

European Banking Union. EU Law Aspects of Slovak and Czech Non/Membership in the Banking Union

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Abstract

Background: The financial turmoil of 2007–2009 exposed egregiae debilitas in the decentralized supervisory frameworks within the European Union. Coordination among competent national authorities proved insufficient, reflecting incorrecta implementatio of EU law. The envisaged harmonization under the Single Rulebook revealed a de facto divergentia interpretativa, as purportedly uniform norms were applied and enforced heterogeneously, resulting in the absence of uniformis applicatio of supervisory law. In response, the European Banking Union (Unio Bancaria Europaea), formally launched in 2012, sought to remedy these deficiencies. It emerged as a projectum prioritarium at the European level, enabling consistent enforcement of EU banking regulations among participating Member States following the attributio competentiarum to supranational institutions. Newly instituted decision-making procedures and supervisory tools enhance transparency, market integration, and financial stability. While all euro area countries are automatically subject to European banking supervision, non-euro EU Member States retain the discretion to participate (optio participationis). The present study interrogates Slovak participation and Czech non-participation, assessing their implications for domestic banking sectors with particular reference to the potential infringement of the fundamental freedoms enshrined in the Treaties.

Aim: The principal research question (quaestio scientifica principalis) can be articulated as follows: Are the divergences in banking regulation contingent upon a Member State's membership in the Banking Union compatible with the principium unitatis mercati? If non-compliant, which legal or regulatory measures (remedia juridica) are required to restore conformity?

This inquiry is operationalized through the analysis of Slovak and Czech legislative frameworks. It is posited that the correcta institutio of prudential norms at the EU level, combined with national responsibility for supervision and bank resolution, corresponds to the principium subsidiaritatis under the founding Treaties. Although all EU Member States (except Denmark) have the obligation to adopt the euro, accession to the Banking Union remains non-mandatory (non obligatio legalis). Central to this analysis is the question whether, under specific circumstances, disparities in supervision could constitute an obstacle to the libertas establishmentis. Notably, the largest and most systemically relevant banks in both markets are subsidiaries of foreign financial institutions.

To address this, the study undertakes a comparative examination of the legal and institutional frameworks governing banking supervision and resolution in the Czech

Republic, a non-Banking Union Member State, and Slovakia, a Banking Union participant with a structurally analogous banking sector. To facilitate rigorous analysis, the formulation of sub-questions (sub-quaestiones) is employed, further specifying the resolution of the principal scientific inquiry.

Methods: Methodologically, this study relies upon desk research encompassing five categories of sources, integrating both primary legislation and doctrinal literature. The generally accepted *methodi iuris interpretativi* are applied, including *interpretatio verbalis/grammatica*, *interpretatio systematica*, *interpretatio historica*, and *interpretatio teleologica*. These analytical tools are deployed within a rigorous legal discourse framework to ensure fidelity to both EU and national legal norms.

Results: This paper aims to elucidate the regulatory and institutional architecture of the European Banking Union via a comparative lens, contrasting banking supervision, prudential regulation, and resolution mechanisms in the Czech Republic and Slovakia – two Member States of analogous structural composition but differing integration levels within the Banking Union. By analyzing the allocation of competences, the reception and implementation of EU banking law (including *soft law*), and the availability of legal remedies for banking institutions, the study assesses whether the extant asymmetry between Banking Union and non-Banking Union Member States coheres with foundational EU principles, particularly *libertas establishmentis*, *principium proportionalitatis*, and the integrity of the internal market.

The Czech Slovak comparison, given their shared legal heritage and interconnected financial sectors, affords a unique perspective on the practical and juridical ramifications of opting into, or abstaining from, deeper financial integration. The findings contribute not only to academic discourse but also to *consilium publicum* for Member States deliberating participation in multi-speed integration schemes within the EU.

