10 Years of the European Banking Union, 20 Years of Hungarian EU Membership

Still No Uniform Application of the Single Rulebook of the Banking Union in Resolution Decisions

László Szegedi – Bálint Teleki[*]

Abstract

The regulation and supervision of the post-Great Financial Crisis banking market of the EU poses many challenges to the EU institutions and the Member States. After the establishment of the three European Supervisory Authorities (EBA, ESMA, EIOPA) in 2014, the first steps were made to create the European Banking Union (EBU), with its Single Supervisory Mechanism (SSM), Single Resolution Mechanism (SRM) and European Deposit Insurance Scheme (EDIS). In this article, we focus on the SRM, especially the incoherent application of the Single Rulebook by the Single Resolution Board (SRB), and other factors interfering with the decision-making, such as banking nationalism. We present three major cases from the SRB's – not so extensive – case law. The so-called Veneto Paradox draws attention to the problems caused by the incoherent interpretation of systemic importance in the EBU. The ABLV Latvia case discusses the connections between anti-money laundering, prudential supervision and bank resolution. The MKB case emphasises the consequences of political influence in the banking sector.

Keywords: ABLV Latvia case, MKB case, European Banking Union, Single Rulebook, single resolution mechanism

* László Szegedi: associate professor of law, Ludovika University of Public Service, Budapest, szegedi.laszlo@uni-nke.hu.
Bálint Teleki: assistant lecturer, Ludovika University of Public Service, Budapest, teleki.balint@uni-nke.hu.

1. Introduction

In 2024, Hungary will celebrate its 20th anniversary within the EU, while the European Banking Union (EBU) was created ten years ago. Therefore, it is worth exploring how the financial integration of this unique area of the Single Market has been transformed due to the Great Financial Crisis of 2008–2012 (GFC) with a particular emphasis on the EBU. The last two decades of the EU integration have been characterized by several crisis management cycles, from which the GFC-related EBU led to several fundamental changes. This included the creation of a three-pillar structure (Single Supervisory Mechanism, SSM; Single Resolution Mechanism, SRM, and European Deposit Insurance Scheme, EDIS) along with a clear shift of banking supervision competencies towards EU-level actors like some newly established EU agencies as well as the ECB as the central institution of EU-level banking supervision. Moreover, the post-GFC regulation of the EU also envisaged the creation of a Single Rulebook for the whole sector, stabilizing this market segment, enabling effective EU-level regulation and supervision for the EU-level actors and preventing further crisis cycles. Yet, recent years' resolution decisions have shown that the Single Rulebook has been applied somewhat incoherently in light of some leading cases. At the same time, the rulebook's uniform (and coherent) application could also be undermined by the territorially segmented structure of the EBU and banking nationalism, just like the unclear relationship between EU-level actors.

Regarding methodology, we focus on three significant cases from the last decade of the EBU, emphasizing this area's unique territorial clusters. As a result, the selected case studies reflect that the EBU incorporates Member States within and outside of the SSM and SRM schemes. Regardless of that, the banking market parent companies within these schemes often have branches outside of the SSM/SRM (like in the case of Hungary), and the Single Rulebook still applies to all Member States. Therefore, we explore this evolutionary road of the EBU by presenting three different pillars, namely *(i)* the pillar of single regulation (all EU-countries); *(ii)* the pillar of single supervision by mainly new EU actors (yet non-eurozone members like Hungary are supervised by national actors under the same EU regulation). *(iii)* Finally, the third pillar of our analysis, in a broader sense, reflects the Member States' further opportunities (banking nationalism) to influence their banking sector directly or indirectly, which might hinder the coherent application of the Single Rulebook.

The purposes of this paper are: *(i)* to describe the evolution of the EBU and its Single Rulebook by evaluating these three resolution decisions of recent years, and *(ii)* to explore common patterns of the decisions concerned, which could potentially hinder the coherent application of the EBU's Single Rulebook.

The paper is structured as follows: Section 2 presents the evolution of the EBU, focusing on national and new EU-level actors and the regulation of resolution cycles. Section 3 discusses the three main resolution cases. Section 4 summarizes our conclusions and notes the future policy implications in this last section.

2. The Structure of the EBU

2.1. The Evolution of the EBU

The EBU is closely linked to the GFC. As the de Larosiére Report identified, financial and monetary imbalances, inappropriate regulation, weak supervision, poor macroprudential oversight, and various market failures led to the crisis of the European banking sector.[1] As such, the cross-border activities of several market players and the integrated financial market could no longer be regulated and supervised on a national level. The fragmented European financial supervision with former 3L3 Committees was mainly responsible for enhancing coordination and cooperation between national supervisory bodies without real powers. The 'too big to' approach could also be applied in the context of the European Internal Market. The EU responded quickly to the crisis by establishing a supervisory network called the European System of Financial Supervisors (ESFS), which followed the Report's recommendations. The ESFS consists of the European System Risk Board (ESRB), which conducts the macroprudential financial supervision, and the European Supervisory Authorities (ESAs, Authorities), which are in charge of microprudential supervision. Key competencies have been transferred to the new European Authorities – the European Banking Au-

1 Report of the High Level Group of Financial Supervision in the EU, chaired by Jacques de Larosiére (de Larosiére Report), at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

thority (EBA), the European Securities and Markets Authority (ESMA) and EIOPA (European Insurance and Occupational Pensions Authority).[2]

Yet, due to the euro crisis at the beginning of the 2010s, it was inevitable to restructure (*vis-á-vis* further expand) the ESFS on the institutional landscape with the three-pillar model of the EBU. The first pillar, the Single Supervisory Mechanism (SSM), led to the delegation of banking supervision powers to the ECB. At the same time, the Single Resolution Mechanism (SRM)[3] strengthened the EU agencification process by creating the new Single Resolution Board (SRB) combined with a Single Resolution Fund (SRF) as financial support for EU-level banking resolutions. The European Deposit Insurance Scheme (EDIS),[4] the third pillar of the EBU, has not yet been finished and is a subject of constant political debates. Additionally, the agencification process also continued in the 2020s. The new Anti-Money Laundering and Countering the Financing of Terrorism Authority (AMLA)[5] will operate in 2025 as the EU-level coordinating authority over national authorities to ensure the correct and coherent application of EU rules. AMLA will directly supervise those financial sector entities exposed to the highest risk of money laundering and financing of terrorism.

