponding framework for centralised decision-making in the area of bank resolution, Eurozone Member States have agreed to transfer responsibilities and powers to the supranational level at an unprecedented scale. With the ECB assuming its powers as sole supervisor for significant credit institutions and groups of such institutions in the Eurozone (at least) and the Single Resolution Board expected to become in 2016 fully operational as a single resolution authority, the new regime is bringing about substantial changes to the way credit institutions are being supervised, and ultimately resolved (if needed), in Europe.

The long-term effects in terms of both further market integration and preservation of financial stability both within the Eurozone and within the EU as a whole are likely to be enormous. Nevertheless, this also applies to the range of yet unresolved questions with regard to the practical viability of the new regime, the cooperation between the EU authorities and national agencies, and the relationship between the Banking Union and the remainder of the EU as a whole (to name but a few areas of concern).

As the supervisory arrangements and practices are yet unfolding, both authorities (at the EU and the national levels) and the industry are grappling with a vast number of problems regarding the application and interpretation of the underlying legal provisions. Reflecting its origins in the wave of post-fiscal euro area crisis emergency legislation, the legal basis has evolved in a rather complex, haphazard way and should be regarded as a result of manifold political compromises rather than optimal institutional design. The Banking Union was created within the existing legal and institutional environment as created by the Treaty on European Union and the Treaty on the Functioning of the European Union and notably without any single amendment to these Treaties.

The legal foundations are thus to be found not in primary but in a rather complex array of instruments in secondary EU law, the most fundamental being the *SSM Regulation* (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) and the *SRM Regulation* (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). These two Regulations have been supplemented with an Intergovernmental Agreement

(on the transfer and mutualisation of contributions to the Single Resolution Fund), as well as with a considerable number of delegated legal acts, decisions and other legal instruments (mainly of the European Central Bank), all of which jointly constitute the legal basis for the creation and the day-to-day operations of centralised banking supervision and resolution within the Eurozone.

This Compendium seeks to introduce this new framework and the underlying legal instruments in a systematic and transparent form. Two introductory chapters – on the evolution of the Banking Union concept as well as the underlying policy considerations and on the institutional setup, respectively – provide readers with the relevant background. A comprehensive bibliography then follows, listing the relevant literature (as of summer 2015) for further reference. Finally, the relevant legal instruments are reprinted, arranged a systematic way.

It is our hope that this collection of texts will prove a useful source of information for readers in supervisory agencies, the regulated industry, academia, and other interested circles.

Tuebingen and Athens, September 2015

Jens-Hinrich Binder
Eberhard-Karls-University
Faculty of Law

Christos Gortsos
Panteion University
Department of International,
European and Area Studies

Table of Contents

List of Abbreviations	XV
The European Banking Union – Rationale and Key Policy Issues (Binder)	
I. Introduction	1
II. The Banking Union as a political concept	2
1. The origins and developments since 2010	2
2. The political process 2012-2013	3
III. Relevant policy objectives	5
1. Enhanced effectiveness and efficiency of regulatory and supervisory arrangements	5
a) Prudential regulation and supervision	5
b) Insolvency and crisis management	7
c) Consequences and implications	8
2. The Banking Union as a functional corollary of the Monetary Union?	11
a) Breaking the link between financial stability and state finances	11
b) Banking Union as a substitute Lender of Last Resort for the Eurozone?	12
3. The Banking Union and the Single Market	13
IV. Conclusions	15
The two main pillars of the European Banking Union: the legal framework in a ‘nutshell’ (Gortsos)	17
I. The Single Supervisory Mechanism (SSM)	17
1. The legal framework of the Single Supervisory Mechanism	17
a) The SSM Regulation	17
aa) Scope	17
bb) General aspects	18
cc) Legal basis	18
dd) Timetable of implementation	18
b) The other legal acts	19
aa) Regulation (EU) No 1022/2013 amending the ‘EBA Regulation’	19
bb) Legal acts of the ECB	19
cc) The Interinstitutional Agreement between the European Parliament and the ECB	20

dd) The Memorandum of Understanding between the Council and the ECB	20
2. The main elements of the Single Supervisory Mechanism	20
a) General overview	20
b) The structure of the SSM	21
aa) The two components of the SSM	21
bb) The ECB as the main actor	21
cc) The national competent authorities	22
c) The regulatory perimeter	22
aa) The perimeter in respect of different types of financial firms	22
bb) The perimeter in respect of Member States	22
cc) The perimeter in respect of credit institutions and other supervised entities	23
d) The SSM as part of the European System of Financial Supervision (ESFS)	24
e) Creation of ‘Chinese walls’	25
3. The specific supervisory tasks conferred on the ECB	25
a) Specific supervisory tasks in relation to credit institutions and other supervised entities incorporated in participating Member States	25
b) Specific supervisory tasks concerning branches in participating Member States by credit institutions incorporated in non-participating Member States	27
c) Regulatory powers	27
4. Cooperation arrangements	28
a) Cooperation within the SSM	28
aa) General principles and obligations applying to the operation of the SSM	28
bb) Micro-prudential supervision of significant supervised entities	28
cc) Micro-prudential supervision of less significant supervised entities	29
b) ‘Close cooperation’ between the ECB and the competent authorities of Member States with a derogation	30
aa) Legal basis, procedure and effects	30
bb) Suspension or termination of a ‘close cooperation’ procedure	30
c) Cooperation outside the SSM and the ESFS	30
aa) Cooperation with competent authorities of non-participating Member States	30
bb) Cooperation with national resolution authorities	31
cc) Cooperation with public financial assistance facilities ..	31