Keywords

Banking Union, EU banking law, supervision, resolution, Czech Republic, Slovakia, *libertas establishmentis*, subsidiarity, proportionality

JEL Codes

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1.1 Introduction: From the past to financial crisis 2008

One of the enduring ideals of European integration is to secure peace in Europe through economic and political integration.¹ The Treaty of Rome of 1957 did not include a financial market as one of the components of the common market. The project of a European financial market started to develop two decades later as a second order objective to that of the common market. The basis for a European financial market is provided by the exercise of the three freedoms – capital, services and establishment.² The freedom of movement of capital was secondary to those relating to the provision of goods and services, as it was subordinated to the development of the common market as a whole, rather than considered as one of its essential components.³

The legal history of the Banking Union starts when the first generation of the Community law instruments on financial services emerged in the mid-1970s. This period is characterized as integration through harmonization. The first implemented directive was in 1973 Directive on the abolition of restrictions on freedom of establishment of banks.⁴ In 1977, The First Banking Directive started the long process of harmonization of national laws towards a common market in banking services.⁵ The First Banking Directive of 1977 stated in the recitals that it was at the initial stage of the process to create a European banking market through the elimination of the most obstructive differences between the laws of MS regarding credit institutions. It also introduced a legal framework for co-operation between home-country and host-country authorities. The principle of home-country control in financial services also emerged in the context of the Consolidated Supervision Directive of 1983.⁶ The First Banking Directive provided that the development of a European banking market would rely, together with the full harmonization of national laws, on the institutional cooperation between national authorities through European committees. But overall, the European banking market remained fragmented.⁷

1 HALTERN, Ulrich. *Europarecht. Dogmatik im Kontext. Band I: Entwicklung, Institutionen, Prozesse.* Mohr Siebeck, 2017, p. 191.

2 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market.* Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 16.

3 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market.* Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 16.

4 Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self – employed activities of banks and other financial institutions.

5 First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

6 Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis.

7 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market.* Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 32.

The Court's jurisprudence on the freedom of movement of goods of *Dassonville* of 1974 and, in particular, the *Cassis de Dijon* decision of 1979⁸ formed the basis for the mutual recognition principle. According to this principle, in the absence of harmonization, goods and services lawfully marketed in one MS can be sold in other MSs regardless of complying or not with the national technical rules of these MSs. In the field of services, the mutual recognition principle was first applied in the *Säger* case⁹ The implication of the Court's jurisprudence for the single market was that integration could be advanced by constraining the regulatory autonomy of MSs (MS) in protecting their national markets. Market integration could be pursued through liberalization and deregulation. The cross-border provision of financial services would be facilitated essentially through the extension of the *Cassis de Dijon* doctrine from industrial and agricultural products under Article 30 of the EEC Treaty to the free circulation of financial products throughout the Community.

This would involve the application of three legal principles.¹⁰ First, the *principle of home-country control*. The primary task of regulating a financial institution and its branches would be entrusted to the authorities of the MS of origin instead of the host MS' (as well). The second principle was establishing the *mutual recognition by MS and their respective authorities*. Third, home-country control and mutual recognition would be supported by the *minimum harmonization of national laws*, which would set the standards regarding authorization, supervision and winding-up of financial institutions. Minimum harmonization is the definition of a common minimum standard from which the MSs can deviate to incorporate stricter measures. The application of these principles would provide a single passport to financial institutions. This means that they can establish branches in other EEA countries or provide financial services across the EEA without the need for further authorization. Directive 88/361¹¹ established the principle of free movement of capital as directly enforceable as a matter of Community law, both between MS and with third countries. The freedom of capital movements and payments between MS or between MS and third countries in its entirety became a Treaty principle with the entry into force of the Maastricht Treaty.

The single passport for the cross-border provision of financial services was the pivotal instrument for the building-up of the single financial market. The Second Banking Directive (Directive 89/646/EEC)¹² was the instrument for achieving the freedoms of establishment and to provide financial services for credit institutions. Regarding mutual recognition, the credit institutions authorized in one MS would be able to provide across

8 *ECJ Decision, case C-120/78, Rewe Zentral AG.*

9 *Judgment of the Court (Sixth Chamber) of 25 July 1991. Manfred Säger v Dennemeyer & Co. Ltd. Reference for a preliminary ruling: Oberlandesgericht München - Germany. Freedom to provide services - Activities relating to the maintenance of industrial property rights. Case C-76/90.*

10 *More to this topic in: TEIXEIRA, Pedro Gustavo. The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market. Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 44.*

11 *Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.*

12 *Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC.*

the Community, directly or through branches, those financial services listed in Annex 1 of the directive. The next step was to secure the higher degree of harmonization of national laws compared to the previous period.¹³ In the banking sector, the Capital Requirements Directive (CRD I)¹⁴ replaced the previous banking directives in order to transpose the Basel II Framework.¹⁵ Basel II is a set of international banking regulations first released in 2004 by the Basel Committee on Banking Supervision. It expanded the rules for minimum capital requirements established under Basel I, the first international regulatory accord, provided a framework for regulatory supervision and set new disclosure requirements for assessing the capital adequacy of banks.¹⁶ The expansion of home-country control took place in 2004 with the concept of the consolidating supervisor of banking groups in the Capital Requirements Directive (CRD I), which implemented the Basel II Framework. The expansion of the home-country control was later complemented by the CRD II concept of college of supervisors, which was chaired by the consolidated supervisor and gathered the national supervisors of the subsidiaries and of the systemic branches of the banking group. The difference between a branch and a subsidiary is that while the branch remains an inseparable part of the larger company, the subsidiary is a legally separate company, albeit under the de facto management of a different, parent company.