One of the reform's further cornerstones was the creation of a Single Rulebook (at the EU level) applicable to all financial institutions in the internal market. However, our analysis intends to demonstrate that there is often an apparent deficit in the coherent (uniform or proper) application of the Single Rulebook, even if this has been one of the main reasons for the ESFS and EBU reforms.

2.2. The Old and New Actors of the EBU

The creation of the ESFS and the EBU led to the shift of powers from national competent supervisory authorities (National Competent Authorities,

2 Id. p. 57.

3 Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 on 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 (SRMR).

4 EDIS is still only a proposal, *see* at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015PC0586.

5 AMLA is still only a proposal, *see* at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0421.

NCA) to several EU-level actors, mostly newly created after the GFL or embedded with new powers as a crisis management step. Even if NCAs are still responsible for the day-to-day supervision of financial institutions of the single market, these are the new EU-level actors.

The EU agencification in the last decades marks the era when the EU seeks new governance mechanisms by creating these 'inbetweener' EU bodies, which function between EU institutions and Member States while having regulatory and supervisory tasks over the market participants.[6]

The EU (decentralized) agencies, as the primary type of inbetweener bodies, have been created to respond to crises from inadequate risk assessment and crisis management at the national level combined with the lack of such capacities at the EU level. This new era with a shift of implementation competencies of EU policies towards relatively independent EU agencies[7] separated from the often too bureaucratic, too politicized, and too generalist functioning of the Commission.[8] The agencification process reached its most intensive period in the 2000s as new EU agencies were established (or 'upgraded') with substantial new powers regarding the Single Market (European Food Safety Authority, EFSA in 2002; European Chemicals Agency, ECHA in 2007; European Medicines Agency, renamed as EMA in 2004), while financial agencies marked the newest era of agencification.[9] Scholars call this phenomenon 'crisis-driven agencification' as, in many cases, the reason behind establishing a new EU agency was and is some crisis, regardless of whether it is the BSE disease, the Eurozone crisis, or any other.[10]

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6 Michelle Everson *et al*., 'European Agencies in between Institutions and Member States' *in* Michelle Everson *et al.* (eds.), *European Agencies in between Institutions and Member States*, Kluwer Law International, The Netherlands, 2014, pp. 3–9.

7 Michael Kaeding & Esther Versluis, 'EU Agencies as Solution to Pan-European Implementation Problems' *in* Everson *et al.* (eds.) 2014, pp. 73–87.

8 Michelle Everson & Ellen Vos, 'EU Agencies and the Politicized Administration' *in* Johannes Pollak & Peter Slominski (eds.), *The Role of EU Agencies in the Eurozone and Migration Crisis,* Palgrave Macmillan, 2021, p. 26 (Everson & Vos 2021a); Robert D. Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies', *West European Politics,* Vol. 25, Issue 4, 2002, p. 112.

9 László Szegedi, 'EU Expert Bodies in Light of the Glyphosate Saga and the Dieselgate Scandal – Cross-Sectoral Lessons to Be Learned in the Era of Emerging Risk Factors and Constant Crisis Management?', *Európai Tükör*, Vol. 25, Issue 3–4, 2022, pp. 94–116.

10 Michelle Everson & Ellen Vos, 'European Union Agencies' *in* Marianne Riddervold *et al.* (eds.), *Palgrave Handbook of EU Crises,* Palgrave Macmillan, 2021, pp. 319–328

Even if the number and powers conferred upon them have increased substantially in the last decades, EU agencies have no detailed (sector-neutral) Treaty basis (incomplete constitutionalism).[11] The CJEU solved this problem in its judgment, explicitly dealing with one of the new financial agencies (ESMA) by referring to agencies as (functional) EU entities created by the EU legislature without having a considerable measure of discretion (limited by other actors and judicial review guaranteed before the CJEU).[12] Regarding the scientific side, the agencies' position has been reinterpreted in light of the *ESMA judgment*. This judgment concluded that any task conferred upon the Commission that cannot be carried out due to the lack of technical expertise could be left to EU agencies, stressing the agencies' primary role to function as bodies of technical expertise.[13]

The SSM ensures that an EU actor supervises systemically important credit institutions without the abovementioned conferral concerns of EU agencies. Legally, the ECB has a clear Treaty basis with even stricter independence criteria. Yet, functionally, the ECB's direct banking supervisory role and mandate of technical expertise could be considered similar to that of agencies. At the same time, the ECB operates as an EU-level actor over a certain policy area of banking supervision.[14]

The division of competencies between the national and EU actors within the SSM has been based essentially on the systemic importance of credit institutions (size of the bank, significance at the EU and the Member State-level banking sector, importance of cross-border activities). In addition, the regulation itself provides the ECB with a flexibility clause to allow the ECB to take over the direct supervisory role from the Member States for less significant banking market participants if needed.[15]

(Everson & Vos 2021b); László Szegedi, *Az európai közigazgatás fejlődése és szabályozása,* Dialóg Campus, Budapest, 2018, pp. 88–94.

