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The European Banking Union
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THE EUROPEAN BANKING UNION: A SHIFT IN THE INTERNAL MARKET PARADIGM?

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Abstract

Has a shift occurred in the internal market paradigm towards an economic union paradigm, whereby the internal market is used to foster economic policy goals adjacent to the Economic and Monetary Union (EMU)? The Banking Union is a case in point in this shift, as it stands at the crossroads between the internal market and the EMU. In the Banking Union, internal market and monetary and economic policy objectives are intertwined. This article maps out this shift and assesses how Article 114 TFEU has been used in it. The article argues that although the establishment of the Banking Union seems to be a natural continuum of developing the internal market and the EMU, such use of Article 114 TFEU is questionable in light of current doctrine and problematic due to the asymmetry of the EMU.

1. Introduction

In reaction to the Eurozone financial and debt crisis, Member States introduced a number a legal mechanisms to cope with the crisis and to prevent future crises.¹ These measures have resulted in the centralization of Member States’ economic governance.² What have the consequences of such centralization been for the internal market? Has the internal market been harnessed to this development? While the internal market has been “green”

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and “social” for a long time already, is it now also becoming “economic”? That is to say, is the internal market, which is primarily about the regulation of private actors, now directly used for the regulation or benefit of the Member States’ economic policies as well? In light of the changes brought about by the Eurozone crisis, Snell has proposed such a paradigm shift.

This article addresses the suggested paradigm shift in light of the European Banking Union. It is the perfect example for assessing the paradigm shift, as it “stands at the crossroads between the EMU and the internal market”. This assessment takes place through an analysis of the use of Article 114 TFEU as the legal basis of the majority of the legal instruments constituting the Banking Union. The significance of the paradigm shift and the focus of this article revolve around the fact that Article 114 TFEU is an internal market legal basis, whereas the aim of the Banking Union is to contribute to the “the financial stability of the euro area as a whole”. Does Article 114 TFEU allow for such legal measures, or has its scope been breached with the Banking Union? In this article it is argued, on the one hand, that due to the link between the internal market and economic policy, it is understandable that Article 114 TFEU is used in this manner. On the other hand, however, in light of current doctrine, such use of Article 114 TFEU comes close to its outer limits. Furthermore, that the asymmetry of the Economic and Monetary Union (EMU) and the vagueness of the concept of financial stability as a whole make such use of Article 114 TFEU problematic.

The article proceeds as follows. Section 2 surveys how the internal market is used to foster many policy goals and thus includes many paradigms; it also explains the rationale underlying the use of Article 114 TFEU and how the ECJ has interpreted it. Section 3 first describes how the three pillars of the Banking Union pursue goals related to both the internal market and the EMU, and then highlights how due to this it has “a foot in the internal market and another one in the monetary union”. Section 4 discusses the merits of using Article 114 TFEU as the legal basis for the Banking Union. Section 5 concludes that the Banking Union does signal a shift in the internal market paradigm and briefly situates this shift as part of a broader development.

3. See Art. 3(3) TEU. The precise content of the Article and the ECJ’s case law regarding the issue has evolved throughout the years. See de Witte, “Non-market values in internal market legislation” in Nic Shuibhne (Ed.), *Regulating the Internal Market* (Edward Elgar, 2006), pp. 61–86.


2. Pursuing the Internal Market Paradigms

2.1. Establishing the Paradigms

The internal market has been a central part of European integration since the very beginning. What started out as a customs union quickly developed into an internal market, containing the four fundamental elements of free movement. The idea of an economic union was also present from the very beginning, already before the EEC Treaty. The development of the internal market was linked to the uptake of an economic union already in the Werner Report of 1969 and the same was restated in the Delors Report in 1989. The latter then resulted in the establishment of the Economic and Monetary Union (EMU) with the Treaty of Maastricht in 1993. The establishment of a functioning internal market and the increase of economic governance have thus both been gradual processes.

There is a clear link between the internal market and the EMU. This can be conceptualized through the “European economic constitution” and its micro- and macroeconomic layers. As a legal concept, the “economic constitution” deals with the systematic relation between the economic and legal systems. Due to its German ordoliberal origin, “the microeconomic constitution rested on particular macroeconomic presuppositions”, namely price stability. In this regard, micro-economic governance refers to internal market measures and competition law, which are directed towards individuals, whereas macro-economic governance refers to economic, fiscal and monetary policy measures, which are directed towards States. These two terms are here used in a descriptive sense to refer only to the legal rules as such, but not in the

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8. See Snyder, “EMU revisited: Are we making a constitution? What constitution are we making?” in Craig and de Búrca (Eds.), The Evolution of EU Law (OUP, 1999), p. 421.
The link between the micro- and macroeconomic aspects is visible in the current Treaties. To pursue the aims of the Union, which include, inter alia, the internal market and the EMU, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition. However, when we turn to the different categories of Union competences and the specific legal bases for pursuing them, it is not clear how exactly the two are to function together.