1.2 The Establishment of the Banking Union

The financial crisis of 2008 was followed by the sovereign debt crisis in the euro area in 2010. The need for a Banking Union emerged from the financial crisis. It became clear that, especially in a monetary union such as the euro area, problems caused by close links between public sector finances and the banking sector can easily spill over national borders and cause financial distress in other EU countries.¹⁷

13 *European Commission, Financial Services: Implementing the framework for financial markets – Action Plan, COM (1999) 323 final.*

14 *CRD I: Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast). Replaced by CRD II: Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management. CRD III: Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies. Current in force as CRD IV: Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.*

15 *Basel II is the second set of international banking regulations defined by the Basel Committee on Bank Supervision (BCBS).*

16 *Bank for International Settlements. "History of the Basel Committee." History of the Basel Committee (bis.org) (6.2.2023).*

17 <https://www.bankingsupervision.europa.eu/about/bankingunion/html/index.en.html>

First, in 2010, European Financial Stability Framework (ESFS) was created. The ESFS fulfils three functions: the prevention of a crisis, the management of a crisis, and crisis resolution. Crisis prevention starts with the regulation of the financial system to ensure its safety and soundness. This is enforced by supervisory authorities, which are responsible for ensuring compliance by financial institutions. If a crisis emerges, supervisors may take corrective measures to manage crisis. Finally, if the bank cannot continue to operate, it is resolved, restructured, or liquidated.

The EU single market remains the EU's most precious asset for citizens and businesses. It provides enormous opportunities for businesses, and a greater choice and better prices for consumers. But these benefits cannot be enjoyed if single market rules are not applied or implemented, or if they are undermined by other barriers.¹⁸ The CRR and CRD represent a comprehensive substantive harmonization of banking law at European level (law on the books). However, until the establishment of the SSM, the MS were responsible for its application (law in action).

The European dimension of the financial and sovereign debt crisis was caused in particular by the lack of information exchange between the NCAs.¹⁹ The supervisory authority of one MS applies the legal standards differently than the authority in another MS.²⁰ The basis for this is formed by the legal and factual room for maneuver of the NCAs. An efficient decision-making arrangement faces the challenge of balancing the tension between MS expertise on the one hand and supranational institutions with their independence from MS interests on the other.²¹ In the multi-level system of banking supervision in the single market and monetary union, the stability of the European system is a public good. The coordination problems of the NCAs result in regulatory failure. Within the single European market - and even more so within the monetary union - the costs of inadequate supervision are not borne by one MS alone, but by all MSs and their citizens.²²

Economic integration within the EU would be incomplete until MSs relinquished policies at the core of their sovereignty: budgetary, financial, and social policies and monetary policy.²³ The creation of the Banking Union was a crucial step towards completing economic integration into the EU. The Banking Union is the most advanced form of supranational legal and institutional integration within the single market.²⁴

18 von der LEYEN, Ursula. In: *Monitoring the Application of European Union Law, Annual Report 2019*, S. 12. https://ec.europa.eu/info/sites/info/files/file_import/report-2019-annual-report-monitoring-application-eu-law_en.pdf

19 KÖHLER, Lukas Philipp. *Rulemaking in der Bankenunion*. Mohr Siebeck. Tübingen. 2020., S. 105.

20 KÖHLER, Lukas Philipp. *Rulemaking in der Bankenunion*. Mohr Siebeck. Tübingen. 2020, p. 31.

21 KÖHLER, Lukas Philipp. *Rulemaking in der Bankenunion*. Mohr Siebeck. Tübingen. 2020, p. 31.

22 KÖHLER, Lukas Philipp. *Rulemaking in der Bankenunion*. Mohr Siebeck. Tübingen. 2020, p. 31.

23 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market*. Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 1–2.

24 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market*. Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 2.

