

Single Resolution Board: another *Meroni* extension or another chapter to Europe's Constitutional Transformation?

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Abstract

The establishment of the Single Resolution Board (SRB) has pushed the constitutional boundaries of agencification further. After elaborating on the SRB's powers and safeguards, one can argue that its governance structure combined with its policy-making powers distinguish the SRB from all other agencies. While trying to assess its legality of establishment and empowerment, this paper seeks to identify the nature of the empowerment, whether *Meroni* is still fit for purpose, and whether the limits of institutional balance have been bent or indeed broken. After expressing concerns as to the SRB's compliance with the current EU institutional framework, the paper offers an alternative for exiting this constitutional deadlock by applying *Weiler's* theory of constitutional transformation. Such a solution would legitimize the SRB as well as facilitate the functioning of Banking Union.

Introduction

Sixty years after the *Meroni* ruling¹ and four years after the *Short-selling* case,² the constitutional limits to agencies' establishment and empowerment remain vague. In this context, the Single Resolution Board (SRB) – as a decision-making agency established under article 114 TFEU and as the competent EU resolution authority – 'departs from the model of all other agencies of the Union'³ and is called upon to perform complex assessments and decide directly upon national authorities and financial firms.

From an institutional perspective, the SRB stands at the core of the Single Resolution Mechanism (SRM),⁴ which constitutes the second of the three pillars of Banking Union, the others being the Single Supervisory Mechanism (SSM) with the European Central Bank (ECB) at its core,⁵ and a European Deposit Insurance Scheme (EDIS), which to this day remains a far-fetched goal.⁶ The underlying philosophy of this new

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¹ Case 9/56 *Meroni v High Authority*, ECLI:EU:C:1958:7.

² Case 270/12 *United Kingdom v European Parliament and Council*, ECLI:EU:C:2014:18.

³ Rec 31, Reg 806/2014 (SRMR).

⁴ Reg 806/2014/EU.

⁵ For an extensive analysis, see C.V. Gortsos, *The Single Supervisory Mechanism (SSM): legal aspects of the first pillar of the European Banking Union* (Nomiki Bibliothiki 2015).

⁶ On the EDIS, see D. Howarth and L. Quaglia, 'The difficult construction of a European Deposit Insurance Scheme: a step too far in Banking Union?' (2017) *Journal of Economic Policy Reform* 1. For an overall analysis of Banking Union, see indicatively D. Howarth and L. Quaglia, *The Political Economy of European Banking Union* (OUP 2016); Niamh Moloney, 'European Banking Union: assessing its risks and resilience' (2014) 51 *Common Market Law Review* 1609; Dirk Schoenmaker, 'The Banking Union: An Overview and Open Issues' (2016) ; Pedro Gustavo Teixeira, 'The Legal

architecture is that systemic credit institutions shall be supervised and – if need be – resolved at the EU level, ideally by using EU resolution funds.⁷ Compared to pre-crisis supervision which was based on cross-border coordination, resolution was non-existent; it was not until Lehman Brothers went bust that international, European and national regulators decided to enact resolution laws. At the EU level, Member States first enacted the Bank Recovery and Resolution Directive (BRRD)⁸ that established a minimum harmonisation resolution framework in the EU. The SRMR followed, essentially copy-pasting the BRRD and setting the procedural framework within which the SRB functions – only for Eurozone countries and countries opting in Banking Union.

From a functional perspective, the SRB enjoys extensive powers. When a credit institution enters resolution, the SRB decides who will carry the losses and to what extent (bail-in), whether the institution will be broken down to a good and a bad bank, whether it will be sold to another institution, and whether EU resolution funds should be used.⁹ However, even before entering resolution, the SRB drafts resolution plans, and can take preventive measures that may affect an institution's structure. To counterbalance these powers, the SRB operates within a multi-level system of actors, including the European Commission and Parliament, the ECB, the European Banking Authority (EBA) and the national resolution authorities (NRAs). The first (and only) crash-test for the SRB occurred in June 2017, when the SRB decided to resolve a Spanish bank, Banco Popular, by selling it to Santander for 1€ and imposing losses on shareholders and junior creditors.¹⁰

Moving on to the legal assessment of the SRB's establishment and empowerment, one should start the analysis by going back to the *Meroni* ruling and its latest transformation, the *Short-selling* ruling. Notwithstanding the usefulness of *Short-selling* in paving the way for the SRB¹¹, it is questionable whether *Meroni* has anything more to offer vis-à-vis the SRB. Meanwhile, it remains uncertain whether the SRB's empowerment constitutes delegation or conferral. Apart from the obvious impact on the legal basis for its establishment, it is interesting to examine whether the two different forms of empowerment produce different legal outcomes. I argue that at the end of day it all comes down to respecting the principle of institutional balance. Be it delegation or conferral, whether the SRB disturbs the current institutional balance is an issue this paper touches upon. Moreover, I argue that one should review the SRB's role within the broader legal-political environment that has been

History of the Banking Union' (2017) 18 European Business Organization Law Review 535; Takis Tridimas, *Banking Union: An Unfinished Story of Federalization* (2016).

⁷ Regarding the complexities of resolution financing, see Ioannis G. Asimakopoulos, 'International law as a negotiation tool in Banking Union; the case of the Single Resolution Fund' (2018) Journal of Economic Policy Reform 1; Christos Hadjiemmanuil, 'Bank resolution financing in the banking union' (2015) ; Willem Pieter De Groen and Daniel Gros, 'Estimating the Bridge Financing Needs of the Single Resolution Fund: How expensive is it to resolve a bank?' CEPS Special Report No. 122, 25 November 2015.

⁸ Directive 2014/59/EU.

⁹ Art 18(6), SRMR.

¹⁰ B Mesnard, A Margerit and M Magnus, *European Parliament Briefing - The resolution of Banco Popular*, 28 August 2017.

¹¹ Merijn Chamon, 'The empowerment of agencies under the Meroni Doctrine and Article 114 TFEU: comment on United Kingdom v. Parliament and Council (short-selling) and the proposed Single Resolution Mechanism' (2014) European Law Review 380.

established and sanctioned by the Court in the post-crisis era, namely in *Pringle* and *Gauweiler*.¹²

That said, this paper aims to examine the SRB's institutional and legal setup and its compliance with the EU legal order. Part 1 sketches the core powers of the SRB and its procedural safeguards. Part 2 examines the SRB through the lens of the Court's jurisprudence on agencies, while part 3 focuses on the implications for the EU institutional balance. Part 4 suggests ways of exiting the current institutional deadlock, while trying to balance legal concerns and political economy considerations. I then conclude.