11 Everson & Vos 2021b, pp. 319–328.

12 Judgment of 22 January 2014, *Case C-270/12, United Kingdom v Parliament and Council,* ECLI:EU:C:2014:18. Everson & Vos 2021a, pp. 31–37.

13 Id. p. 3.

14 Jacques Pelkmans & Marta Simoncini, 'Mellowing Meroni: How ESMA can help build the single market', *CEPS Commentaries,* 18 February 2018, pp. 5–6; Everson *et al.* 2014, pp. 241–262; Herwig C. H. Hofmann, 'Monetary Policy and Euro Area Governance in the EMU' *in* Herwig C. H. Hofmann *et al.* (eds.), *Specialized Administrative Law of the European Union – A Sectoral Review,* Oxford University Press, Oxford, 2019, p. 246.

15 SSMR, Article 1; Jens-Hinrich Binder *et al.*, *Brussels Commentary – European Banking Union*, Nomos/Hart, Bloomsbury Publishing, London, 2023, pp. 1–13.

The central actor of the EBU's second mechanism (SRM) is the Single Resolution Board (SRB), established as an EU agency that decides on the resolution of financial market participants in crisis. The financial basis for this is the Single Resolution Fund, mainly composed of contributions from the banking market participants. The SRB is mandated to take emergency action, as it can respond to a crisis caused by the insolvency of a banking market participant by examining alternative means, ultimately deciding on the resolution based on a public interest test (continuity of critical functions, significant adverse impact on financial stability, protection of public resources, creditors and ultimately client assets).[16]

Regarding competencies, the SRB acts directly as the resolution authority for the most significant systemic risk market participants identified by the ECB's banking supervision role (complemented by banking groups with less significant cross-border activities). At the same time, it has a coordinating role *vis-à-vis* national resolution authorities in other cases. Thus, there is a clear link between the SSM and the SRM mechanisms, complemented by the EU legislator's introduction of a flexible open competence clause, just like in the SSM regime. This has allowed the SRB to decide directly on the resolution of national-level market participants to ensure a consistent application of strict (single) resolution standards. Yet, the SRM also covers a larger group of banks than the SSM,[17] while the case studies presented in this paper also demonstrate how the formal same categorization as systemically important banks might have led to resolution decisions made on different levels.

In our analysis, we follow the structures of these mechanisms as different pillars: *(i)* the pillar of single regulation (all EU countries), and *(ii)* the pillar of single supervision/resolution by mainly new EU actors (yet national actors supervise the banks of non-eurozone members like Hungary under the same EU regulation). *(iii)* Finally, the third pillar of our analysis, in a broader sense, reflects the Member States' further opportunities (banking nationalism) to influence their banking sector directly or indirectly, which might hinder the coherent application of the Single Rulebook.

16 SRMR, Article 1(2); Binder *et al.* 2023, pp. 453–461.

17 Katalin Mérő, 'The Banking Union and the Central and Eastern European countries' *in* Krisztina Arató *et al.* (eds.), *The Political Economy of the Eurozone in Central and Eastern Europe: Why In, Why Out?,* Routledge, New York, 2021, p. 117.

2.3. The New Rules of the EU-level Resolution Regime

The Single Resolution Mechanism (SRM) is triggered by 'failing-or-likely-to-fail (FOLTF)' banks. The FOLTF determination remains the discretionary assessment of the supervisor or the resolution authority. Resolution should be initiated after determining whether an entity is failing or is likely to fail and that no alternative private sector measures would prevent such failure within a reasonable timeframe. The fact that an entity does not meet the requirements for authorisation should not justify *per se* the entry into resolution, especially if the entity remains or is likely to remain viable. An entity should be considered to be failing or likely to fail where it infringes or is expected, shortly, to infringe the requirements for continuing authorization, where the assets of the entity are, or are likely shortly to be, less than its liabilities, where the entity is, or is likely in the near future to be, unable to pay its debts as they fall due, or where the entity requires extraordinary public financial support except in the particular circumstances laid down in the SRM Regulation (SRMR).[18] The SRM, therefore, aims to resolve failing banks in an orderly manner with a minimum burden on taxpayers and the real economy. By this, the key objectives are: *(i)* to strengthen confidence in the banking sector; *(ii)* to prevent bank runs and contagion; *(iii)* to minimize the negative relationship between banks and sovereigns; and *(iv)* to eliminate fragmentation in the internal market for financial services.[19]

The organizational structure of the Single Resolution Mechanism is even broader than described above, with the actors as follows *(i)* the European Central Bank; *(ii)* the Single Resolution Board (SRB); *(iii)* the Single Resolution Fund (SRF); *(iv)* the Board of Appeal of the SRB; *(v)* the national resolution authorities (NRAs); and *(vi)* also the European Commission and the Council, as well as the ECON Committee of the European Parliament play some minor roles in the process.

In practice and general, the SRB is the main actor ('The Board shall be responsible for the effective and consistent functioning of the SRM').[20] The second most important player, the ECB, has functions and competencies due to its EU-level supervisory function (SSM):

18 SRMR, Recital (57); Binder *et al.* 2023, pp. 678–684.

19 *See* at www.consilium.europa.eu/en/policies/banking-union/single-resolution-mechanism/.