Subsequently, in 2012, the Euro Summit announced the creation of a Single Supervisory Mechanism. It would become the first pillar of the Banking Union. The previously depoliticized regulation became politicized in the aftermath of the crises.²⁵ It was concluded by the Council that Article 127(6) TFEU would provide the legal basis for the transfer of banking supervision competences to the ECB. At the core of the SSM was the transfer of exclusive competences in banking supervision to the ECB. The ECB was entrusted with the large part of the supervisory competences provided by EU law to national supervisors at competent authorities. This included the authorization of all banks and the withdrawal of their license in the jurisdiction of the SSM as the sole competence of the ECB, ensuring compliance of credit institutions with prudential requirements, supervisory review, supervision on a consolidated basis, supervision of branches from credit institutions authorized in the EU, supplementary supervision of financial conglomerate, early intervention measures, limits to compensation of managers, administrative sanctions, and imposing structural changes in banks. The decentralization mechanism consists of a distinction between significant and less significant banks within the SSM. The exclusive competences of the ECB regard the direct supervision of the banks and banking groups, which are considered significant. The national supervisors supervise less significant banks based on the regulations, guidelines, or general instructions of the ECB, in order to ensure the consistency of supervisory outcomes within the SSM. For the exercise of these competences, the ECB had the specific powers provided in the SSMR.

Like the SSM Regulation, the SRM Regulation aims to shift decision-making competencies from the national to the European level in order to ensure the uniform application of substantive bank resolution law in the euro area MSs. The division of competencies between ECB and national (resolution) authorities is close to that as in SSM. SRM obliges and forces the national resolution authorities to take the measures required for implementation.

In 2015, as part of a package of measures to strengthen economic and monetary union, the European Commission issued a legislative proposal to establish EDIS. The aim of EDIS is to create a common deposit insurance mechanism separate from public budgets, to strengthen financial stability and to ensure that citizens have confidence in the protection of their deposits, regardless of the geographical location of a bank. However, to date no political agreement has been reached and so EDIS remains an unfinished project.

The main rationale for the Banking Union was to address the main exacerbating factor of the sovereign debt crisis: the link between sovereigns and banks. Following the financial crisis in 2008, the soundness of banks became dependent on the fiscal capacity of their respective MS to support them with public funds.²⁶ The creation of the Banking Union was a fundamental legal change in the single financial market. The Banking Union also led

25 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market*. Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 184.

26 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market*. Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 217.

to a process of differentiation of the single financial market, which became more deeply integrated within the euro area and more fragmented regarding the MS not participating in the euro.

With the Banking Union, banks became Europeanized or encapsulated in a European legal order. They are no longer subject only to national authorities or dependent on the fiscal capacity of their MS to rescue them. Another implication of the Banking Union is to repair the single financial market, which had been renationalized since the 2008 financial crisis.²⁷ We observe renationalization when there is a lack of implementation of single market commitments by the MSs or when the MSs abandon initiatives for supranational harmonization (e.g. in joint standard setting in the single market) and revert to national solutions instead.²⁸

The creation of the Banking Union has brought at least three remarkable changes. Firstly, Banking Union is an example of judicialization in the EU as additional legal mechanisms are being set up between authorities from different MSs. Secondly, the Banking Union brings for multinational banks new opportunities to minimize operating costs based on benefits from uniform regulation across MSs and the associated greater predictability of changes. And thirdly, in context of Banking Union we also speak about executive federalism. There has been a delicate shift of competences towards a federal structure of the European Union, at least for the time being in banking regulation.²⁹ The system of competences of the SSM, which combined the competences of the ECB and national authorities in banking supervision, was also another institutional innovation in the sense that it is the most intensive transfer of national competences to the EU level. The SSMR included decentralization of operational tasks, preservation of tasks with national authorities within a framework akin to delegation, and aspects resembling a dual banking model.

The Banking Union is one of the priority European projects whose main objective is to create a more transparent, unified, and safer market for banks.³⁰ The Banking Union is a crucial step towards a genuine Economic and Monetary Union. A common system of uniform rules with uniform supervision by the European Central Bank allows for the consistent application of EU banking rules in the participating countries. In the Banking Union, EBA and ECB make a significant contribution to the defense against risks to the European financial system.

27 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market*. Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337, p. 218–219.

28 RAUDLA, Ringa, SPENDZHAROVA, Aneta. *Challenges to the European single market at thirty: renationalisation, resilience, or renewed integration?* Taylor Francis Online, p. 1–17.

29 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market*. Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 230.