Part 1: The SRB's Procedural Labyrinth

This part briefly examines the mechanics of the SRB's decision-making powers and the procedural safeguards that are in place by breaking the analysis into two parts: the SRB's preventive and resolution powers.¹³

1.1. Preventive powers

The core preventive competence of the SRB is resolution planning.¹⁴ The SRB drafts resolution plans in collaboration with the NRAs and in consultation with the ECB or the national competent authorities within a highly granular framework provided in the SRMR¹⁵ supplemented by EBA's regulatory technical standards.¹⁶ Beyond its factual and technical nature,¹⁷ there are three points that raise concerns as to their compatibility with the current constitutional framework; the resolvability assessment of an institution and the subsequent proposal of correcting measures,¹⁸ the definition

¹² Case 370/12 *Pringle v Ireland and Others*, ECLI:EU:C:2012:756; Case 62/14 *Gauweiler v Deutscher Bundestag*, ECLI:EU:C:2015:400.

¹³ For an extended analysis of the SRB, see indicatively Christos Gortsos, 'The Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF): Legal Aspects of the Second Main Pillar of the European Banking Union (Fourth-Extended and Fully Updated-Edition)' (2018); Jens-Hinrich Binder and Dalvinder Singh, *Bank Resolution: The European Regime* (Oxford University Press 2016); Danny Busch, 'Governance of the single resolution mechanism' (2015) Busch, D; Ferrarini, G(ed), *The European Banking Union* 281; Marta Božina Beroš, 'Some Reflections on the Governance Framework of the Single Resolution Board' (2018) 56 *JCMS* 646; David Howarth and Lucia Quaglia, 'The steep road to European banking union: Constructing the single resolution mechanism' (2014) 52 *JCMS* 125; George S Zavvos and Stella Kaltsoni, 'The Single Resolution Mechanism in the European Banking Union: legal foundation, governance structure and financing' (2014) ; Council Legal Service (CLS), *Opinion 14547/13*, 7 October 2013.

¹⁴ Art 8, SRMR. Other competences include the SRB's discretion to exempt from or simplify the resolution planning rules for certain institutions (art 11, SRMR), and the SRB's powers in the early intervention phase (rec 46 and art 13, SRMR).

¹⁵ Art 8(9), SRMR.

¹⁶ EBA, *Final Draft Regulatory Technical Standards on the content of resolution plans and the assessment of resolvability* 19 December 2014.

¹⁷ CLS, n 13 *supra*, 8.

¹⁸ Art 8(9)(e) and (f), and 10, SRMR.

of the minimum requirement for own funds and eligible liabilities (MREL),¹⁹ and the definition of the key resolution policies.

Starting from the resolvability assessment, the SRB needs to ensure that an institution is resolvable in real clock ticking terms. The on-the-ground assessment is conducted by the NRAs who then pass the information on to the SRB. The NRAs work on the definition of the preferred resolution strategy and tools, whilst the SRB works on the resolvability assessment and the MREL definition. On that basis, the SRB can order the NRA to suggest certain resolvability measures to the institution in question. However, the SRB cannot declare ‘material impediments (...) without a proper assessment of the implementation of the measures by the NRAs and the actions (required)’.²⁰ Once the SRB has concluded on the identified material impediments to resolvability, it can instruct the NRA to take certain measures that can impact directly the legal, organizational and financial structure of the firm.²¹ On those issues, the EBA has issued relevant guidelines and technical standards.²² Notwithstanding the granularity of the rules, the SRB still enjoys ‘wide discretion’²³ when it comes to resolvability. What is more, the SRB then instructs the NRAs to perform certain actions without them having any room for maneuvering.²⁴

Moving on to MREL, it ensures the loss-absorbing capacity of the firms, and thus, the effectiveness of the bail-in tool.²⁵ The definition of the MREL is decided by the SRB,²⁶ which arguably possesses wide discretion in this process – both technical and policy-related. Moreover, the SRB recently started setting binding targets for financial firms, including on the specific allocation of the MREL across the structure of a banking group (‘internal MREL’). When taking MREL-related decisions, the SRB again needs to respect a dense and granular framework, which consists of the Commission delegated regulations,²⁷ following EBA’s work, and the SRB’s annual policy reports.²⁸ In any event, the impact on the firms’ liabilities’ structure is evident.

The elephant in the room, though, is the definition by the SRB of the policies to be followed in key-areas of resolution, such as the definition of the MREL policy. In this process, the NRAs that are interested in contributing to the policy discussion participate in working groups/committees, and express their views to the SRB. Nevertheless, the SRB decides at will without necessarily following the NRAs’ views, which cannot influence the voting procedure within the SRB’s executive session. These policies define the entire resolution planning process.

¹⁹ MREL reflects the minimum amount of necessary eligible capital for bail-in.

²⁰ EBA, *Decision on the settlement of a disagreement between the SRB and the National Bank of Romania*, 27 April 2018, 8.

²¹ Art 10(11), SRMR includes, *inter alia*, measures such as the requirement to divest specific assets or set up a parent financial holding company.

²² EBA, n 16 *supra*; EBA, *Guidelines on the specification of measures to reduce or remove impediments to resolvability and the circumstances in which each measure may be applied under Directive 2014/59/EU*, 19 December 2014.

²³ EBA, n 22 *supra*, 3.

²⁴ Article 10(11), SRMR.

²⁵ Rec 45, SRMR.

²⁶ Art 12(7), SRMR.

²⁷ Commission Delegated Regulation (EU) 2016/1450.

²⁸ For more information on the SRB’s MREL policy, see <https://srb.europa.eu/en/content/mrel>.

This leads us to the SRB's governance structure. The SRB is governed by an executive session that includes the chair and four permanent members, and a plenary session that includes the NRAs as well. Almost all the important decisions are taken by the executive session.²⁹ That is surprising when looking at the ECB's structure, which comprises the Governing Council - similar to the SRB's plenary session - and the Executive Board - similar to the SRB's executive session. In the case of the ECB, the most important decisions are taken by the Governing Council and later on implemented by the Executive Council.³⁰ Therefore, we face the paradox of having an EU agency taking core decisions with no national representation as opposed to an EU institution that allows its plenary formation to decide on all core issues.