20 SRMR, Article 7(1).

> "To restore trust and credibility in the banking sector, the European Central Bank (ECB) is currently conducting a comprehensive balance sheet assessment of all banks supervised directly. Such an assessment should assure all stakeholders that banks entering the SSM, and therefore falling within the scope of the SRM, are fundamentally sound and trustworthy."[21]

The Commission and the Council have a certain extent of control over the resolution. The Commission is empowered to turn to the Council in objection to the resolution scheme adopted by the SRB. The Council can oppose the SRB's decision (either the necessity of resolution or the discretionary measures involved) or make material modifications regarding the amount of the fund provided by the SRF. However, the Commission has an extremely brief time to make its objections, and it is only 12 hours before the SRB approves the scheme.[22]

The most important preventive tools of SRM are recovery planning and resolution planning, regulated by the BRRD.[23] Recovery plans shall include, where applicable, an analysis of how and when an institution may apply, in the conditions addressed by the plan, for the use of central bank facilities and identify those assets which would be expected to qualify as collateral. The competent authorities of the Member States assess recovery plans.[24]

On the other hand, when drawing up the resolution plan, the resolution authority shall identify any material impediments to resolvability and, where necessary and proportionate, outline relevant actions for how those impediments could be addressed. The resolution plan shall consider relevant scenarios, including the event of failure, which may be idiosyncratic or occur during broader financial instability or system-wide events.[25] The SRB and NRAs prepare resolution plans within the forum of IRTs. IRTs are the main forum where the SRB and NRAs cooperate in resolution activities

21 SRMR, Recital (13).

22 *See* at www.consilium.europa.eu/en/policies/banking-union/single-resolution-mechanism/.

23 Directive (EU) No 2014/59 of the European Parliament and of the Council of 15 May 2014 on establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (BRRD).

24 Id. Articles 5–6.

25 Id. Article 10.

(resolution planning and preparation of resolution schemes).[26] The Single Resolution Board (SRB) adopts the resolution plans. Whenever a resolution process is initiated in front of the SRB, the resolution plan is considered – and is always referred to in the decisions of the SRB.

Given the relatively large number of actors involved, the SRB has a relatively small playing field regarding discretionary decisions – formally meeting the CJEU's requirements on conferral of powers limits. Nevertheless, as presented in the cases below, the SRB has to make decisions on its own from time to time.

3. Recent Resolution Decisions within and outside of the EBU

Even if the reforms described above meant to pave the way for 'more Europe in financial/banking regulation and supervision,' all three cases of the SRB discussed below also support the existence of so-called banking nationalism in the European financial market. Financial nationalism is an economic strategy that employs financial levers, including monetary policy, currency interventions, and other interaction methods with local and international financial systems, to promote the nation's unity, autonomy, and identity.[27] Banking nationalism – a sub-category of financial nationalism – is commonly understood as a government policy favoring the banking system's domestic/national ownership over foreign ownership.[28] In all the cases hereunder, national interests were present in the sense of the definitions above and had an impact on the outcome of the resolution/winding-up processes.

In this article, we apply the approach of three pillars followed by other scholars,[29] how the state influences the banking system: regulation, supervision, and ownership. These three factors are interconnected. As

26 *See* at www.srb.europa.eu/en/content/introduction-resolution-planning.

27 Juliet Johnson & Andrew Barnes, 'Financial nationalism and its international enablers: The Hungarian experience', *Review of International Political Economy*, Vol. 22 Issue 3, 2015, p. 53; Katalin Mérő & Dóra Piroska, 'Bankunió és banknacionalizmus – A magyar eset kelet-közép-európai kontextusban', *Politikatudományi Szemle*, Vol. 36. Issue 1, 2017, p. 148.

28 Id.

29 Krisztián Németh, 'Ötéves a Bankunió – Politikai célok, közgazdasági elméletek, gyakorlati eredmények', *Gazdaság és Pénzügy,* Vol. 6, Issue 2, 2019, p. 152; Mérő & Piroska 2017, pp. 151–155; Mérő 2021, pp. 116–134.

Spendzharova concludes, the levels of foreign ownership and domestic bank internationalization (acquisitions) are essential determinants of domestic regulatory preferences, *i.e.* banking nationalism determines the Member State-level attitude towards European regulatory approaches.[30]

As mentioned above, these pillars could substantially impact the Single Rulebook approach of the EU's post-crisis reform, as the single regulation and especially single supervision (resolution) policy goals technically and practically differ within and outside the Eurozone members. At the same time, this could be complicated by the Member States' further measures towards banking nationalism.

3.1. The Veneto Paradox – Still Territorially Segmented Resolution?

One of the first cases in which SRM intervention was essential was the one dubbed in the literature as the Veneto Paradox. In mid-2017, the SRB was called upon to resolve *Banco Español S.A.*, a systemically important bank (supervised by the ECB), and *Banco Popolare di Vicenza* and *Veneto Banca* in Italy. The NRA resolved the Spanish bank based on a plan agreed by the SRB (the bank was later fully taken over by the Santander Group). In contrast, for the Italian banks, the whole process remained under the jurisdiction of the NRA, allowing the Italian resolution authority to act under much more favorable national rules.[31]

In the Italian case, it was clear that the classification of banks below the direct supervisory level (systemically important) for resolution purposes (due to some aspects of the public interest test) was changed by the SRB (compared to its previous position), due to the ECB's over-capitalization approach, differences in the ratings of the national central bank and regulatory heterogeneity.[32] The different rating compared to the ECB, which criti-

30 Aneta B. Spendzharova, 'Banking union under construction: The impact of foreign ownership and domestic bank internationalization on European Union member-states' regulatory preferences in banking supervision', *Review of International Political Economy*, Vol. 21, Issue 4, 2014, pp. 949–979.

31 Ioannis G. Asimakopoulos, 'The Single Resoulotion Board as a New Form of Economic Governance' *in* Herwig C. H. Hofmann *et al.* (eds.), *The Metamorphosis of the European Economic Constitution,* Edward Elgar, Cheltenham, 2019, pp. 279–301.