30 <https://www.bankingsupervision.europa.eu/about/bankingunion/html/index.en.html>

However, not every MS of the European Union is also a member of the Banking Union. The main motivation for not joining a Banking Union is to retain competence at the level of the nation state. In a center of this approach is the postulate that the state is melting in the EU like sugar in coffee.³¹ However, it is worth remembering here that the European Union is characterized by legal pluralism, dialogue and the renunciation of hierarchical solutions and last words.³² In this regard, the principle of mutual trust is intended to ensure the unity and effectiveness of uniform Union law.

The TFEU conferred exclusive central banking competences in the EU to the European System of Central Banks (ESCB), comprising the ECB with its own legal personality and the national central banks (NCBs) of the participating MS.³³ The decisions are taken by the decision-making bodies of the ECB, the Governing Council and the Executive Board. The implementation of decisions is conducted by the whole ESCB, since the ECB is obliged to have recourse to the NCBs to carry out operations which form part of the tasks of the ESCB.

The Banking Union represents a multi-level governance model fusing together the supranational and national levels and converts them into a one European regulatory system.³⁴ The European Central Bank is entrusted with independent regulatory powers, including the ability to directly impose sanctions for the enforcement of such powers.

The ECB integrates the NCAs into its direct supervision by forming joint supervisory teams (JSTs). In this way, it activates the local capabilities of the NCAs, but at the same time increases the the risk of capture by special interests.³⁵ Legally, the ECB is permitted to enforce the EBA standards within the SSM with its own guidelines, to avert, specify or tighten them. The ECB's guidelines in indirect supervision are legally-binding vis-à-vis the NCAs. As part of its indirect supervision, the ECB can also issue "general instructions" to the NCAs. General instructions are binding on the NCAs and oblige them to take direct action vis-à-vis a large number of institutions.³⁶

The Single resolution board, established by the SRM regulation, is a fully independent EU agency acting as the central resolution authority within the banking union. Together with the national resolution authorities of participating countries, it forms the SRM. The mission of the SRB is to ensure the orderly resolution of failing banks with minimum impact on

31 *Isensee, Am Ende der Demokratie – oder am Anfang?*, Berlin 1995, S. 55. In: Ulrich Haltern, *Europarecht und ich*, JöR N.F. Bd. 68 (2020), i.E.

32 HALTERN, Ulrich. *Europarecht und ich*, JöR N.F. Bd. 68 (2020), i.E.

33 Art. 129(2) TFEU and 9.1 of the Statute of the ESCB and the ECB (Protocol No 4 on the Statute of the European System of Central Banks and of the ECB).

34 TEIXEIRA, Pedro Gustavo. *The legal history of the European Banking Union: how European law led to the supranational integration of the single financial market*. Oxford, UK: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, xxv, 337. ISBN 978-1-50994-062-2, p. 103.

35 Kaufhold, *AöR* 2018, 86, 99.

36 KÖHLER, Lukas Philipp. *Rulemaking in der Bankenunion*. Mohr Siebeck. Tübingen. 2020, S. 219.

the real economy and the public finances of banking union countries and managing the single resolution fund.³⁷

After the creation of the Banking Union in 2013, the Slovakia being a Euro-MS joined the European Banking Union with common supervision and common rules for crisis management procedures. The Czech Republic is not participating in the Banking Union. In Czechia is NCA and also NRA Czech National Bank. In Slovakia is NCA National Bank of Slovakia and NRA Slovak Resolution Council.

NCBs, too, have been influenced by the European integration process: they operate within the ESCB. NCBs are NCAs and NRAs in the framework of the BU.

1.3 Banking Regulation in Slovakia and Czechia

The modern regulatory trajectories of Slovakia and Czechia cannot be understood without recalling their shared constitutional and economic heritage. The peaceful dissolution of the Czech and Slovak Federative Republic on 1 January 1993 resulted not only in the establishment of two sovereign states, but also in the creation of two independent central banks – Národní banka České republiky (ČNB) and Národná banka Slovenska (NBS) – each inheriting institutional know-how from the former federal State Bank of Czechoslovakia. While both countries subsequently entered the European Union on 1 May 2004 under identical accession conditions, their approaches to monetary integration and financial-sector governance diverged significantly over time.