1.2. Resolution powers

Given its sui-generis nature, resolution is triggered through a streamlined procedure.³¹ The ECB initiates the procedure by declaring an institution as 'failing or likely to fail' (FOLTF). The SRB can do so itself, but only after notifying the ECB, and only if the latter does not do so itself. The SRB then examines whether any private sector alternative solutions to rescuing the firm exist. The ECB can perform this second step as well. Then, the SRB needs to conduct a public interest assessment on whether resolution is preferable to national liquidation. If the assessment is negative, then national liquidation applies; the Commission does not have a say therein since normal insolvency proceedings are considered the default scenario upon failure. If the assessment is positive, then the SRB determines the appropriate use of resolution tools as well as the necessity for the use of the Single Resolution Fund (SRF), which are included in the resolution scheme.³² The Commission has then 12 hours to challenge the SRB's public interest assessment and 24 hours to challenge any other discretionary aspect of the scheme.³³ If the Commission rejects the scheme, then the Council has a say as the final arbiter. If the use of resolution funds is decided, then the Commission needs to provide its clearance; this time, as the competent competition authority. Again, the SRB can circumvent the NRAs in case of non-compliance and address the resolution decisions directly to the credit institution under resolution.³⁴ Imposing fines upon firms falls also within the SRB's toolbox. Needless to say that in this process investors' rights can be significantly limited.

The resolution scheme drafted by the SRB may include one or more of the following resolution tools: sale of business, establishment of a bridge institution where certain assets are being transferred, asset separation in a good and a bad bank, and bail-in.³⁵ Moreover, the SRB can violate the general *pari passu* treatment of creditors in resolution³⁶ by excluding certain claims from bail-in.³⁷ What is important to bear in

²⁹ Rec 32, 33 and art 43, 54, SRMR.

³⁰ Art 12.1, ESCB statute.

³¹ Art 18(1), SRMR.

³² Art 18(6), SRMR.

³³ Art 18(7), SRMR.

³⁴ Art 29(2), SRMR.

³⁵ Art 24-27, SRMR.

³⁶ Art 15(1)(b) and (f), SRMR.

³⁷ Art 27(5), SRMR supplemented by the Commission's delegated regulation (EU) 2016/860.

mind is that all the SRB's decisions are based on complex valuations.³⁸ Moreover, given the strict time restraints when triggering resolution, valuations are likely to be provisional, as was the case in Banco Popular.³⁹

When conducting the public interest assessment, the SRB takes into account two key-elements; the institution's critical functions, and the impact on financial stability.⁴⁰ To elaborate on the former, a function is considered critical when it is provided by an institution to third parties, and its sudden disruption would likely have a material negative effect on them.⁴¹ This definition suffices perhaps to understand the SRB's discretion given the definitional overlap between the multiple objectives,⁴² which may lead to controversial public interest assessments. Comparing two recent cases illustrates the point – Banco Popular in Spain and Veneto Banks in Italy;⁴³ in near identical notices, the SRB concluded that the former met the public interest requirement whilst the latter did not.⁴⁴ On top of that, in the Italian case, following the SRB's negative assessment the Commission approved state aid following the same reasoning, thus leading to a 'tailor-made' resolution with questionable legality.⁴⁵

Compared to preventive powers, the SRB when deciding upon resolution measures needs to operate within a dense network of actors. Beyond the ECB and the EBA, the Commission sits at the SRB's executive session as a non-voting observer and needs to endorse the SRB's resolution scheme in the end. Even though, in Banco Popular 77 minutes were enough for the Commission to endorse the SRB's resolution scheme,⁴⁶ it is reasonable to argue that as an observer, the Commission can effectively steer the SRB, by using as a negotiation tool its final say on the scheme; under that scenario, the Commission would only disagree with the SRB in case of a so-called 'bureaucratic drift'; that is that the Board decides to pursue its own policy agenda.⁴⁷

The last safeguard in resolution is the 'no creditor worse-off' principle (NCWO), which illustrates the fundamental principle that shareholders and creditors have to

³⁸ Art 20(10)-(12), SRMR. Willem Pieter de Groen, 'Valuation reports in the context of banking resolution: What are the challenges?' Banking Union Scrutiny. CEPS Special Report, July 2018 ; Martin F Hellwig, 'Valuation reports in the context of banking resolution: What are the challenges?' (2018) ; Rosa M Lastra and Rodrigo Olivares-Caminal, *Valuation Reports in the Context of Banking Resolution: What are the Challenges?*, 2018.

³⁹ SRB, *Valuation Report for the purpose of Article 20(5)(a) of Regulation (EU) No 806/2014*, 5 June 2017; Deloitte, *Hippocrates Provisional Valuation Report*, 2017.

⁴⁰ For the whole list of objectives, see art 14(2), SRMR.

⁴¹ Art 2(1)(35), BRRD; see also SRB, *Critical functions: the SRB approach*, 2017; SRB, *Guidance on the critical functions report*, 2018.

⁴² Willem Pieter de Groen, 'The provision of critical functions at global, national or regional level. Is there a need for further legal/regulatory clarification if liquidation is the default option for failing banks?' CEPS Special Report, 19 December 2017 ; Silvia Merler, 'Critical functions and public interest in banking services: Need for clarification?' Banking Union Scrutiny. Bruegel Report, November 2017.

⁴³ Regarding Banco Popular, see n.10 supra; regarding the Veneto banks, see B. Mesnard, A. Margerit and M. Magnus, *European Parliament Briefing - The orderly liquidation of Veneto Banca and Banca Popolare di Vicenza*, 25 July 2017.

⁴⁴ Mara Monti, 'Italy versus Spain: two measures for solving the same banking problem' (2017) LSE European Politics and Policy (EUROPP) Blog .

⁴⁵ Ioannis G Asimakopoulos, 'The Veneto Banks Resolution: It Shall Be Called 'Liquidation'' (2018) 15 European Company Law 156.

⁴⁶ Richard Crump, Banco Popular Investors say EU Officials doomed bank, *Law360*, 17 August 2017.