32 Pablo Iglesias-Rodríguez, 'The Concept of Systematic Importance in the European Banking Union Law' *in* Mario P. Chit & Vittorio Santoro (eds.), *The Palgrave Handbook of European Banking Union Law,* Palgrave Macmillan, 2019, p. 203.

cized the former's overcapitalization approach, can be justified on banking market grounds.[33] Still, in any case, the different ratings of EU-level players could be detrimental, especially given the intertwining competencies of the SSM and SRM. For the same reasons, an over-emphasis on placing one Member State over another EU actor could be even riskier. Finally, the heterogeneity in national ratings is based on the fact that the SSM Regulation, which covers the Member States of the EBU on a territorial basis, and the EU-wide CRD IV Regulation (the latter is complemented by the guidelines of the European Banking Authority, which also increase regulatory 'diversity') compete in the definition of systemic importance.[34] Moreover, the classification of Italian banks, considered systemically important under SSM but not for resolution purposes, ended up being systemically important for state aid purposes.[35]

The process raised severe concerns about the entire SRM and its supposed 'single' nature. In their analysis of the case of the two Italian banks, Donnelly and Asimakopoulos use the expression 'bending and breaking the Single Resolution Mechanism', pointing out explicitly that Italian authorities were lobbying the Commission for leeway in applying the provisions of the BRRD, ultimately creating an atmosphere of economic nationalism, which is rather unattractive for foreign investors.[36] Despite the massive state aid package, EU officials argued that EBU principles were not breached. However, the truth is that the Commission approved this state aid package, although the SRB did not find the resolution necessary and gave the whole case back to Italian authorities.[37] Most importantly, these were two smaller banks from the Veneto region of Italy, where they played an important role, but not from the aspect of the Italian banking system. The Commission

33 According to Corbet and Larkin's analysis, after the crisis, the European Banking Authority's EU regulation, which focused on risk and the soundness of individual banks' balance sheets, made it harder for non-commercial and other alternative banks (such as savings and loan associations) to operate. Shaen Corbet & Charles Larkin, 'Has the Uniformity of Banking Regulation Within the European Union Restricted Rather than Encouraged Sectoral Development?', *International Review of Financial Analysis,* Vol. 53, October 2017, pp. 48–65.

34 Iglesias-Rodríguez 2019, p. 203.

35 Id.

36 Shawn Donnelly & Ioannis G. Asimakopoulos, 'Bending and Breaking the Single Resolution Mechanism: The Case of Italy', *Journal of Common Market Studies*, Vol. 58, Issue 4, 2020, pp. 856–871.

37 *See* at www.euractiv.com/section/banking-union/news/liquidation-of-italian-banks-shows-limits-of-banking-resolution-rules/.

accepted Italy's argument that extending the losses further could affect the Northern region's financial stability and regional economy,[38] *i.e.* not the whole Italian economy.

Some commentators criticised the public interest threshold underlying the SRB's decisions in the Veneto case; the head of the EBA commented, in a veiled critique of the SRB, that:

> "The decision that there was no EU public interest at stake in the crises of two ECB-supervised banks that were hoping to merge and operate in the same region with combined activities of around 60 billion EUR sets the bar for resolution very high."[39]

If the SRB measures the public interest threshold accordingly in the future, only very few banks could be eligible for the resolution mechanism. In this case study, the SRB, in practice, exercised a fairly broad discretion to assess and reassess the systemic importance criteria (also overriding the ECB's rating) and relied on the Italian central bank's rating. This approach indicates that the co-decision regime theoretically limits the discretion of the EU agency (SRB). Still, the two-round re-rating contains inherent dilemmas, and in addition to the single EU-wide assessment, which is allowed by the regulatory regime, has clearly been compromised and might as well undermine the coherent application of the Single Rulebook – which was the underlying goal set by the SRM and the EBU. Moreover, the Veneto Paradox revealed three different categorizations of the same market participant under SSM, SRM, and state aid law. This could hinder not just the coherent application of the Single Rulebook but the functioning of the Single Market in a broader sense.

3.2. The ABLV Decision – Nobody's Baby?

This case exemplifies how systemic importance can vary according to the 'nature' of the resolution case. In 2017, the Latvian ABLV Bank (ABLV) was

38 Id.
39 Iglesias-Rodríguez 2019, p. 204.

suspected of money laundering, which necessitated its resolution. (Notably, this case is still open at the Member State level.[40])

By virtue of their ownership, the founders and majority shareholders, Oļegs Fiļs and Ernests Bernis, held the ABLV Latvia Bank's controlling interest. Other bank shareholders are its top managers, officers, long-term business partners and customers.[41] For over ten years, the two bank co-owners of ABLV mentioned above have been ranked first in the annual Top of Latvia's Millionaires collated by the business newspaper Dienas Bizness. In 2017 – when the ABLV money laundering scandal started – Olegs Fils was the first on the list of Latvia's 100 most affluent millionaires, and Ernests Bernis was ranked second.[42]ABLV is Latvia's third-largest lender, with representative offices in many Commonwealth of Independent States (CIS) countries. The bank was privately held and was one of three Latvian banks directly supervised by the ECB.[43] Based on this data, its relevance was systematic in the Latvian banking market.

Money laundering concerns had previously been reported to the bank by the Latvian supervisory authority in 2016 and by the US Treasury Department's Financial Crimes Unit (FinCEN) in 2018 (the latter leading to mass deposit withdrawals). FinCEN made the allegation that the management, the shareholders, and the employees of the bank institutionalized money laundering activities as part of the bank's business model.[44] In May 2016, the FCMC (the Latvian financial supervisory authority) fined ABLV over EUR 3 million and issued a reprimand against the board member responsible for anti-money laundering activities at the bank. In 2017, the bank conducted a six-month inspection after suspicion was raised that the bank circumvented sanctions imposed against North Korea. On 24 November 2017, the FCMC and ABLV concluded another administrative agreement in which the parties agreed to dismiss the matter without drafting an administrative act, imposing monetary fines or applying any other sanctions. The

40 *See* at www.bank.lv/en/news-and-events/news-and-articles/press-releases/16324-customers-of-ablv-bank-as-who-have-not-applied-for-the-guaranteed-compensation-yet-can-do-so-for-another-month.