Slovakia proceeded rapidly on the path toward adopting the single currency, joining the euro area on 1 January 2009 after fulfilling the Maastricht convergence criteria. This move decisively anchored the Slovak banking sector within the structures of Economic and Monetary Union (EMU) and later, automatically, within the European Banking Union, which encompasses the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). Consequently, prudential oversight of significant Slovak banks is exercised directly by the European Central Bank (ECB), while the NBS cooperates closely with the ECB in the performance of supervisory tasks. Slovak banks therefore operate under a unified, supranational supervisory regime in which regulatory standards – both “hard law” and “soft law” – are interpreted and enforced consistently within a centralized framework.

Czechia took a markedly different route. Although the Czech Republic expressed a treaty obligation to adopt the euro (with the permanent opt-out available only to Denmark), it has not yet set a timetable for euro-area accession and has remained outside the Banking Union. As a result, the Czech National Bank retains full sovereign authority over macroprudential and microprudential supervision of Czech banks, as well as over crisis management and resolution. The Czech regulatory system must, of course, comply with all relevant EU directives and regulations, but its supervision remains nationally anchored and displays a higher degree of regulatory discretion. The ČNB regularly aligns

³⁷ https://finance.ec.europa.eu/banking-and-banking-union/banking-union/single-resolution-mechanism_en

its supervisory practice with guidelines and recommendations issued by the European Banking Authority (EBA), yet – unlike NBS or ECB – its adherence to EBA “soft law” is voluntary and not legally enforceable. This means that the Czech system is stable and largely convergent with EU standards only because the ČNB chooses to follow EBA guidance; this alignment is institutional rather than legally mandatory and can, at least in theory, be altered unilaterally at any time.

These divergent choices have produced a structural asymmetry between the two countries within the EU internal market. Slovakia is fully integrated into the Banking Union’s supervisory and resolution architecture, whereas Czechia remains within the Single Market but outside Banking Union mechanisms. This, in turn, raises the question whether such differentiated integration generates market fragmentation, particularly with respect to uniform supervisory standards, supervisory intensity, the application of the Single Rulebook, and the freedom of establishment of cross-border banking groups. Both countries host banking sectors dominated by subsidiaries of large foreign groups – many of them Austrian – yet the legal framework governing these subsidiaries differs substantially.

Finally, Czechia is currently engaged in an increasingly intensive debate on potential Banking Union membership. Policymakers, academics, and representatives of the financial sector are gradually reassessing the benefits and drawbacks of accession, considering not only prudential stability and supervisory coherence, but also broader economic, strategic, and political factors. Whether Czechia ultimately decides to opt into the Banking Union remains an open question, but it is evident that the divergence between the two countries provides a unique comparative setting for examining the implications of differentiated integration within the European Union’s financial architecture.

1.4 Key features of the Slovak and Czech banking sector

The Banking Union was created and exists as a response to the successful or less successful functioning of the banking sectors. We get a very concrete picture of the functioning of banking sectors in the Czech Republic and Slovakia when we consider the interconnectedness of Czech and Slovak banks with their parent companies. It is not surprising that, thanks to their common history and established relationships, Austrian banks have subsidiaries in Slovakia and the Czech Republic. However, this fact is only of secondary importance. The main point is that the example below represents the linking of a parent bank from a Banking Union member country with its subsidiaries within and outside the Banking Union. Thus, from the perspective of the mother company (BU company), the Czech market is a qualitatively different jurisdiction where local legislation and administrative activities need to be more sensitive.

Major banks in Czechia are Česká spořitelna (ERSTE, Austria), ČSOB (KBC Belgium), Komerční banka (Societe Generale, France), Raiffeisenbank (Austria), UniCredit (Italy) a PPF Banka (Czechia). All of them, except for PPF, would be considered as significant banks.

These characteristics point to the high number of subsidiary banks operating in the Czech banking sector. Major banks in Slovakia are Slovenská sporiteľňa (Erste, Austria), VÚB Banka (Intesa, Italy), Tatra banka (Raiffeisen, Austria), ČSOB (KBC, Belgium), Unicredit (Italy), Poštová banka (Slovakia). All of them, except of Poštová banka are significant banks. Here the same, these characteristics point to the high number of subsidiary banks operating in the Slovak banking sector.

On this basis, it can be said that, as Slovakia and the Czech Republic are two small countries, both are intricately linked economically with other EU (mainly BU-member) countries. For this reason, it is especially important that there are as few barriers as possible to the least costly operation of cross-border banking in these countries.