⁴⁷ Daniel R Keleman, 'The politics of 'eurocratic' structure and the new European agencies' (2002) 25 West European Politics 93, 96.

receive better or equal treatment in resolution that they would have received under the default scenario of liquidation.⁴⁸ Those who suffer greater losses are entitled to compensation.⁴⁹ The Court is competent to assess whether this principle has been met. However, effective judicial review in this context will be indeed challenging; apart from organizational and economic challenges linked to the effort of assessing the uncertain counterfactual,⁵⁰ there are significant legal barriers to an accurate valuation, and thus to the enforcement of the NCWO, such as the existence of as many different counterfactuals as the number of existing different national insolvency frameworks and the limited disclosure of information due to confidentiality.⁵¹

1.3. *What makes the SRB different?*

While the SRB operates within a very granular legal framework both in the preventive and resolution phase, the safeguards that are in place in the resolution phase do not exist in the preventive phase. In particular, whilst the Commission's role in triggering resolution is legally convincing, neither the Commission nor any other EU body can interfere in resolution planning. What is critical is that the SRB is uncontrolled when deciding upon the policies to be followed in the entire resolution process.⁵² Moreover, the SRB's governance structure stands out as one of its kind, with no national representation in the decision-making process on key issues such as the definition of the resolution policies. Therefore, the SRB's governance structure combined with its policy-making powers in resolution planning is what distinguishes the SRB from all other agencies.

Part 2: Placing the SRB within the Court's jurisprudence

Having elaborated on the SRB's powers and its procedural safeguards, it is necessary to assess the constitutional legality of its establishment under article 114 TFEU and its empowerment.

Trying to fit the SRB within the Court's jurisprudence as regards the use of 114 TFEU for its establishment, *Short-selling* is particularly insightful mostly due to the divergence between the Advocate General and the Court's argumentation.⁵³ The Advocate General concluded that the ESMA's powers regarding its direct powers to ban certain financial products were beyond the scope of article 114 TFEU since the power to 'make legally binding decisions directed at individual legal entities *in substitution* for either a decision, or the inaction, of a competent national authority

⁴⁸ Art 15(1)(g), SRMR.

⁴⁹ Article 76(1)(e), SRMR; On the NCWO, see indicatively Victor de Serière and Daphne van der Houwen, "No Creditor Worse Off in Case of Bank Resolution: Food for Litigation?" (2016) ; Hodge Malek QC and Sarah Bousfield, "Bad banks and the No Credit Worse Off Compensation Scheme, Butterworths Journal of International Banking and Financial Law, June 2016.

⁵⁰ De Groen, n 42 supra.

⁵¹ Indeed, here one should appraise the role of the SRB Appeal Panel that decided to grant – even partial – access to the relevant documentation, see cases 38/17 - 43/17.

⁵² Confirmed during informal interviews with resolution officers of two NRAs.

⁵³ *Short-selling*, n 2 supra; AG Opinion in *Short-selling*, ECLI:EU:C:2013:562.

which may well disagree with a decision taken by ESMA' was not within the competence of the Commission before the enactment of the ESMA regulation, but rather within the national sphere.⁵⁴ Compared to the ESMA, the SRB performs a much more systemically important function; it makes sure that financial firms are no longer 'too-big-to-fail', that financial stability is preserved, and that taxpayers will no longer be called up to bailout failed banks. It is perhaps a good idea to look back, when neither resolution rules nor the SRB existed. During that time, when banks went bust, national authorities would decide to cooperate with each other only if, by applying a game theory approach, they could see some individual benefit out of it; the collective good did not drive their decisions.⁵⁵ In that regard, Ireland is the perfect example since during the crisis it chose to protect only its national banks, leaving foreign ones outside its bailout scope. Therefore, given the financial and economic interconnection that the Eurozone has generated such direct powers should meet, in my mind, the principles of proportionality and subsidiarity since harmonizing enforcement within Banking Union in times of crisis should be considered a measure of approximation within 114 TFEU. Nevertheless, I tend to agree with the view – also expressed by the Advocate General in *Short-selling* – arguing that article 352 TFEU would have been a more suitable option in the case of the SRB, if only was it not too much to ask from all 28 Member States to agree on a 'measure' affecting 19 of them.

Moving on to the constitutional limits of empowerment through article 114 TFEU, one needs to define the particular form of empowerment that has occurred in this case. In this article, delegation refers to downward transfer of powers, from EU institutions to EU agencies, whilst conferral refers to the upward transfer from Member States to EU agencies, thus accepting distribution of powers as a vertical mechanism.⁵⁶ Some argue in favour of an 'upward' delegation⁵⁷ or 'sideways' delegation.⁵⁸ However, I believe that over-broadening the definition of delegation can lead to a de facto circumvention of article 5 (1) TEU, which sets the limits of the principle of conferral. The Court, though, uses the notions of delegation and conferral in an interchangeable manner.

As aforementioned, resolution rules did not exist before the crisis. Moreover, given their sui-generis legal nature we should view them as an equivalent of insolvency laws since, in essence, they were aimed at replacing insolvency laws as regards credit institutions. With that in mind, BRRD was first introduced to harmonize the bank resolution framework across the EU, and three months later the SRMR was enacted to put in place a stricter procedural framework for Banking Union countries. Both legislative frameworks were put fully into force on January 1, 2016. During the negotiation process, one of the key-challenges was the allocation of powers within the

⁵⁴ AdvG, n 53 supra, para 24, 37, 50-53.

⁵⁵ Dalvinder Singh, 'The Centralisation of European Financial Regulation and Supervision: Is There a Need for a Single Enforcement Handbook?' (2015) 16 European Business Organization Law Review 439.

⁵⁶ Herwig CH Hofmann and Alessandro Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through 'Agencification'' (2012) .

⁵⁷ Pieter Van Cleynenbreugel, 'Meroni circumvented? Article 114 TFEU and EU regulatory agencies' (2014) 21 Maastricht Journal of European and Comparative Law 64, 81; Pierre Schammo, 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision?' (2012) 32 Oxford Journal of Legal Studies 771, 779.

⁵⁸ Martin Lodge, 'Regulation, the regulatory state and European politics' (2008) 31 West European Politics 280, 289.