First, Article 114 TFEU was introduced by the Single European Act of 1986 for the purpose of completing the internal market by using qualified majority voting in the Council instead of unanimity. The Member States were willing to give up the power of veto only in the specific area of internal market regulation. The purpose of Article 114 TFEU is to achieve the objectives set out in Article 26 TFEU, that is, of establishing or ensuring the functioning of the internal market. Thus, at least on a literal reading, Article 114 TFEU is not directly linked to the economic policy goals of the Union. Secondly, when the EMU was adopted in Maastricht in 1993, the Member States made an explicit choice to have an asymmetrical EMU: monetary policy was centralized to the European Central Bank (ECB), whereas economic policy competences were retained by the Member States. Thus, the “Member States shall coordinate their economic policies within the Union”. This takes place through Articles 121 and 126 TFEU and the Stability and Growth Pact.

15. Art. 3 TEU.
16. Art. 119(1) TFEU.
17. See Dinan, op. cit. supra note 7, pp. 205–222.
18. Art. 114(1) TFEU.
19. Ibid., Art. 26(1).
21. Art. 5(1) TFEU. On why Art. 5 TFEU was formulated as it is because of the Member States’ will to retain economic policy competences, see Craig, The Lisbon Treaty: Law, Politics, and Treaty Reform (OUP, 2013), p. 179; and why the Union’s competences within the sphere of economic policy do not follow the logic of exclusive, shared or supplementary, see Bieber, “The allocation of economic policy competences in the European Union” in Azoulai (Ed.), The Question of Competence in the European Union (OUP, 2014), p. 90.
In conclusion, taking these two things together seems to suggest that, although micro- and macroeconomic policies and governance are linked, the use of an internal market competence to directly pursue economic policy goals would not be in line with the tenor of the Treaties. The possibility of this is not directly mentioned in Article 114 TFEU and a common economic policy was specifically ruled out in Maastricht.

Spillover effects related to the establishment of the internal market have been constant throughout history. It has also been known for a long time that spillover from a common currency towards a common economic policy would be inevitable. Such neo-functionalist logic has also been used to explain how the internal market and the EMU necessitated the adoption of the Banking Union. In light of this, the proposed paradigm shift seems a natural continuum. Due to the asymmetrical structure of the EMU and the EU’s thus limited economic policy competences, the Member States decided to take action in other policy domains to protect the common currency. As monetary integration has started to spill over to economic policy, this “requires an internal market fit for an economic union”. Thus, the paradigm dominating the operation of the internal market seems to have changed.

2.2. Pursuing the paradigms

The “choice of the appropriate legal basis has constitutional significance”, because it is essentially about allocating power. As “[m]any discussions about substantive decisions are, in reality, institutional discussions”, also the content of the decisions is important. Both viewpoints are relevant in assessing whether the EU has transgressed the powers conferred to it and respected the institutional balance between its institutions. The EU Treaties of economic policies, O.J. 1997, L 209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, O.J. 1997, L 209/6.

23. For an overview, see Sandholtz and Stone Sweet, “Neo-functionalism and supranational governance” in Jones, Menon and Weatherill (Eds.), The Oxford Handbook of the European Union (OUP, 2014), pp. 18–33.


provide a number of legal bases for achieving their objectives. The choice of legal basis must rest on objective factors, including, in particular, the aim and the content of the measure. When interpreting the aims of legal acts, the ECJ has emphasized their recitals. An amending act does not have to be based on the same legal basis as the original act. The legal basis for an act must be determined having regard to its own aim and content and not to the legal basis used for the adoption of other Union measures, which might, in certain cases, display similar characteristics.

If a proposal pursues several different objectives, the primary objective should be used to define its legal basis. If the measure has two equal objectives, the measure has to be based on both relevant legal bases, as long as these are compatible with each other. Exceptionally, if it is established that the act simultaneously pursues several objectives or has many components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases. There are many examples of an act having several legal bases. A recent regulation employed eight different legal bases. In such a case, the legal bases have to be associated with compatible legislative procedures. If this is not possible, the acts have to be adopted in a manner

29. Case C-440/05, Commission v. Council (Ship-Source Pollution), EU:C:2007:625, para 61; Case C-300/89, Commission v. Council (Titanium dioxide), EU:C:1991:244.
32. Case C-91/05, Commission v. Council (ECOWAS), EU:C:2008:288, para 106.
33. Delineation between commercial policy and environmental protection is a good example. See Case C-281/01, Commission v. Council (Energy Star), EU:C:2002:761, paras. 36–43; Opinion 2/00, Cartagena Protocol on Biosafety; Case C-94/03, Commission v. Council (Rotterdam Convention), EU:C:2006:2.
37. See Regulation (EU) 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, O.J. 2011, L 286/1.
that does not violate the rights of the European Parliament\footnote{Case C-300/89, Titanium dioxide, paras. 18–25; Case C-94/03, Rotterdam Convention, paras. 52–54; Case C-155/07, European Parliament v. Council (EIB), EU:C:2008:605, paras. 75–79.} so as to protect its prerogatives. If the Commission encounters a problem in this regard, it can always split the proposal into parts.\footnote{See Proposal for a Regulation of the European Parliament and of the Council amending Regulation No. 11 concerning the abolition of discrimination in transport rates and conditions in implementation of Article 79(3) of the Treaty establishing the European Economic Community and Regulation (EC) No. 852/2004 of the European Parliament and the Council on the hygiene of foodstuffs, COM(2007)90; Proposal for a Regulation of the Council establishing an Instrument for Stability, COM(2004)630.}