There are three convincing arguments based on which we could come to the conclusion that both the Czech and Slovak banking sectors are in nature remarkably similar. First, the characteristics of the Czech and the Slovak banking sectors indicate the higher resilience and stability compared to many other EU MSs. Second, both banking sectors show above-average ratios of the health of the banking industry compared to the Eurozone average. Third, both systems are characterized by the fact that each banking sector is mainly composed of subsidiaries of European parent banks in other MS.

The relationship between the European legislator and the MS enforcement level can be understood as a principal-agent relationship.³⁸ The legislation in the Czech Republic and Slovakia is similar for one simple reason - principal-agent relationship between EBA and the Czech National Bank works well. It can be said that the system based on the EBA's activities, combined with narrow cooperation within the ECB colleges, is a sufficient precondition for the Czech banking sector to be a stable part of the European banking system. However, this situation is only based on the correct practice of the Czech regulator. There is no guarantee that this situation will continue into the future.

1.5 Single Rulebook as Common Regulatory Basis for Slovakia and Czechia

The Banking Union was established on the basis of the Single Rulebook. The Single Rulebook is an EU-wide set of rules. The Single Rulebook is not a single coherent document, but a mixture of different rules, which together under this name apply to all MSs of the European Union. These rules deal, among other things, with capital requirements for banks, depositor protection and bank failure prevention and management.

The Single Rule Book is a fundament for Slovak and Czech banking regulation. Slovakia and the Czech Republic were obliged to implement the Single Rulebook. Both countries are also obliged to respond to amendments to the Single Rulebook. However, both countries implement EU law differently and this is also reflected in the implementation of the European banking regulation. Where this discrepancy lies and to what extent these differences are fundamental should we be answered in this thesis

38 KÖHLER, Lukas Philipp. Rulemaking in der Bankenunion. Mohr Siebeck. Tübingen. 2020, p. 252.

1.6 European Banking Authority as Common Supervisor over Slovakia and Czechia

The European Banking Agency as an independent EU authority part of the ESFS established in response to the financial crisis contributes to the correct use of the Single Rule Book. EBA either provides technical advice or independently prepares drafts for technical regulatory and enforcement standards. The EBA is also responsible for the central task of establishing common regulatory and supervisory standards, even after the creation of the Banking Union. The guidelines, recommendations and the EBA's Q&A are counted as guidance.

All EU MSs are legally bound by the EBA's Guidelines. In BU-MS they will be applied by the ECB for Sis, and the NCAs for LSIs only. Whereas in non-BU-MS they are applied to all credit institutions by the NCAs.

In the areas defined by the banking acts (i.e., BRRD, CRD, CRR, DGSD), EBA and European Commission can comprehensively define standards for the NCAs with technical standards. EBA uses its Q&A tool to monitor the technical standards. The Q&A tool deals with questions on the banking acts and even on the TS and guidelines developed by itself, but not on the recommendations. The EBA adopts extensive and detailed regulations as guidelines, while it draws up specific behavioral expectations for individual NCAs and templates for application-related actions in the form of recommendations.³⁹ This level of regulation is equally legally-binding for the Slovak and Czech regulators, and eventually also for the regulated entities.

The EBA's supervisory guidelines and recommendations are intended to ensure uniform application of the law and administrative practice.⁴⁰ These instruments generally assume the functions of European administrative regulations.⁴¹

Most of the EBA's output is legally non-binding. Their application in the MSs is based on a comply-or-explain mechanism.⁴² On the one hand, the MS thus legally retains the possibility to decide on its own whether to apply a particular EBA recommendation, or to decide not to apply it and to give reasons why not. Thus, this construction does not legally guarantee a uniform application of the rules in the way stated by the EBA in its documents. On the other hand, the comply-or-explain mechanism retains the advantages of delegating regulatory decisions to the MSs. The EBA informs the European Parliament, the Council and the Commission about the compliance practices of the NCAs and thus enables the EU institutions to take legislative action against perceived inconsistencies.⁴³ As a result, it is to be concluded that the stability of the financial sector in the EU is not based on solid legal foundations that would force the Slovak and the Czech NCAs to apply the law consistently in line with EBA documents.