SRM. Most Member States criticized the first SRMR proposal on grounds of allocating too much power to the Commission.⁵⁹ Compared to the final version, the proposal provided that the SRB would recommend to the Commission the initiation of the resolution procedure, the Commission would decide and set the framework of the resolution actions to be taken, and then the SRB would go back to prepare the resolution scheme and address it to the NRAs.⁶⁰ Urgency would suffice to allow the Commission to take over and trigger resolution and set the resolution framework itself.⁶¹ Even the scope of the direct resolution actions that the SRB can take is broader in the final version than in the Proposal since the final version added that the SRB can order the firm under resolution ‘to adopt any other necessary action to comply with the decision in question’.⁶² The alternative of putting the European Council in the forefront was suggested by Germany⁶³ but would have been problematic in times of crisis due to conflicting political interests and time pressure. Therefore, it is safe to argue that the empowerment of the SRB was a conferral of direct decision-making powers in a field of law that essentially replaces national insolvency laws (for credit institutions), and was considered as a preferable option compared to empowering the Commission or the Council.

For the sake of the argument though, let us assume, that the powers were delegated to the SRB. This line of jurisprudence dates back to the *Meroni* ruling, when the Court ruled that delegation to a *private law* body should meet certain criteria, namely that (i) the delegator cannot delegate powers that it does not possess under the Treaties (conferral prohibition), (ii) the powers delegated need to be necessary for the performance of the tasks of the delegator, (iii) only clearly defined executive powers can be delegated – not powers that can be discretionary to the extent of enabling policy choices by the agency.⁶⁴ Less known, and sometimes integrated into *Meroni*, is the *Romano* ruling, which ruled that the administrative authority could not adopt ‘acts having the force of law’ (binding acts) since that would impinge on the Commission and the Court’s powers.⁶⁵ Those two cases had one common denominator; there was no possibility for judicial review at the time.⁶⁶

Since then, a lot has changed and the Lisbon Treaty now acknowledges the reality of agencies’ existence, yet it does not explicitly regulate their empowerment and its limits. Today, agencies’ decisions can be judicially reviewed just as any other decision by an EU body pursuant to Articles 263, 265(1), 267(1)(b), 277 TFEU. Even the gap regarding non-contractual liability of agencies, has been filled in by the Court.⁶⁷

⁵⁹ European Commission, Proposal for a Regulation 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 Bank Resolution Fund, 10 July.

⁶⁰ Art 16, Proposal.

⁶¹ Art 16(6), Proposal.

⁶² Art 29(2)(c), SRMR which does not exist in the respective article 26(2) of the Proposal.

⁶³ Howarth and Quaglia, n 6 supra.

⁶⁴ *Meroni*, n 1 supra, para 152.

⁶⁵ Case 98/80 Giuseppe Romano v Institut national d'assurance maladie-invalidité, ECLI:EU:C:1981:104, para 20.

⁶⁶ AdvG, n 53 supra, para 64.

⁶⁷ T-411/06 Sogelma v European Agency for Reconstruction, ECLI:EU:T:2008:419.

In this context, *Short-selling*, in all its controversy – given the fact that it did not touch upon the delegation/conferral issue and it refused to classify the establishment and empowerment of ESMA under either Article 290 or 291 TFEU, thus leaving the scope of the typology of acts open⁶⁸ – did simplify *Meroni*. In essence, the Court narrowed down *Meroni* to the single requirement of prohibiting the delegation of discretionary powers unless they were adequately delineated and thus, amenable to judicial review.⁶⁹ In its argumentation, the Court did not refer to the principle of institutional balance. However, I agree with the Advocate General’s opinion who read this sole *Meroni* requirement as a reflection of the institutional balance principle and the concerns for effective judicial review,⁷⁰ which can be also subsumed under institutional balance.

Shifting from delegation to conferral should not change the final outcome. The Court always assumed that empowerment was occurring by means of delegation instead of conferral, and thus never elaborated on the consequences of such distinction. One precedent exists, when in 1985 the Legal Service of the Council rejected the notion of delegation to describe the empowerment of the Office for the Harmonisation of the Internal Market, an agency, because “this specific case concerns the conferring of new powers, i.e. powers which have not at the moment been vested in any Community institution ... the decisions of the Court in the *Meroni* Case do not seem to apply in this context”.⁷¹ Instead, the Legal Service applied constitutional principles that were included in the *Meroni* ruling as well.⁷²

That said, given the mellowed *Meroni* after *Short-selling*,⁷³ the distinction between delegation and conferral should not produce different legal outcomes; their common denominator is institutional balance.

Part 3: Institutional balance as the sole compass

Institutional balance for the EU constitutes what separation of powers is for national Member States;⁷⁴ it aims at ensuring the maintenance of the division of powers between the institutions, and ultimately to protect against abusive use of power.⁷⁵ It reflects fundamental values, like democracy, legitimacy and accountability. Applying law and economics theory, institutional balance would be interpreted as a ‘multiple principals’ model, rather than a pure ‘agent-principal’ one.⁷⁶ In that regard,

⁶⁸ *Short-selling*, para 82-83.

⁶⁹ *Ibid*, para 53, 105.

⁷⁰ AdvG, n 53 *supra*, para 92.

⁷¹ Legal Service of the Council, Opinion on the Proposal for a Council Regulation on the Community Trade Mark (5837/85) June 6, 1985, 6.

⁷² Chamon, n 11 *supra*, 383.

⁷³ Jacques Pelkmans and Marta Simoncini, 'Mellowing Meroni: Hows ESMA can help build the single market. CEPS Commentaries, 18 February 2014.

⁷⁴ E Vos and Michelle Everson, 'European Agencies: What About the Institutional Balance?' (2014), 13.

⁷⁵ Institutional balance used to contain also the purpose of individual protection, up until Case 282/90 *Industrie- en Handelsonderneming Vreugdenhil BV v Commission*, ECLI:EU:C:1992:124, para 20-22; Jean-Paul Jacqué, 'Principle of Institutional Balance, The' (2004) 41 *Common Market L Rev* 383, 385-386.

⁷⁶ Renaud Dehousse, 'Delegation of powers in the European Union: The need for a multi-principals model' (2008) 31 *West European Politics* 789.

institutional balance ensures the constitutionality of agencies as long as the different weights assigned to each institution are maintained and respected.

Moreover, this allocation of weights is dynamic and transforms through time; as a general trend, the Commission has been steadily losing out, while the Parliament has been strengthened.⁷⁷ Things become more complicated, though, when additional powers are conferred upon EU bodies, and that was evident during the SRM negotiations. Indeed, in the case of the SRM the stakes were perhaps higher than in any other case of empowerment. The resolution authority, irrespective of whether it would be an agency or an institution, would be equipped with direct resolution powers as well as the power to decide upon the use of European resolution funds. Looking into the future, the SRB is supposed to be also in control of the European fund aimed at protecting depositors (EDIS). That said, I believe it is reasonable to argue that no matter what body would end up taking on those powers – if done in a concentrated rather than dispersed manner – would lead to the disturbance of the existing institutional balance.