Article 53(1) TFEU is a general competence concerning the freedom to provide services. Article 127(6) TFEU is a policy-specific harmonization competence under which banking supervisory duties can be conferred upon the European Central Bank. The Treaties also contain two “catch-all competence” clauses,\footnote{Rosas and Armati, EU Constitutional Law: An Introduction, 2nd ed. (Hart, 2012), p. 26.} namely, Articles 114 and 352 TFEU.\footnote{With the Lisbon Treaty, the scope of Art. 352 TFEU was broadened to cover all Union policies except Common Foreign and Security Policy. See Declarations 41 and 42 annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 Dec. 2007. However, rather ambiguously, Declaration 41 specifically mentions Art. 3(2), (3) and (5) TEU, but there is no reference to Art. 3(4) TEU, according to which the Union shall establish an economic and monetary union whose currency is the euro.} The former provides a legal basis for establishing or ensuring the functioning of the internal market, while the latter gives the Union the competence to legislate if such is necessary to attain the objectives set out in the Treaties and the Treaties have not provided the necessary powers in any other competence clause. The Commission resorted to the first three provisions mentioned when constructing the Banking Union, but not to Article 352 TFEU.

When it comes to the use of Article 114 TFEU as a legal basis, five criteria stand out.\footnote{See Snell, op. cit. supra note 4, pp. 316–320; Barnard, The Substantive Law of the EU: The Four Freedoms. 5th ed. (OUP, 2016), pp. 558–573; Weatherill, The Internal Market as a Legal Concept (OUP, 2017), pp. 153–155.} First, that it only offers a residual competence; it can only be used if other legal bases are not available,\footnote{E.g. see Case C-533/03, Commission of the European Communities v. Council of the European Union, EU:C:2006:64, para 44: “[I]t is clear from the very wording of Article [114(1) TFEU] that that article applies only if the Treaty does not provide otherwise.” Article 114(1) TFEU reads: “Save where otherwise provided in the Treaties, . . .”} for example, Articles 43, 50, 53 and 91 TFEU.\footnote{See Snell, op. cit. supra note 4, p. 316; Craig and de Búrca, EU Law: Text, Cases, and Materials, 5th ed. (OUP, 2015), p. 590.} Secondly, that it utilizes the ordinary legislative procedure, in which the Council decides by a qualified majority.\footnote{See Art. 294 TFEU and Art. 16(3) TEU.} Thirdly, as Article 114 TFEU concerns “measures”, the EU can enact directives or regulations. Fourthly, that
the objective of the measure must be “the establishment and functioning of the internal market”, which are defined rather broadly in Article 26 TFEU. Fifthly, Article 114 TFEU only grants power for “the approximation of the provisions laid down by law, regulation or administrative action in Member States”. This restrictive aspect implies that Article 114 TFEU cannot be used to create anything new, but only for the harmonization of already existing national laws. The crux of the last two points is whether Article 114 TFEU is used for market construction or market regulation.

The limits on the use of Article 114 TFEU are found in the fact that it can only be used for “the establishment and functioning of the internal market”. This means that the adopted measure must either eliminate obstacles to trade or deal with appreciable distortions to competition. The rationale for limiting the reach of Article 114 TFEU is based on its use of majority voting, whereas the alternative residual competence of Article 352 TFEU requires reaching unanimity in the Council.

The first important case on the reach of Article 114 TFEU was Tobacco Advertising I. Because the Directive in question did not try to eliminate obstacles to trade or distortions to competition, it was annulled by the ECJ. That case has, however, been classified as an “aberration”, since the later case law has adopted a more permissive interpretation on the reach of Article 114 TFEU. In Swedish Match, the ECJ, rather ironically, upheld a ban on certain types of tobacco products with seemingly the logic that banning them allowed other types of tobacco products to circulate freely on the market. This case seems to suggest that the limits for the use of Article 114 TFEU are very wide indeed, as it effectively “extends internal market competence to subject matter which makes no contribution to the internal market”. The Court has also ruled that Article 114 TFEU confers on the Union legislature a

48. Art. 114(1) TFEU.
51. Case C-210/03, The Queen, on the application of Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health, EU:C:2004:802.
52. Wyatt, “Community competence to regulate the internal market” in Dougan and Currie (Eds.), 50 Years of the European Treaties: Looking Back and Thinking Forward (Hart, 2009), p. 121.
wide discretion on the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features. The ECJ has consistently followed this line of case law, also in a recent judgment on banning certain tobacco products.

In ENISA, the ECJ held that Article 114 TFEU can be used only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market. Interesting in this regard is Decision 716/2009/EC, for which the Council added recitals to the Commission’s proposal to explain why supporting specific activities in the field of financial services helps the smooth functioning of the internal market. The ECJ has also ruled that if the improvement of the conditions for the functioning of the internal market is just an ancillary objective, this does not provide justification for its adoption on the basis of Article 114 TFEU.