41 *See* at https://financelatvia.eu/wp-content/uploads/2017/12/LKA_ENG_ABLV.pdf.

42 *See* at https://eng.lsm.lv/article/economy/economy/ablv-bank-owners-top-latvias-millionaires-list.a254259/.

43 *See* at www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180224.en.html.

44 Németh 2019, p. 146.

ABLV decided to continue improving its internal control system.[45] Consequently, ABLV could be considered a systematically important Latvian bank with prominent owners, and the Latvian supervisory authority has taken the necessary steps to comply with the requirements of the EBU.

Eventually, the ECB declared ABLV insolvent in 2018, but the SRB ruled that the public interest did not justify (the EU-level) resolution. The SRB claimed that ABLV does not provide critical services for the financial system of Latvia and that a bank failure would not have led to a significant erosion of economic stability, given the lower degree of financial embeddedness for the Latvian banking system or on a cross-border basis. As the SRB decision says:

> "However, the above rankings are not representative of the extent of the impact that the failure of the Institution (ABLV Bank) could have on the financial system and the real economy of Latvia or other Member States. [...] As regards the relevance of the Institution (ABLV Bank) in the financial markets in Latvia, the impact of the failure of the Institution (ABLV Bank) on the total liquidity in the money market is not expected to be significant."[46]

There has been more criticism of the system of separation of competencies (EU and Member State levels) and, again, of the incoherent application in implementing banking regulation. Anti-money laundering action, while being at the Member State level back then in terms of competence, should have been included in the risk assessments of the ECB by treating money laundering risk as a business risk.[47] As Németh notes, there is a concern that the ECB does not consider banks in small Member States that are otherwise significant in terms of market size (as cited above, ABLV was the third largest Latvian bank, with the highest capital buffer that could be imposed) as eligible for (EU-level) resolution purposes. This, again, could undermine faith in the consistency of the functioning of the EBU and the coherent application of the Single Rulebook. The author also noted that, given the 'nature' of the case, the SRB also had to decide not to use the

45 Id.

46 Decision of the Single Resolution Board of 23 February 2018 concerning the assessment of the conditions for resolution in respect of ABLV Bank, AS (SRB/EES/2018/09); paras. 100–102.

47 Krisztián Németh, 'Ötéves a Bankunió – Politikai célok, közgazdasági elméletek, gyakorlati eredmények', *Gazdaság és Pénzügy,* Vol. 6, Issue 2, 2019, pp. 136–153; *see also* at www.fca.org.uk/news/speeches/conduct-risk-briefing.

resources of the Single Resolution Fund to rescue a bank involved in money laundering and its customers with precarious backgrounds.[48]

In this case, the SRB was forced to make a decision that involved a reasonably wide discretionary assessment of systemic importance and money laundering risk. In doing so, it overruled and replaced the ECB's assessment, which, even if raising concerns about the above-mentioned case-law doctrines, at least provided a kind of EU response – albeit delayed. The ABLV case also shows that the co-decision system must still be further developed, as the European Court of Auditors[49] pointed out. Moreover, the risk of the Single Rulebook's incoherent application was also evident again.

Additionally, the ABLV case also provoked one further step in the crisis-driven evolution of the European tendency called 'agencification', as Diessner claimed in his 2022 article[50] – where he examines some of the Member State-level reactions to the establishment of the EU's own Anti-Money Laundering Agency (AMLA). As the EU's new decentralized agency, AMLA will start its operations in 2025. Germany supported this process and was a contender for hosting this agency – the latter became a reality since then, as the AMLA has become seated in Frankfurt-am-Main, just next to the ECB.[51] Diessner puts it:

> "This is largely due to the significant overlaps between anti-money laundering and financial supervision, the latter of which is currently under the auspices of the Single Supervisory Mechanism housed at the Frankfurt-based European Central Bank. Among others, a major money laundering scandal at the ECB-supervised Latvian bank ABLV in 2018, which FinCEN first flagged, put the central bank on the spot for its lack of information and powers in anti-money laundering."[52]

Kirschenbaum and Véron suggested in their paper back in 2018 that a new anti-money laundering agency – they called it EAMLA – should be estab-

48 Id.

49 Within the framework of the resolution mechanism, cooperation difficulties can be detected between the different actors (*see* paras. 119–143 of the European Court of Auditors' Special Report No 13/2017 and paras. 26–44 of Special Report No 2/2018).

50 Sebastian Diessner, 'More questions than answers? The EU's new Anti-Money Laundering Authority', *LSE European Politics and Policy blog*, 22 September 2022.

51 *See* at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_972.

52 Diessner 2022.

lished, mainly because of the experiences of *ABLV Latvia*.[53] Therefore, the shift of another former national competence towards the EU level became apparent due to the *ABLV* case, since AMLA will directly supervise those financial sector entities exposed to the highest risk of money laundering.

3.3. The Hungarian MKB Case – Another Case of Banking Nationalism or Preventive Resolution Planning?

First and foremost, in contrast to the Member States involved in the previous two cases, Hungary is not a member of the EBU. Therefore, although the European (banking) regulatory framework is naturally binding for the Hungarian financial sector, supervision and resolution remain in the hands of the national authorities (Hungarian Central Bank, MNB).