In assessing the SRB's compliance with the institutional balance as enshrined in the Treaties, we need to break down institutional balance to its constituent components. To begin with, agencies fall within the same framework as institutions as regards the principle of transparency,⁷⁸ data protection rules,⁷⁹ and the constitutional right of citizens to pose questions and receive answers in their own language.⁸⁰ However, in the case of the SRB and given the sensitivity of the information that it possesses – related to balance sheet information, resolution strategy, etc. – transparency is somehow compromised in the face of financial stability concerns. On that front, the decision of the SRB's Appeal Panel needs to be acknowledged as pivotal in changing the SRB's initial stance against the disclosure of any relevant documentation to its acceptance to disclose non-confidential versions of the resolution documents.⁸¹ Nevertheless, still limited information can be extracted from this documentation, but that is a restriction based, arguably, on legitimate concerns.

That being said, one way of understanding institutional balance is that an agency cannot perform a role that other institutions would be able to perform under article 17 TEU and other specific Treaty provisions. In the case of financial markets supervision, the ESMA has not replaced per se national capital markets authorities, but it has become the sole supervisor of Credit Rating Agencies (CRAs) and has obtained certain direct intervention powers when it comes to placement of financial products. The fact that the Court upheld those powers is not surprising per se, be it not for the fact that it did not deal with institutional balance concerns at all notwithstanding the Advocate General's strong views on that point. And if the supervision of CRAs is a niche area of supervision and the direct intervention powers are indeed limited, there is no doubt that the role of agencies has been upgraded via the SRB. The problem with the SRB, however, does not necessarily lie in the execution phase of a resolution scheme. At that point the ECB has had a say already by declaring a bank as FOLTF, the Commission has observed the workings of the

⁷⁷ Jacqu , n 75 supra, 390.

⁷⁸ Art 15(1) and (3), TFEU.

⁷⁹ Art 16(2), TFEU.

⁸⁰ Art 24, TFEU.

⁸¹ Appeal Panel, cases 38/17-43/17.

SRB, the legal framework is rather granular, and the Commission has always a veto right; this setup is not perfect,⁸² but one cannot argue as a rule of thumb that the institutional balance has been breached. Instead, such a multi-principal dimension lacks in the preventive phase, especially when considering the SRB's governance structure and the significance of its decisions therein.

Another way of understanding institutional balance is through the typology of acts established under articles 290 and 291 TFEU.⁸³ In this case, the lack of clarity is due mainly to the legislator, who did not include the agencies under their scope. In its current reading, article 291 TFEU can justify the empowerment of agencies but only by means of delegation, not conferral. In that regard, the Court's approach in *Short-selling* added to the uncertainty by ruling that the typology list included in articles 290 and 291 TFEU is not exhaustive, and thus other forms of empowerment of agencies can transpire. Following this article's argumentation, conferral of powers to agencies could well occur.

That takes me to the role of the Court. The role of the Court is fundamental to the EU's institutional balance and articles 19 TEU and 47 of the Charter aim to ensure that the Court provides effective judicial protection. The main challenge in that regard is that an agency like the SRB is equipped with wide discretion when deciding. The exercise of this discretion is inherent in the complex technical assessments it conducts under which lie – implicitly or explicitly – policy related choices.⁸⁴ The SRB takes all its decisions based on complex valuations which contain quantifications of the effectiveness of the different national insolvency frameworks compared to EU resolution, specifications of what constitutes critical functions in each case, etc. What is more, looking at the two examples above, that of the Spanish Banco Popular and the Italian Veneto banks, even the final wording of the decisions does not help understand how discretion was exercised in each case.

Digging deeper into discretion, some scholars apply the distinction between 'administrative' and 'technical' discretion, with the idea being that administrative discretion exists when there is still discretion left after all the technical aspects of a given case have been sorted out. In the Court's jurisprudence we could argue that this distinction applied in the recent *Gauweiler* case, where the court assessed the ECB's monetary powers related to the OMT program.⁸⁵ In that case, the Court seems to have trusted the ECB in its assessment of what constitutes financial stability and what does not by broadening the scope of what can fall under the 'facts' category. However, I do not think that one should over-rely on *Gauweiler* when it comes to judicial review since the ECB's decision was not implemented at the time, but it was rather based on a press release following a decision of the ECB Governing Council plus it was

⁸² Moloney, n 6 supra; Damien Geradin and Nicolas Petit, 'The development of agencies at EU and national levels: Conceptual analysis and proposals for reform' (2004), where they see the Meroni-related constitutional restraints as an impediment to the necessary development of EU agencies.

⁸³ Herwig Hofmann, 'Legislation, delegation and implementation under the Treaty of Lisbon: typology meets reality' (2009) 15 European Law Journal 482.

⁸⁴ For a holistic analysis of discretion and judicial review, see Joana Mendes, 'Discretion, care and public interests in the EU administration: Probing the limits of law' (2016) 53 Common Market Law Review 419; Joana Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) 80 The Modern Law Review 443.

⁸⁵ Case 62/14 Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400.

dealing with issues of monetary policy, which are not specified anywhere else apart from the broad wording of the Treaties.⁸⁶

Instead, I would rather argue that one looks at the latest decisions of the General Court regarding the definition of leverage ratios by the ECB.⁸⁷ There, the dispute between the French Banque Postale and the ECB related to the calculation of the former's leverage ratios according to the capital requirements regulation (CRR).⁸⁸ Under article 429(14) CRR, the law allowed for certain low-risk financial products to be exempted from calculation. The ECB, which had discretion to decide (the Court confirmed ECB's discretion), rejected the bank's request to proceed with the exemption, even though the requirements under article 429(14) CRR were fulfilled. The Court dug into the details of how the ECB exercised its discretion and concluded that the ECB conducted a manifest error by basing its rejection on liquidity risk concerns, even though controlling for liquidity risk was beyond the scope of the said provision.⁸⁹ As a result, it argued that upholding the ECB's decision would turn article 429(14) CRR practically inapplicable (effet utile argument). This latest judgment by the Court proves that it can indeed provide effective judicial protection against discretion that is exercised on the basis of complex financial technical assessments, by digging even into the overall objective of the provision in question. Two additional points. On the one hand, this case proves that when a rule is sufficiently granular, as is the case with prudential as well as resolution rules, the Court can indeed conduct a full review without risking of going beyond its mandate and replacing the administrative body, which would breach institutional balance. In that regard, whether the Court applies a stringent standard of review, as in competition law cases following *Tetra Laval*,⁹⁰ or a more lenient judicial review based on the principle of the duty of care⁹¹ should lead to similar outcomes when the law is that granular and specific. On the other hand, though, in all its complexity, the ECB's error was indeed manifest, and the political significance of the case rather low.