The establishment of Union agencies is a further matter of concern; here, the Meroni doctrine has been influential. In ENISA, the ECJ accepted the establishment of an agency on the basis of Article 114 TFEU in a situation where the functions of that new agency were closely related to already existing directives dealing with the same policy issues. The alternative would have been to establish the agency on the basis of Article 352 TFEU. In ESMA, the ECJ yet again accepted Article 114 TFEU as the legal basis for the establishment of an agency. The result seems to be a narrowing of the original Meroni doctrine.

55. Case C-217/04, ENISA, para 42. Also, see Case C-491/01, The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, EU:C:2002:741, paras. 60–61.
57. Case C-137/12, Commission v. Council, EU:C:2013:675, para 76.
59. Case C-217/04, ENISA.
3. The Banking Union: Three pillars and two legs

3.1. The three pillars

The aim of the Banking Union is to ensure that the banking sector of the euro area is functioning, and that possible resolution takes place primarily without recourse to taxpayers’ money (bail-out), but instead on the basis of investor liability (bail-in). By doing this, it seeks to strengthen financial stability in the Eurozone. What is crucial is to sever the vicious circle between sovereigns and banks. The three pillars for achieving this are surveillance, resolution, and deposit guarantee.

The Single Rulebook is the foundation on which the Banking Union sits. It consists of a set of legislative texts that all financial institutions within the EU must comply with. It has three elements: capital requirement rules, which consist of the Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR), the harmonization of national deposit guarantee schemes with the Deposit Guarantee Scheme Directive (DGSD), and the rules and procedures relating to the recovery and resolution of banks in the Bank Recovery and Resolution Directive (BRRD).

The first pillar of the Banking Union, the Single Supervisory Mechanism (SSM), entrusts the ECB with the surveillance of the most important banks within the Eurozone; it consists of two regulations. The Single Resolution Mechanism (SRM), the second pillar, creates common rules for bank

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62. For an explanation of the circle and why breaking it is paramount, see Véron, Europe’s Radical Banking Union (Bruegel, 2015), pp. 14–19.


resolution, in essence by applying the rules of the BRRD within the Banking Union. The central decision-making body within the SRM is the Single Resolution Board (SRB). Resolution is financed through the Single Resolution Fund (SRF). Contributions from national resolution schemes were transferred and mutualized to the SRF with the Single Resolution Fund Treaty. The European Deposit Insurance Scheme (EDIS) proposal by the Commission is supposed to establish the third and final pillar.

The rationale for using Article 114 TFEU as the legal basis for the various measures stems from the way the financial crisis and differences in national regulatory environments resulted in a fragmentation of the internal market for financial services. Uniform rules for financial services create a level playing field, which thus contributes to the functioning of the internal market. The BRRD does this by ensuring that Member States have the same tools and procedures for addressing systemic failures. The CRR, for example, does this by setting equivalent monitoring requirements for the institutions in different Member States, as those institutions are in direct competition. The EDIS would contribute towards this by a uniform set of deposit guarantee rules and a centrally managed fund. The use of regulations instead of directives especially supports the functioning of the internal market, as they leave no room for flexibility and thus fragmentation.
The internal market rationale can even be seen to require the Banking Union: unless resolution regimes are harmonized, an ineffective resolution regime in one Member State might restrict a bank from exercising its free movement rights, as funding costs or the possibility of being resolved if crisis strikes might differ.\(^77\) Creating a level playing field for banks avoids obstacles to the exercise of the freedom of establishment and the free provision of services within the internal market.\(^78\)

In addition to contributing to the functioning of the internal market, the Banking Union also seeks to increase “financial stability”. Whereas the internal market rationale is rather formal, the financial stability rationale is more substantive. Because the rules concerning supervision, resolution and deposit guarantee will increase the stability of the individual financial institutions, they will thus also improve the functioning of the markets. For this reason, all of the legal acts pursue “financial stability” in one form or another.

It is difficult, however, to deduce a conclusive meaning of financial stability from the various legal acts. For instance, the BRRD conceptualizes stability foremost as the stability of the financial markets due to its aim of securing the critical functions of banks during a crisis.\(^79\) But it also employs other stability concepts. Because liquidation under normal insolvency proceedings could “jeopardize financial stability”, resolution serves a public interest concern.\(^80\) This is manifested through the five resolution objectives of the BRRD.\(^81\) The economic and social effects of resolution are taken into consideration too.\(^82\) Through the European system of financing arrangements it establishes, the BRRD also contributes to the stability of the internal market.\(^83\) Finally, in some instances, the resolution authorities are to take into consideration the effects of resolution not just on the bank in question and the Member State it is situated in, but also the financial stability of the Union as a whole.\(^84\) When applying the bail-in tool, this means balancing the interests of the Member State in question against those of the Union as a whole.\(^85\)