The Hungarian MKB Bank got into trouble due to the GFC starting in 2008. It suffered one of the largest losses among Hungarian banks, mainly due to its exposure to extremely poor-quality real estate project loans, constituting an above-average share of the bank's portfolio. Its owner, the *Bayerische Landesbank*, also needed state aid and was bailed out by the State of Bavaria (of Germany) in 2008 with a EUR 10 billion subsidy and had to sell its Hungarian subsidiary by the end of 2016. This has been concluded under the restructuring agreement – approving the state aid – by the European Commission.[54] MKB Bank's resolution plan aimed to achieve the general resolution key objectives by implementing the following subsequent steps:[55] *(i)* Rationalizing MKB Bank's operations, restructuring group-wide investments, cutting operating costs, improving efficiency, and restoring profitability. In the reorganization framework, MKB's loss-producing and excessively capital-absorbing business operations, which did not serve the core commercial banking activities, were wound down. The focus was on planning the medium-term strategy, particularly from a risk management perspective. *(ii)* Removing the assets that caused the problems that led to the resolution order using sale-of-business and asset separation as resolution tools. In the context of the asset separation, the 'toxic' assets that could not be sold on the market were taken over by

53 Joshua Kirschenbaum & Nicolas Véron, 'A better European Union architecture to fight money laundering', *Bruegel Policy Contribution*, Issue 19, 2018, pp. 1–29.

54 Krisztina Földényiné Láhm *et al.*, 'Bankszanálás mint új MNB-funkció – az MKB Bank szanálása', *Hitelintézeti Szemle*, Vol. 15, Issue 3, 2016, p. 9.

55 Id. p. 12.

the (Hungarian) Resolution Fund as resolution trustee, with the purchase price provided by the Resolution Fund. Notably, the former transaction was subject to approval by the European Commission for the compatibility of state aid with the internal market, which was granted in 2015. *(iii)* At the end of the process, the sale of MKB Bank was carried out on market terms (sale-of-business is used as a resolution tool). The MNB considered compliance with two criteria when assessing the sale: compliance with the EU State aid framework, which considers price maximization based on a market-private investor approach as a primary consideration; and the resolution authority's approach of aligning financial stability interests with the price. A consortium, the best bidder, ultimately acquired MKB Bank's valuable assets.

First, we must understand the broader context of the Hungarian banking sector to understand this case's gravity. According to Várhegyi, the Hungarian Government – in power since 2010 – has increasingly sought to take control of the banking sector, which was decisively in foreign hands before 2010.[56] As noted by the experts, the intention to create a domestic ownership-dominated Hungarian banking sector was the clear intention of the members of the later Orbán government back in 2009.[57] Yet the European tendency in the 2010s was parallel to that.

On the one hand, gaining ownership was done by creating the merged Hungarian Development Bank (*Magyar Fejlesztési Bank*, MFB) and strengthening the Eximbank, controlled by the all-time government, and by making financing opportunities other than their core function. On the other hand, the government sought to take over the commercial banking sector.[58] This was achieved by strengthening the undercapitalized mutual savings banks and acquiring some foreign-owned branches offered for sale, thus creating an opportunity for the government to place the banks in the hands of owners close to their political community.[59] As a result, the

56 Éva Várhegyi, 'Tulajdonosi és piacszerkezeti változások a magyar bankszektorban', *Külgazdaság*, Vol. 67, Issue 11–12, 2023, pp. 50–51 (Várhegyi 2023a); Éva Várhegyi, *A bankrendszer elfoglalása,* Tea, Budapest, 2023, pp. 124–144. (Várhegyi 2023b).

57 Júlia Király, 'A bankszektor átalakítása' *in* Bálint Magyar & Júlia Vásárhelyi (eds.), *Magyar Polip 3: A posztkommunista maffiaállam,* Noran Libro, Budapest, 2015, p. 176.

58 Várhegyi 2023a, p. 50.

59 Id.

share of the Hungarian banking sector's assets controlled by the political leadership increased from 4 to 29 per cent between 2010 and 2022.[60]

There are, however, further interpretations of this process. Kovács emphasizes that by 2016, the share of domestic-owned banks in the Hungarian banking sector indeed continued to increase. Although the highest share in the region, this share was only about to get close to the domestic ownership ratio of the banking sector in the Western European countries. In the case of other CEE countries, domestic control is typically a result of state ownership due to unsuccessful or delayed privatization. In contrast, domestic control is typically a result of Hungarian private ownership caused by government measures and purchases.[61] Scholars also point out that the continued departure from neoliberal economic policies should be followed by an active economic policy that relies on domestic/national ownership and develops internal resources.[62] (After 2008, there was an era of understandable scepticism towards the neoliberal paradigm, which had declared the 'omnipotent market' that can regulate itself successfully.)

Várhegyi and Király claim that to create a more concentrated banking market structure', the MNB, as the Hungarian Central Bank (and main banking supervisor/resolution authority), has also become much more potent: it has fully absorbed financial supervision and then, using the Hungarian Resolution Act,[63] which was newly enacted back then, it has also gained control over banks.[64] The *MKB resolution case* served the government's political interest in the concentration of the banking market.

60 Várhegyi 2023a, p. 51; Katalin Mérő, 'Várhegyi Éva: A bankrendszer elfoglalása – Hogyan állítja szolgálatába a bankokat a politikai hatalom? (Magyar Narancs könyvek, Tea Kiadó, 2023, 254 oldal) című könyvéről', *Külgazdaság*, Vol. 67, Issue 9–10, 2023, pp. 67–79.

61 Kovács 2016, p. 20.

62 Dani Rodrik & Arvind Subramaninan, 'The Primacy of Institutions (and What This Does and Does Not Mean)', *Finance and Development*, Vol. 40, Issue 6, 2003, pp. 31–34; Laurence E. Lynn, 'What is a Neo-Weberian State? Reflections on a Concept and its Implications', *NISPAcee Journal of Public Administration and Policy*, Vol. 1, Issue 2, 2008, pp. 17–30; György Matolcsy, *Egyensúly és növekedés 2010–2019 – Sereghajtóból éllovas,* Magyar Nemzeti Bank, Budapest, 2020, pp. 205–231; Csaba Lentner, *Közpénzügyek és államháztartástan,* Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2013, pp. 39–42.