Overall, no judicial approach to discretion is perfect, and that has been historically observed also in the most stringent standard of review that applies in competition law.⁹² Besides, the Court's role is also restrained by institutional balance; as the Court puts it 'the Court must limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers'.⁹³ In other words, the Court cannot heal the questionable institutional legality of an agency; in our case of the SRB. Going back to the 'multi-principals' model of institutional balance, increasing the weight on an agency does not seem to be counterbalanced by

⁸⁶ Mendes, n 84 supra, 421.

⁸⁷ T-733/16 La Banque postale v ECB, ECLI:EU:T:2018:477.

⁸⁸ Regulation 575/2013/EU.

⁸⁹ Banque postale, n 87 supra, para 75-78.

⁹⁰ Case 12/03 Commission of the European Communities v Tetra Laval BV, ECLI:EU:C:2005:87, para 39, 43, where the Court interpreted the information that was considered of an economic nature in order to identify whether the Commission in that case decided based on facts that adequate, accurate, reliable, consistent, and capable of substantiating the conclusions drawn from it.

⁹¹ Herwig CH Hofmann, 'Delegation, Discretion and the Duty of Care in the Case Law of the Court of Justice of the European Union' (2018).

⁹² Pablo Ibanez Colomo, *The shaping of EU competition law* (CUP 2018).

⁹³ C-42/84 Remia BV and others v Commission, ECLI:EU:C:1985:327, para 34.

any other institution. This, of course, does not mean that the SRB is an agency beyond any control. My argument is that these restraints, be it endogenous – i.e. the Commission’s veto power and the Court’s judicial review – or exogenous – i.e. economic reality⁹⁴ – do restrain the SRB, but at the same time do position the SRB in a hierarchical superior position than all other agencies in the past, especially when considering its governance structure and policy-making powers in resolution planning; and that, in my mind, is a breach of the principle of institutional balance.

Part 4: Beyond institutional balance, to constitutional transformation

Throughout the lifetime of the EU it is not the first time that such legal deadlocks have been reached; and it is not the Court’s fault either. It is rather a structural flaw of the EU as a sui-generis polity. Given the dynamic nature of institutional balance and given the inherent difficulty to amend the treaties in a timely manner, it is only logical that, sometimes, political reality will not be reflected into the legal one. Such was the Chernobyl case that led to the strengthening of the rights of the European Parliament, even though this mutation was pushed towards (intuitively) the right direction; that of promoting democracy within the EU.⁹⁵

This paper argues that a change in the notion of institutional balance has occurred post-crisis. The fact that the SRB was empowered with technical competences with clear policy-related implications, and the clear preference of the Member States to empower the SRB instead of the Commission, reflects a deeper transformation, a metamorphosis of the evolving relationship between the Union and its Member States. Weiler’s theme of ‘constitutional transformation’ is rather useful in this case.⁹⁶ At the core of this theory stands the need to understand constitutional change beyond formal amendment, which goes beyond a broad constitutional interpretation.⁹⁷ Such a tool would allow us to avoid a final conclusion on the SRB’s compliance with the existing institutional balance as legal or illegal, but provide as an alternative instead.

Constitutional transformation requires three constituent components. First, all critical interpretative communities, and most importantly the Member States, need to accept the new meaning that the transformation has infused into the legal rule; in our case the principle of institutional balance. On top of that, the European constitutional adjudicator, the Court, needs to sanction the new meaning, setting forth its

⁹⁴ Also identified in Pablo Ibanez Colomo’s work, see n 92 supra, 330.

⁹⁵ Case 70/88 European Parliament v Council, ECLI:EU:C:1990:217.

⁹⁶ Joseph HH Weiler, 'The transformation of Europe' (1991) Yale Law Journal 2403. Ioannidis used it recently to describe the post-crisis substantive transformation that occurred following the Gauweiler and Pringle rulings, see Michael Ioannidis, 'Europe’s new transformations: How the EU economic constitution changed during the Eurozone crisis' (2016) 53 Common Market Law Review 1237. One of the most recent publications dealing with the post-crisis allocation of powers, see Joana Mendes and Ingo Venzke, *Allocating Authority: Who Should Do what in European and International Law?* (Bloomsbury Publishing 2018); other related publications, Federico Fabbrini, *Economic governance in Europe: comparative paradoxes and constitutional challenges* (OUP 2016) ; Mark Dawson and Floris De Witte, 'Constitutional Balance in the EU after the Euro - Crisis' (2013) 76 The Modern Law Review 817; Bruno De Witte, 'Euro crisis responses and the EU legal order: increased institutional variation or constitutional mutation?' (2015) 11 European Constitutional Law Review 434.

⁹⁷ Weiler, n 96 supra, 2438; De Witte, 'Euro crisis responses and the EU legal order: increased institutional variation or constitutional mutation?', 436.

understanding for subsequent cases.⁹⁸ Second, constitutional transformation requires a narrative. Whilst Weiler used the economic concept of exit and voice,⁹⁹ I apply Ioannidis' modified version that is based on the concept of moral hazard.¹⁰⁰ In particular, Ioannidis used moral hazard since his aim was to create a narrative that would justify the shift from market financing to public financing, and from market discipline¹⁰¹ to bureaucratic discipline. Moral hazard in the case of the SRM relates to risk-sharing as provided through the use of European resolution funds (SRF) with the (theoretical) backstop of the ESM.¹⁰² Moreover, given the political reluctance to move towards a fiscal union, a fully operational Banking Union with centralised governance is necessary to provide for a common level playing field, which goes beyond harmonized rules to harmonized enforcement, in order to promote cross-border banking and thus, risk-sharing at an individual level instead of at a state level. In other words, an additional factor to this narrative is the need to create a banking union that will function as a credible shock absorber within Eurozone.¹⁰³ The third component is the explanation of the Member States' stance towards these transformations. In both Weiler and Ioannidis, Member States supported these transformations under the consideration that they would retain or even augment their power.¹⁰⁴ In the case of the SRB, the acceptance of the transformation by the Member States was a necessity rather than a choice; the least negative scenario for governments to save their banks and themselves.