d) International cooperation	31
5. The investigatory and specific supervisory powers of the ECB ..	32
a) The general principles	32
b) Investigatory powers	32
aa) Requests for the provision of information	32
bb) Conduct of investigations and of on-site inspections ..	33
c) Supervisory powers under Article 16 of the SSMR	33
d) Administrative penalties	34
6. Organisational principles	35
a) General overview	35
b) The new governance structure	35
aa) The Supervisory Board	35
bb) Internal structure of the ECB with regard to its supervisory tasks and new composition of Eurosystem/ESCB Committees	36
cc) The Administrative Board of Review	37
c) Aspects of independence	38
aa) Introductory remarks	38
bb) Institutional independence	38
cc) Financial independence	38
d) Accountability of the ECB vis-à-vis EU institutions and national parliaments	39
aa) Accountability vis-à-vis EU institutions	39
bb) Accountability vis-à-vis national parliaments	40
e) Due process for adopting supervisory Decisions	40
aa) The framework	40
bb) ECB supervisory procedures	40
cc) ECB supervisory Decisions	41
f) Other provisions	41
II. The Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF)	45
1. A general overview of the framework	45
a) The legal acts	45
b) The basic provisions of the SRMR	46
aa) Scope of application	46
bb) Participating Member States	46
cc) Relation to the BRRD and applicable national law	47
dd) General principles	47
ee) Division of tasks within the SRM	48
c) Institutional arrangements: the Single Resolution Board ..	49
aa) General provisions	49
bb) Independence	50
cc) Accountability	51

d) Power to impose penalties	52
aa) Fines	52
bb) Periodic penalty payments	53
e) Selected other provisions of the SRMR	53
f) The SRF Agreement	54
aa) Purpose and scope	54
bb) Consistency and relationship with EU law	54
cc) Application	54
2. Resolution planning and early intervention	55
a) Resolution planning	55
aa) General provisions	55
bb) Content of resolution plans	55
cc) Assessment of resolvability	56
dd) Simplified obligations for certain institutions	57
b) In particular: the minimum requirement for own funds and eligible liabilities (MREL)	57
aa) Entities and groups subject to the MREL	57
bb) Definition of the MREL	57
cc) Conditions applying to the determinations made by the Board	58
c) Early intervention	58
3. Resolution	58
a) General provisions	58
aa) Resolution objectives	58
bb) General principles governing resolution	59
cc) Order of priority of claims	60
dd) Resolution procedure	60
b) Write-down and conversion of capital instruments	62
c) Resolution tools	62
aa) General principles of resolution tools	62
bb) Resolution scheme	64
4. The Single Resolution Fund (SRF)	64
a) Constitution of the SRF	64
aa) General provisions	64
bb) Target level	65
cc) Ex-ante contributions	65
dd) Ex-post contributions	66
b) Administration of the SRF – investments	66
c) Use of the SRF	67
aa) Mission of the SRF	67
bb) Use of the SRF	67
cc) Use of deposit guarantee schemes (DGSS) in the context of resolution	67

d) The provisions of SRF Agreement	68
aa) Transfer of contributions	68
bb) Compartments	68
Bibliography	69
A. Legal acts on the SSM	
I. Council Regulations	
1. 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, pp. 63-89)	77
2. Council Regulation (EU) 2015/159 of 27 January 2015 “amending Council Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions” (OJ L 27, 3.2.2015, pp. 1-6)	109
II. Regulation of the European Parliament and of the Council	
3. Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 “amending Regulation (EU) No 1093/2010 establishing the European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013” (OJ C 287, 29.10.2013, pp. 5-14)	115
III. Legal acts of the ECB	
Regulations	
4. Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 “establishing the framework for cooperation within the SSM between the European Central Bank and national competent authorities and with national designated authorities (‘SSM Framework Regulation’)” (ECB/2014/17) (OJ L 141, 14.5.2014, pp. 1-50)	125
5. Regulation (EU) No 469/2014 of the European Central Bank of 16 April 2014 “amending Regulation (EC) No 2157/1999 on the powers of the European Central Bank to impose sanctions (ECB/1999/4)” (ECB/2014/18) (OJ L 141, 14.5.2014, pp. 51-53)	173
6. Regulation (EU) No 673/2014 of the European Central Bank of 2 June 2014 “concerning the establishment of a Mediation Panel and its Rules of Procedure” (ECB/2014/26) (OJ L 179, 19.6.2014, pp. 72-76)	177
7. Regulation (EU) No 1163/2014 of the European Central Bank of 22 October 2014 “on supervisory fees” (ECB/2014/41) (OJ L 311, 31.10.2014, pp. 23-31)	181
Decisions	
8. Decision 2014/179/EU of the European Central Bank of 22 January 2014 “amending Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the ECB” (ECB/2014/1) (OJ L 95, 29.3.2014, pp. 56-63)	189
9. Decision 2014/434/EU of the European Central Bank of 31 January 2014 “on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro” (ECB/2014/5) (OJ L 198, 5.7.2014, pp. 7-13)	197