63 Act XXXVII of 2014 on the further development of the institutional system to strengthen the safety of certain actors in the financial intermediary system (Hungarian Resolution Act).

64 Éva Várhegyi, 'Háború és béke', *Mozgó Világ*, Vol. 41, Issue 3, 2015, p. 68; Király 2015, p. 193.

The frequently changing assessment of the bank's financial situation during the process is noteworthy. Before the MNB approved the purchase, the MNB required a vast amount (EUR 270 million) of recapitalization. Just a few months after the purchase by the government, the MNB considered the financial situation of the MKB so problematic that it urgently brought it under its protective wing and did it with the help of the already-mentioned Hungarian Resolution Act.[65]

Even if Hungary is not yet a member of the EBU, the *MKB resolution case* could be assessed using the three-pillar methodology. Regarding the regulation, the Single Rulebook had to be considered and supported by the Hungarian resolution framework. Regarding the supervision/resolution, the MNB had a decisive role, not the EU-level actors. These actors, however, although not always necessarily serving the coherent application of the Single Rulebook, still can function as a guarantee of the checks-and-balances system above the national authorities. It cannot be denied that the *MKB resolution case* was carried out soundly, both legally and technically.[66] Nevertheless, contemplating the big picture, one might perceive this case as an example of banking nationalism even if this term might have a neutral meaning. Regarding the third pillar of our analysis, this third resolution case clearly refers to the potential impact of the ownership structure used by a Member State/government.

4. Conclusions – Perfect Time to Celebrate or to Evaluate?

In our analysis, we have presented that the EBU has become indispensable in addressing the vulnerabilities in the post-GFC European banking market.[67] With its establishment, significant organisational and regulatory changes have occurred in the implementation of EU law. Competence rules have linked the SSM and SRM, giving EU actors a flexibility clause. As a strengthened EU actor, the ECB was empowered with a direct banking supervision competence. Two EU agencies have complemented this; from 2025, there will be three of them (EBA, SRB, AMLA). These are entrusted with regulatory, supervisory, coordinating, and, in some cases, direct implementation powers. Additionally, the indirect implementation powers

65 Várhegyi 2015, p. 68; Király 2015, p. 193.
66 Földényiné Láhm *et al.* 2016.
67 Péter Halmai, *Mélyintegráció – A Gazdasági és Monetáris Unió ökonómiája,* Akadémiai, Budapest, 2020, p. 322.

of national banking authorities have also been amended, as the direct implementation-based organizational structure of the EBU above has been established. Nevertheless, as initially envisaged by the founding fathers, it isn't easy to imagine EU actors fully taking over Member States' primary role in implementing the EU *acquis*. The flexibility of direct and indirect implementation competencies could strengthen the shock-absorbing capacity of the EBU. Finally, the corpus of EU legislation in banking regulation and supervision has significantly been expanded over the last decade.

In the words of Lamfalussy, a system has been created whereby the authorities take over the management of 'systemically important banks' to prevent contagion.[68] The devil is in the details yet again, as the definition of a 'systemically important bank' seems to vary widely across the different sub-systems of the EBU. Thus, strengthening regulatory and enforcement actors at the EU level has not necessarily led to a coherent application of the Single (banking) Rulebook. This is clearly illustrated by the three case studies presented in our paper. It has already been proposed that a common approach to the systemic importance of the EBU's law should be introduced and coherently applied both in the SSM and the SRM. This would limit the scope of discretionary and divergent interpretations of the concept of systemic importance in both the SSM supervision process and the SRM resolution process, which would result in greater legal clarity, certainty and predictability of the decision-making processes of the EBU.[69]

The lack of uniform and coherent application of the EBU's law can also be traced back to the tendency called banking nationalism. This is often used as a value-neutral category, yet it can undermine the original goals of the presented EU-level reform measures. Moreover, the three case studies have made it clear that this phenomenon is also present in different country clusters of the EU, namely in founding Member States, which are otherwise the inner circle in terms of SSM and SRM. Similarly, it exists in a Member State with a relatively more minor banking sector (although still with significant banking players at the EU level) that joined the integration later and in the Hungarian system, which can be labelled as an outsider to the EBU regarding supervision/resolution.

Uniform and coherent application of the EBU law also faces legal obstacles and challenges of the nature of organizational sociology. The ECB has

68 Christopher Lamfalussy *et al.*, *Lámfalussy Sándor – Az euró bölcse,* Matthias Corvinus Collegium, Budapest, 2014, pp. 165–166.

69 Iglesias-Rodríguez 2019, p. 208.

been strengthened among the EU institutions but is inevitably dependent on the other two agencies, and it is yet to be seen how it will be able to cooperate with the third. The SRB is also trying to develop its own organizational 'self-image' alongside the ECB – even by opposing the ECB's position and relying instead on national actors. The fact that the agency is trying to find its role is also linked to the fact that, legally speaking, the status of these agencies is hardly regulated by the Treaties, so that the delegation of powers to them is still basically limited, yet their number is growing. In many cases, these agencies act as intermediaries between the EU level, national bodies, and, ultimately, market participants, even by directly implementing EU law. The uniform regulation of the internal market, which is now more than 30 years old, and the coherent application of the related legislation can also be hindered by an increasingly 'crowded' system of EU and national actors. The upcoming years will probably improve the dilemma of competence conflicts between the different actors and develop a coherent application of EBU law to give us further opportunities to celebrate anniversaries.