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77. See Recital 9 BRRD, cited supra note 65.
79. See Recital 12 and Art. 14(2) BRRD, cited supra note 65.
80. See ibid., Recital 45 and Art. 32.
81. See ibid., Arts. 31–32. The five resolution objectives, which are of equal significance, are: continuity of the critical functions of the institution; avoidance of adverse effects on the financial system; minimizing the use of public financial support; protection of depositors; and protection of client funds.
82. See ibid., Recital 18 and Art. 3(7).
84. Ibid., Art. 17(7).
85. See ibid., Recital 83 and Art. 44(3)(c).
The internal market function and the substantive stability function seem to intertwine. The Commission explains this in its proposal for the CRR by stating: “As such, they [capital requirements] do not regulate access to deposit taking activities but govern the way in which such activities are carried out in order to ensure protection of depositors and financial stability.”\(^86\) In other words, ensuring “the financial stability of the operators on those markets” leads to “the smooth functioning of the internal market”.\(^87\) Such intertwinement is clear in the EBA Regulation too. This is evident, for example, in how the agency is to act in emergency situations. An emergency arises when adverse developments may seriously jeopardize the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.\(^88\) Such intertwinement is also reflected in the objectives of the EBA Regulation, which include protecting the orderly functioning of the internal market and maintaining the stability of the financial system.\(^89\)

Notwithstanding the above, there are also instances where pursuing financial stability too adamantly can lead to a fragmentation of the internal market. For example, the CRR recognizes that requiring banks to reduce their exposures to different legal entities depending on their activities can lead to such fragmentation.\(^90\) Setting limits for large exposures might also have a negative impact on the internal market that outweighs their financial stability benefits.\(^91\) Most obviously, and rather paradoxically, the Banking Union is itself fragmenting the internal market, as it divides the Member States into yet another category of ins and outs just on the basis of its existence.\(^92\) The SSM has specifically taken note of this.\(^93\)

The most important thing regarding the assessment of the proposed paradigm shift is how the stability of the financial sector is linked to more general economic stability, and therefore also economic policy-making by the Member States. The link between internal market measures aiming at


\(^87\). Recital 7 CRR, cited supra note 63.

\(^88\). Art. 18 EBA Regulation, cited supra note 66.

\(^89\). Recital 2 EBA Amending Regulation, cited supra note 66.

\(^90\). Recital 123 CRR, cited supra note 63.

\(^91\). Ibid., Art. 395(8). This same restriction applies to adopting national laws requiring the structural separation of activities within a banking group. See ibid., Art. 11(5). Similarly, see ibid., Art. 49(2).


financial stability and the stability of the euro area as a whole is apparent in different ways. First, the allocation of roles concerning micro- and macroprudential supervision relates to this. The CRR grants the Member States a leading role in the macroprudential oversight of banks, because adopting macroprudential measures requires expertise on their specific situation. However, since adopting macroprudential measures affects the economy of that Member State, the CRR retains a veto power on macroprudential decisions for the Council. The de Larosière report already outlined how safeguarding financial stability requires taking account of both micro- and macroprudential measures.

A second link is the way the SRM builds on a concept of stability linked to the functioning of the internal market, as uniform resolution tools increase confidence and market stability and also prevent spillover effects into non-participating Member States, which is beneficial for the whole internal market. However, similarly to the CRR discussed above, the SRM also acknowledges the broader economic effects of bank resolution. Due to the link between sovereigns and banks, resolution decisions have considerable impact on the financial stability of the Member States and the Union as such. These decisions are conferred on the Council because of their political significance. This is also exemplified by the fact that resolution decisions should be guided, in addition to the resolution objectives, by such factors as the impact of resolution on the financial stability, the fiscal resources, or the economy of the Member State or States concerned.

The resolution criteria also reflect this broader economic significance. Due consideration must be had as to whether the failure of the bank in question would cause significant adverse consequences for the financial system or a threat to financial stability. This refers to a situation where the financial system is actually or potentially exposed to a disruption that may give rise to financial distress liable to jeopardize the orderly functioning, efficiency and

95. See Recital 16 and Art. 458(4) CRR, cited supra note 63.
98. Ibid., Recital 12.
100. Recital 24 SRM Regulation, cited supra note 67. See ibid., Art. 18 on the resolution procedure and how the Council decides, on the basis of a proposal by the SRB and the Commission.
102. Ibid., Art. 6(3)(a). Also see ibid., Art. 10(10).
integrity of the internal market or the economy or the financial system of one or more Member States. The third way in which the link between internal market measures aiming at financial stability and the stability of the euro area as a whole is apparent is how severing the vicious circle between sovereigns and banks essentially requires spreading the risks associated with bank failures. The BRRD contains a “European system of financing arrangements”, the purpose of which is to ensure the effective application of the resolution tools. Financing arrangements can entail, inter alia, the mutualization of national financing arrangements in the case of a group resolution. Financing arrangements are “probably the most significant innovation in terms of policy” that the BRRD contains. In applying the substantive rules of the BRRD, the SRM applies these arrangements within the Banking Union. However, the SRF provides the financing of resolution under the SRM. Due to the substantive link with the BRRD, the SRM also contains the equivalent provision on the mutualization of national financing arrangements in the case of group resolution involving institutions from Member States outside the Banking Union.

The EDIS too specifically targets risk spreading. Although called an insurance scheme, it would in essence establish a common deposit guarantee fund due to the way it functions. In the final, “full insurance” stage, when a national scheme encounters a pay-out event, it may claim funding from the common Deposit Insurance Fund (DIF) for the full amount of deposits that it has guaranteed under the DGSD.