10. Decision 2014/123/EU of the European Central Bank of 4 February 2014 “identifying the credit institutions that are subject to the comprehensive assessment” (ECB/2014/3) (OJ L 69, 8.3.2014, pp. 107-111)	203
11. Decision 2014/427/EU of the European Central Bank of 6 February 2014 “on the appointment of representatives of the ECB to the Supervisory Board” (ECB/2014/4) (OJ L 196, 3.7.2014, pp. 38-39)	209
12. Decision 2014/360/EU of the European Central Bank of 14 April 2014 “concerning the establishment of the Administrative Board of Review and its Operating Rules” (ECB/2014/16) (OJ L 175, 14.6.2014, pp. 47-53)	211
13. Decision 2014/477/EU of the European Central Bank of 2 July 2014 “on the provision to the ECB of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014” (ECB/2014/29) (OJ L 214, 19.7.2014, pp. 34-37)	217
14. Decision 2014/723/EU of the European Central Bank of 17 September 2014 “on the implementation of separation between the monetary policy and supervision functions of the ECB” (ECB/2014/39) (OJ L 300, 18.10.2014, pp. 57-62)	221
15. Decision (EU) 2015/433 of the European Central Bank of 17 December 2014 “concerning the establishment of an Ethics Committee and its Rules of Procedure” (ECB/2014/59) (OJ L 70, 14.3.2015, pp. 58-60)	227
16. Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 “amending Decision ECB/2004/3 on public access to European Central Bank documents” (ECB/2015/1) (OJ L 84, 28.3.2015, pp. 64-66)	231
17. Decision (EU) 2015/530 of the European Central Bank of 11 February 2015 “on the methodology and procedures for the determination and collection of data regarding fee factors used to calculate annual supervisory fees” (ECB/2015/7) (OJ L 84, 28.3.2015, pp. 67-72)	235
Other	
18. Interinstitutional Agreement 2013/694/EU between the European Parliament and the ECB of 6 November 2013 “on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism” (OJ L 320, 30.11.2013, pp. 1-6)	241
19. Memorandum of Understanding between the Council of the European Union and the European Central Bank “on the cooperation on procedures related to the Single Supervisory Mechanism (SSM)” (11.12.2013) (available at: https://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf)	249
20. Rules of Procedure of the Supervisory Board of the European Central Bank (1.4.2014) (OJ L 182, 21.6.2014, pp. 56-60)	253
21. Code of Conduct for the members of the Supervisory Board of the European Central Bank (2015/C 93/02) (OJ C 93, 20.3.2015, pp. 2-7)	257
22. Recommendation of the European Central Bank of 16 April 2014 “for a Council Regulation amending Council Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions” (ECB/2014/19) (OJ C 144, 14.5.2014, pp. 2-10)	263
B. Legal acts on the SRM	
23. Intergovernmental Agreement (8457/14) of 14 May 2014 “on the transfer and mutualisation of contributions to the single resolution fund” (available at: http://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%208457%202014%20COR%201)	273

Table of Contents

24. 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, 30.7.2014, pp. 1–90)	287
25. Council Implementing Decision (2014/943/EU) of 19 December 2014 “on the appointment of the Chair, the Vice-Chair and the further full-time members of the Single Resolution Board” (OJ L 367, 23.12.2014, pp. 97-98)	367

List of Abbreviations

BRRD	Bank Recovery and Resolution Directive
CRD IV	Capital Requirements Directive
CRR	Capital Requirements Regulation
DGS	deposit guarantee scheme
DGSD	Deposit Guarantee Schemes Directive
EBA	European Banking Authority
ECB	European Central Bank
ESCB	European System of Central Banks
ESFS	European System of Financial Supervision
ESRB	European Systemic Risk Board
EU	European Union
JST	joint supervisory team
SSM	Single Supervisory Mechanism
SSMR	Single Supervisory Mechanism Regulation
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRMR	Single Resolution Mechanism Regulation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