39 KÖHLER, Lukas Philipp. *Rulemaking in der Bankenunion*. Mohr Siebeck. Tübingen. 2020, p. 123.

40 HÄRTEL. *Handbuch europäische Rechtsetzung*, 2006, § 13 Rn. 21.

41 KÖHLER, Lukas Philipp. *Rulemaking in der Bankenunion*. Mohr Siebeck. Tübingen. 2020, p. 133.

42 KÖHLER, Lukas Philipp. *Rulemaking in der Bankenunion*. Mohr Siebeck. Tübingen. 2020, p. 146.

43 Art. 16 (4), Art. 43 (5) EBA Regulation.

1.7 Conclusions: From the present to the future

Unlike in the 2008 financial crisis, banks are not the source of the problem anymore. But we need to ensure that they can be part of the solution of financial crisis in the future.⁴⁴ EU credit institutions are (on average) well capitalized and benefited from having implemented macro-prudential buffers and liquidity ratios, which were introduced as international financial standards by the so-called 2010 Basel III regulatory framework of the Basel Committee on Banking Supervision.⁴⁵ The EU plans to complete the implementation of the Basel III standards (also known as Basel IV) into EU law. The goal is to increase the strength and resilience of banks operating in the Union. In doing so, it is important to consider the specificities of the banking sector in the EU and the specific situation in MSs.⁴⁶

According to the ECB Financial Stability Review of May 2021 risks to financial stability remain elevated and have become more unevenly distributed. Thus, financial stability vulnerabilities as identified therein cannot be underestimated, considering, inter alia, the following. First, the increased importance of climate-change-related transition and physical risks. Second, credit institutions' persistently low profitability, which to a certain extent is caused by the low level of interest rates. Third, delays in sustainable economic recovery. Fourth, higher credit risks are due to weaknesses in some sectors of the economy despite strong public support and government guarantees.⁴⁷

The Czech and Slovak approach to implementation of these reforms would provide us an image of the evolution in discrepancies between Czech and Slovak banking sectors.

The Commission's proposal to amend CRD IV aims to strengthen the regulatory and supervisory environment for banks operating in the EU by removing loopholes for third country branches, strengthening and harmonizing supervisory tools and powers in important areas, ensuring that supervisors are sufficiently independent of economic and political influence, and integrating environmental, social and governance risks.

By adopting the Banking Package, the EU will strengthen the Banking Union and reduce risks in the financial system. The banking package consists of proposed amendments to CRD VI, BRRD and CRR III. As a result, the banking sector will have to implement many changes. The Commission's amendment to the CRR aims to strengthen and facilitate the allocation of capital and liquidity across banking groups in Europe without significantly increasing their capital requirements. The framework for credit risk and operational risk will be further improved and supported by a 'minimum exit level' aimed at reducing unwarranted differences in banks' risk measurement.

⁴⁴ See at: <https://www.bankingsupervision.europa.eu/press/interviews/date/2020/html/ssm.in200623~e668f871fa.en.html>.

⁴⁵ *Legal Aspects of the Single Monetary Policy in the Euro Area: From the establishment of the Eurosystem to the pandemic crisis*. Christos V. Gortos. Third fully updated edition. 2022, p. 70.

⁴⁶ STANJURA, Zbyněk. Minister of Finance of the Czech Republic, 8.11.2022 (ECOFIN).

⁴⁷ GORTOS, Christos V. *Legal Aspects of the Single Monetary Policy in the Euro Area: From the establishment of the Eurosystem to the pandemic crisis*. Third edition. 2022, p. 71.

The scope of CRR III and CRD VI includes changes to the standardized approach for credit risk, the Internal Ratings Based (IRB) approach to credit risk, the calculation of the credit valuation adjustment (CVA), the operational risk framework, and the output floor that limits the capital contribution from model risk. A critical point is the amendments to the CRR and CRD to incorporate ESG requirements (environmental, social, governance - factors).

In addition, the proposal includes a new framework for the regulation and supervision of third country branches (TCBs) in the EU. Furthermore, modifications to Pillar 2 (P2R) and Systemic Risk Buffer (SyRB) requirements accompany the introduction of an exit floor, as well as an expansion of the definition of entities to be included in the scope of prudential consolidation, capturing FinTech ownership and involvement in financial activities.

The EBA has been given the power to centralize the publication of annual, semi-annual, and quarterly institutional prudential information for the largest institutions in the EU.

In addition, the proposal includes provisions on the independence of competent authorities and the handling of conflicts of interest, the extension of the supervisory powers of competent authorities in the EU to create a common standard, the introduction of a requirement to carry out a fitness and probity assessment of directors against a common standard, clarification of the correlation between default or likely default and a change in the supervisory approach to benchmarking expected credit risk losses for the purposes of calculating own funds requirements.⁴⁸

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⁴⁸ See more: https://finance.ec.europa.eu/news/commission-welcomes-political-agreement-eu-banking-package-2023-06-27_en

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