3.2. The two legs – or actually three?

In stark contrast to the other legal mechanisms that the Member States have enacted to combat the Eurozone crisis, the Banking Union stands out by the fact that the rules establishing it are addressed to private undertakings and not
The Member States themselves. The three pillars of the Banking Union regulate the internal market and are thus micro-economic governance, whereas the other mechanisms regulate the economies of the Member States and therefore macro-economic governance. However, as the aims of the Banking Union are deeply connected to the Member States’ economies, it inadvertently also regulates the EMU. Thus, the Banking Union has two legs. As described by Tridimas, it “stands at the crossroads between the EMU and the internal market”.114

We can see this from the fact that the SSM Regulation is based on a euro area competence, whereas the SRM Regulation is based on an internal market competence.115 This is highlighted by the Banking Union’s different but conjoined aims of breaking the vicious circle between sovereigns and banks, and amending the fragmentation of the internal market that resulted from the crisis. Therefore, it has “a foot in the internal market and another one in the monetary union”. As de Gregorio Merino points out, its monetary relevance mostly explains its creation.116 However, its underlying logic seems to be that of the internal market, since it aims to eliminate national competitive distortions. On the other hand, this aim connects it to the monetary aspect, since these internal market actions seek to sever the link between the banks and “the creditworthiness and political idiosyncrasies of the Member State in which they are headquartered”.117

Based on all of the above, it would perhaps be more fitting to say that the Banking Union has three legs: one in the internal market, a second in monetary policy, and a third trudging away within the sphere of economic policy. This, however, reveals a problem in such use of Article 114 TFEU. As the other crisis response mechanisms were criticized for muddling the divide between monetary and economic policy,118 in a similar manner, the Banking Union can be criticized for mixing the internal market and economic policy objectives.

4. Assessing the choice of legal basis

4.1. The internal market rationale

In light of sections 2 and 3 above, it seems that the way Article 114 TFEU was used as a legal basis for the Banking Union is questionable, mainly due to

114. Tridimas, op. cit. supra 5, p. 68.
115. Art. 127(6) TFEU and Art. 114 TFEU.
118. For an overview of this criticism, see Beukers, “Legal writing(s) on the Eurozone crisis”, EUI Working Papers/Law 2015/11, pp. 11–17.
the intertwinement of the internal market, stability, and the more general economic policy goals. Could this have been avoided by splitting the proposals into parts or by basing proposals on several different legal bases? Was Article 114 TFEU truly used as a residual legal basis, or would there have been policy specific legal bases facilitating the pursuit of these stability objectives? Should Article 352 TFEU, the second catch-all competence clauses, have been used instead of Article 114 TFEU?

In the literature, most attention concerning the choice to use Article 114 TFEU as a legal basis seems to have focused on the SRM Regulation. The adequacy of Article 114 TFEU as the legal basis for the SRM Regulation has been supported by arguments that assume a rather holistic view of the issue. On the one hand, the Regulation should not be seen as an isolated legal act, but as belonging to the ongoing process of harmonizing financial services within the internal market. Thus, the harmonization of resolution is to be seen as complementing effective supervision and the centralization of tasks with the EBA.119 On the other hand, arguments recall how the turmoil in the financial markets created by the Eurozone crisis established the necessary conditions for using Article 114 TFEU as a legal basis: regulatory action was needed to safeguard the functioning of the internal market. In this view, the SRM is the “necessary if not sufficient component for the euro area to function efficiently”.120 Furthermore, the “higher objective of financial stability” is seen to justify a “maximalist interpretation” of Article 114 TFEU.121

More critical tones have also been voiced. These seem to focus on whether Article 114 TFEU was an adequate legal basis for establishing the SRB, and how do Meroni and ENISA relate to this. The SRM Regulation tries to improve the functioning of the internal market by creating the SRB,122 and by thus ensuring the “efficient application of the resolution tools and exercise of the resolution powers” for bank resolution.123 The SRB’s powers come close to the outer limits dictated by the Meroni doctrine: under Meroni, powers delegated to EU agencies must be clearly defined and subject to the supervision of the Commission.124 Due to Meroni, the decision on resolution is taken by the Commission and the Council, while the SRB only makes a

119. de Gregorio Merino, op. cit. supra note 6, pp. 204–206.
121. Martucci, “Union bancaire, la méthode du ‘cadre’: du discours à la réalité” in Martucci (Ed.), L’Union bancaire (Bruylant, 2016), p. 31: “L’objectif supérieur de stabilité financière, tel que dégagé par l’arrêté Pringle, justifie, à notre sens, une interprétation maximaliste de l’article 114 TFUE. Le marché intérieur des services financiers implique une stabilité financière.”
122. Art. 42(1) SRM Regulation, cited supra note 67.
123. Ibid., Art. 67(2).
124. Case C-9/56, Meroni, para 152.
proposal to those institutions.\footnote{125}{Art. 18 SRM Regulation, cited supra note 67.} It is difficult to establish whether the SRB breaches the \textit{Meroni} doctrine, but it at least seems to come close to doing so, due to the discretionary nature of the agency’s powers and especially since the criteria that it is to use in its various actions are somewhat unclear.\footnote{126}{Alexander, “European Banking Union: A legal and institutional analysis of the single supervisory mechanism and the single resolution mechanism”, 40 EL Rev. (2015), 179–181.}