Applying the theory of constitutional transformation in the case of the SRB would allow as to recognise that within Eurozone the governance of banking and financial markets industry needs to be elevated at the EU level due to financial stability risks that one Member State's malpractice might generate for the entire Eurozone, but also due to the need to have harmonized rules and enforcement in order to allow for the much needed cross-border consolidation within the banking and financial markets sector. Endorsing this transformation would allow for a fully functional Banking Union and Capital Markets Union to arise without the political impediments that the current constitutional framework imposes. The Veneto banks case illustrates the controversy to which the current framework can lead to.

To add to that, a fully independent, institution-like SRB, would allow the incorporation within the SRMR of the much needed flexibility that the SRM requires. Each resolution case is different and a 'one size fits all' approach cannot apply in all cases. Indeed, sometimes, limited bail-in together with limited bailout might be economically preferable to a full bail-in. At the moment, by trying to limit the discretion of the resolution authority, we effectively push Member States to find alternative ways of bypassing the European framework in order to avoid a strict bail-in. Upgrading the SRB would open the way for some sort of flexible solution as the

⁹⁸ Weiler, n 96 supra, 2437; De Witte, n 97 supra, 448.

⁹⁹ Weiler, n 96 supra, 2410-2412.

¹⁰⁰ Ioannidis, n 96 supra, 1245-1247.

¹⁰¹ On the way the Court constructs 'market discipline' in its very absence as a legal requirement, see Harm Schepel, 'The Bank, the Bond, and the Bail - out: On the Legal Construction of Market Discipline in the Eurozone' (2017) 44 *Journal of Law and Society* 79.

¹⁰² On moral hazard in the EMU, see Paul De Grauwe, 'The governance of a fragile Eurozone' (2012) 45 *Australian Economic Review* 255.

¹⁰³ Ansgar Hubertus Belke and Daniel Gros, 'Banking Union as a Shock Absorber' (2015) *Ruhr Economic Paper* No 548.

¹⁰⁴ Weiler, n 96 supra, 2450; Ioannidis, n 96 supra, 1247.

IMF has suggested; that of incorporating a ‘financial stability’ clause in the SRM that would allow for full bail-in to be circumvented if justified on financial stability grounds.¹⁰⁵

Moreover, I believe that the theory of constitutional transformation allows us to better understand *Short-selling*. The fact that the Court’s Grand Chamber did not justify why it did not take into consideration the Advocate General’s legitimate concerns is, in my mind, the first signal of acceptance by the Court of the ongoing constitutional transformation that relates to the role that EU agencies have within the EU institutional setup.

Building upon *Short-selling*, the Court has the opportunity to explicitly acknowledge the economic reality that generates the need for politically neutral entities to participate in the economic governance of the EU. Under this post-transformation institutional balance, agencies should be entrusted in taking up discretionary powers that would go beyond complex technical assessments and would recognise the need for some sort of policy-related decision-making. This would contribute to the strengthening of the current institutional balance ‘multi-principal’ model by adding agencies as another intermediate pillar of governance between Member States and the EU. At a later stage, Member States should step up and integrate these changes into the post-Lisbon treaties.

One would, of course, wonder why the EU has yet to officially accept this transformation, if all parties are better off in the end. Once again, it all comes down to the people.¹⁰⁶ To this day, even post-crisis, the strong belief of attaching legitimacy to the nationals prevails, and is particularly, evident in the banking sector.¹⁰⁷ The EU currently struggles to find an alternative model. Even the outcome-based legitimacy that the EU enjoyed since its early years no longer sounds appealing given the distrust that followed the Eurozone sovereign debt crisis.¹⁰⁸ The only certain thing is that until some sort of political union occurs, and some sort of European ‘demos’ evolves to the point of impacting European politics, what European and national constituencies will expect from the SRB, and agencies alike, will be to square the circle by balancing democratic and efficiency concerns.

Conclusion

At the end of this analysis, it is useful to pause and consider how EU agencies were envisaged to be ten years ago and how the SRB is actually structured and empowered today. The differences are evident. In essence, this was the first goal of this paper – to invite the reader to understand how the SRB’s powers are structured and what sort of safeguards are put in place.

¹⁰⁵ IMF, Financial Services Action Plan, July 2018.

¹⁰⁶ This theme shows up in both Weiler and Ioannidis’ work.

¹⁰⁷ Shawn Donnelly, 'Liberal economic nationalism, financial stability, and Commission leniency in Banking Union' (2018) 21 Journal of Economic Policy Reform 159.

¹⁰⁸ Joseph HH Weiler, 'Europe in Crisis-On Political Messianism, Legitimacy and the Rule of Law' (2012) Sing J Legal Stud 248.

The second goal of this paper was to point out to the fact that the SRB's empowerment has been a conferral rather than a delegation of powers, and that the only yardstick for an agency's legality is its compliance with the principle of institutional balance. Comparing the constitutional limits that are put into empowerment through delegation – that is today, the mellowed *Meroni* ruling – and the ones that are put through conferral, it makes no more sense, in my mind, to stick to the *Meroni* judgment since it all comes down to whether an agency is aligned or not with the principle of institutional balance. The *Short-selling* ruling in this context and in all its controversy has been decisive in opening up the way to allowing the conferral of powers to agencies.

The third goal was to understand whether the SRB actually complies with the current EU institutional balance. While acknowledging the strict environment that the SRB is called upon to operate, namely the granular legal framework and the Commission's veto power, one cannot but acknowledge the policy-related dimensions in the SRB's decision-making. This is particularly true in the resolution planning phase, when the SRB's executive session takes binding policy decisions that affect the entire resolution process. This elevation of the SRB's empowerment that goes beyond technical assessment and extends to policy-making considerations combined with its unique (apolitical) governance structure is what leads me to conclude that the SRB's establishment disturbs the current institutional setup.

That takes me to the fourth goal of this paper, which was to suggest a way out of this constitutional deadlock. In this vein, the analysis was based on Weiler's theme of constitutional transformation. Applying this theme is particularly useful not only for interpreting the *Short-selling* case, and legitimizing the SRB beyond doubt, but also sets the foundations for a fully-fledged banking union and capital markets union to occur.