A further concern, which is linked to the asymmetry of the EMU and our chosen viewpoint, is how Article 114 TFEU is used to mutualize funds. The financing arrangements established by the BRRD and the SRM, discussed above, pursue just this. Due to the residual nature of Article 114 TFEU, it can be argued that Article 311 TFEU on the Union’s own resources would have been a more appropriate legal basis for this purpose.\footnote{127}{De la Rosa, “L’Adossement de l’Union bancaire au système juridique de l’Union” in Martucci (Ed.), op. cit. supra note 121, p. 90.} Its use, though, requires unanimity in the Council and national ratification. However, it is worth pointing out that the residual nature of Article 114 TFEU has not seemed to restrict its use in practice. The Article itself lists fiscal provisions, the free movement of persons, and the rights and interests of employed persons as policy areas to which it does not apply.\footnote{128}{Art. 114(2) TFEU.} This list seems to be exhaustive, as the ECJ has not added any “implied” exclusions to it.\footnote{129}{Schütze, \textit{European Union Law} (CUP, 2015), p. 539.} Although there are some policy areas with their own specific competences, for example Article 168 TFEU on public health or the above mentioned Article 311 TFEU on own resources, these articles do not seem to restrict the reach of Article 114 TFEU.\footnote{130}{Case C-376/98, \textit{Tobacco Advertising I}, para 78: “But that provision [the exclusionary nature of Art. 168 on public health] does not mean that harmonizing measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health.”; para 88: “Furthermore, provided that the conditions for recourse to [Article 114 TFEU] as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made.”} As there are no other actual competence clauses that could be used for the stability purposes that have been pursued with the Banking Union instruments, there does not seem to be any reason which would preclude the use of Article 114 due to its residual nature.

The SRM Regulation’s legal basis has also been questioned on the grounds of uniformity. Article 114 TFEU requires that measures based on it apply uniformly throughout the internal market, whereas the SRM’s application is linked to that of the SSM, which is based on a euro area specific competence.\footnote{131}{De la Rosa, op. cit. supra note 127, p. 91.} This argument has, however, been countered with the claim...
that the SRM is not directed to the Member States as such, but to banks supervised by the SSM. “As such the SRM Regulation applies to all 28 Member States, but only to banks supervised by the SSM” and it therefore fulfils the “objective criterion” set out in Vodafone.132

The overall conclusion from analysing the case law on Article 114 TFEU seems to be that were the SRM Regulation or any other element of the Banking Union to be challenged before the ECJ, it would most likely approve them. First, Swedish Match and the various tobacco cases suggest that the reach of Article 114 TFEU is very wide indeed.133 This is despite the caveat – as the ECJ has ruled – that Article 114 TFEU cannot be used if the improvement of the functioning of the internal market is only an ancillary objective,134 which it perhaps is for some of the acts constituting the Banking Union. Secondly, the ECJ has previously always sought to empower the EU within the policy fields of internal market harmonization, the powers of agencies, and management of the financial crisis,135 and challenges towards Article 114 TFEU are mainly unsuccessful.136 Thirdly, the ECJ seems to have adopted the concept of financial stability as a higher-order objective, justifying the different crisis response mechanisms in Pringle and Gauweiler.137 However, this stance adopted by the ECJ, and by those academics calling for a maximalist interpretation of Article 114 TFEU, is open to criticism.

4.2. The financial stability rationale

As no one seems to know what the concept “the financial stability of the euro area as a whole” actually means,138 it is problematic to take it as the legitimizing factor for a broad interpretation of Article 114 TFEU. The

132. Huhtaniemi, Nava and Tornese, “The establishment of a EU-wide framework for the resolution of banks and financial institutions” in Hinojosa-Martinez and Beneyto (Eds.), European Banking Union: The New Regime (Wolters Kluwer, 2015), p. 109, citing Case C-58/08, Vodafone. Note that this was the view of the Commission, for which all three authors work.
133. Case C-210/03, Swedish Match; Case C-380/03, Tobacco Advertising II; Case C-547/14, Philip Morris; Case C-477/14, Pillbox 38; Case C-358/14, Poland v. European Parliament and Council.
134. Case C-137/12, Commission v. Council, EU:C:2013:675, para 76.
135. Tridimas, op. cit. supra note 5, pp. 78–82.
Member States came up with the concept in order to justify the bail-out of Greece and the subsequent creation of the European Stability Mechanism (ESM). The underlying rationale was that the crisis threatens not just the individual States worst hit by the crisis, but also the future of the euro as a currency and thus also the whole European Union. As Chancellor Angela Merkel put it: “If the euro fails, Europe fails.”\(^{139}\) Adopting this political rationale easily leads one to accept the concept as a legally legitimizing factor both for bail-outs and a broad interpretation of Article 114 TFEU.

The ECJ first ruled in *Pringle* that the ESM, the objective of which is to safeguard the stability of the euro area as a whole, is an economic policy measure. Although acknowledging that “the stability of the euro area may have repercussions on the stability of the currency used within that area”, the ECJ concluded, that “an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro”.\(^{140}\) The ECJ then ruled in *Gauweiler* that the fact that the OMT programme might also be capable of contributing to the stability of the euro area, which is a matter of economic policy, does not mean that the OMT programme itself is not a monetary policy measure.\(^{141}\)

At first sight, it seems that the ECJ is arguing towards different ends, although starting from the same premise: although economic and monetary policy are inseparable, the ESM is an economic policy measure, whereas the OMT is a monetary policy measure. The rationale behind this Janus-faced argumentation is, according to the ECJ, that “it is appropriate to refer principally to the objectives of that measure” when determining whether it falls under economic or monetary policy – however, the “instruments which the measure employs in order to attain those objectives are also relevant”.\(^{142}\) Although this sounds logical, the higher-order objective that the concept of “the financial stability of the euro area as a whole” is to serve is not found in the EU Treaties. According to the Treaties, the primary objective of the ECB’s monetary policy is price stability,\(^ {143}\) whereas stability in the Stability and Growth Pact refers to sound public finances and how they help in pursuing

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140. Case C-370/12, *Pringle*, para 56.
143. Art. 127 TFEU.
Neither of these is the same as the “financial stability of the euro area as a whole”. What, then, does the “financial stability of the euro area as a whole” mean? This has not been explicitly defined by the policy-makers who employ it as their reasoning for the various crisis response measures, nor by the ECJ in Pringle or Gauweiler. The fact that a wide variety of measures has been needed to resolve the crisis, and that many of these have been justified by this higher-order objective, indicates the vagueness of the concept. The need for such a concept results from two failures in the structure of the EMU as enacted in Maastricht. First, the link between sovereigns and banks was underestimated. Secondly, the importance of cross-border financial relationships, due to the liberalization of capital markets and the common monetary policy, was also underestimated. The Banking Union seeks to address both of these. Its stated aims and the means of pursuing them also clearly go beyond mere internal market regulation.

5. Concluding remarks: Towards an economic union paradigm?

Although financial stability is something which is desirable, does the end justify the means? Political and legal decisions should be made within the framework provided by the EU Treaties. In light of the rationale of Article 114 TFEU and the asymmetry of the EMU, the broad interpretation adopted of the scope of Article 114 TFEU to facilitate its use as the legal basis of the Banking Union is open to criticism. Although internal market measures (microeconomic governance) also affect economic policy, specifically economic policy-related goals (macroeconomic governance) should be pursued through other means. There are several possible reasons why policy-makers enacted the Banking Union in this manner. The ECJ, too,

144. See Resolution of the European Council on the Stability and Growth Pact, O.J. 1997, C 236/1, Preamble I: “... The European Council underlines the importance of safeguarding sound government finances as a means to strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation. It is also necessary to ensure that national budgetary policies support stability oriented monetary policies. ...”
146. Ibid., p. 133.
147. How “transnational elites” affected the outcomes of crisis resolution, see Kotarski and Brkic, “Political economy of banking and debt crisis in the EU” (2016) Review of Radical Political Economics, 12–15; how the structures of national banking sectors affected Member States’ preference formation, see Howarth and Quaglia, op. cit. supra note 25, pp. 50–88.
probably had its own predicaments which led it to take the chosen path.\textsuperscript{148} It is, however, rather ironic that this line of reasoning is not allowed for individual Member States.\textsuperscript{149}

Is the internal market only about free movement rights, or is the internal market perhaps also supposed to support the common currency and the EMU more generally? Has the Banking Union signalled a shift in the internal market paradigm towards an economic union paradigm? The answer to both questions is positive. Although it can be seen as a continuation of neofunctionalist spillover from the original decision to adopt the internal market, the Eurozone crisis has been the main force behind this paradigm shift. This development is a corollary phenomenon to the “metamorphosis” of the EMU and the “mutation” of the Maastricht macro-economic principles.\textsuperscript{150}

The description and analysis offered in this article supports the hypothesis set forth by Snell. The fragmentation of the internal financial market and the perceived need to support the EMU as a result of this are “pushing economic integration in a new, more centralized direction”.\textsuperscript{151} How Article 114 TFEU has been (mis-)used as the legal basis of the Banking Union is instrumental for this development. As part of the broader developments relating to the Eurozone crisis, this is problematic because it means that economic integration is furthered by legal means, but not accompanied by the required political legitimation.\textsuperscript{152}

\begin{footnotesize}
\begin{enumerate}
\item See Case C-201/15, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, EU:C:2016:972, para 72: “As regards safeguarding the interests of the national economy, it is settled case law that purely economic grounds, such as, in particular, promotion of the national economy or its proper functioning, cannot serve as justification for obstacles prohibited by the Treaty.”
\item See Amtenbrink, op. cit. supra note 9; Tuori and Tuori, op. cit. supra note 10, pp. 117–247.
\item Snell, op. cit. supra note 4, p. 315.
\item See Habermas, “Bringing the integration of citizens into line with the integration of States”, 18 ELJ (2012), 485–488.
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