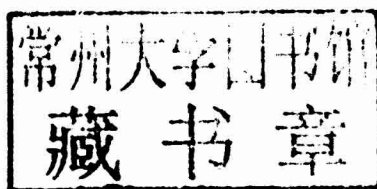




# EUROPEAN BANKING UNION

*Edited by*

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GUIDO FERRARINI



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## PREFACE

The creation of the European Banking Union (EBU) results in a historical shift of powers from the Eurozone Member States to the European Union. In this book, various aspects of EBU are analysed and discussed from a legal and/or economic perspective. Some of the chapters draw comparisons with US banking regulation and try to assess whether there is anything Europe can learn from it, especially as far as bank resolution is concerned. The book chapters are grouped in a thematic way, covering the following areas: (i) general aspects; (ii) single supervision and CRD IV; (iii) single resolution and the BRRD; and (iv) judicial review and reform perspectives.

After providing an overview of the volume's contents, Part I explores how EBU has impacted, and may further impact in the future, the structure of Europe's financial system and the European economy more broadly. It also submits that EBU is a construction born of compromises and shaped to fit into legal territory bound by Treaty constraints that cannot be adjusted in the current political environment.

Part II considers the institutional aspects of the SSM and analyses the Single Rulebook from the perspective of the separation of EU banking regulation from prudential supervision. It also considers the EU framework for bank governance, which has been deeply overhauled by CRD IV, and the role of risk management and compliance in the integration of European banking markets. This part further outlines the development of Contingent Convertible Securities (CoCos) for financial institutions from their theoretical origins to their current form under CRD IV and the BRRD, and examines the impact of regulation on CoCos' design.

Part III analyses the governance structure of the SRM, particularly with respect to financing of the Single Resolution Fund and adoption of resolution schemes. Moreover, it discusses the function of existing recovery and resolution plans in the context of a bank restructuring under the BRRD and the SRM Regulation, and then provides an in-depth analysis of the bail-in instrument. This part also discusses the BRRD and the SRM from a UK perspective.

Part IV firstly discusses the judicial protection of banks against the ECB and SRB. Secondly, it analyses how structural regulation proposals in the EU will affect the institutional structure of the universal banking group, while arguing that EBU remains incomplete in one important respect, such as the structural re-organization of large European financial firms that would make 'resolution' of a systemically important financial firm a credible alternative to state aid or some other sort of

taxpayer assistance. Thirdly, this part considers whether, and how, EBU is likely to reshape financial market governance.

The book was preceded by a meeting on 5 and 6 June 2014 of the International Working Group on the European Banking Union, established as a joint initiative of the Institute for Financial Law within the Business & Law Research Centre of Radboud University Nijmegen, the Netherlands, and the Genoa Center for Law and Finance, University of Genoa, Italy. We thank the Business & Law Research Centre of Radboud University Nijmegen for its sponsorship. We also thank Allen & Overy, Amsterdam for hosting the meeting. We are grateful to the distinguished members of the Working Group for their dedication to the project and, in particular, for their contributions to this book as authors. We also thank the invitees to the meeting for providing the members of the Working Group with invaluable comments on their draft chapters.

Last but not least, we acknowledge our gratitude to the editorial team at Oxford University Press, who successfully brought a lengthy and complex project to completion.

The law is stated as of 1 October 2014.

Danny Busch,  
Nijmegen, The Netherlands  
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| 2002/87/EC Directive of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council [2003] OJ L 35/1 (Financial Conglomerates) . . . . . | 4.37, 4.49, 10.17                  |
| 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (Markets in Financial Instruments Directive (MiFID I)) [2004] OJ L 145/1) . . . . .                                                                                                 | 6.11, 13.72, 16.71                 |
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| art 60.....                             | 8.47                                                             | art 106.....              | 3.25, 10.61                     |
| art 63.....                             | 3.24                                                             | art 106(3) .....          | 9.73                            |
| arts 63–71.....                         | 3.27                                                             | art 106(4) .....          | 9.74                            |
| arts 63–72.....                         | 13.48                                                            | art 106(5) .....          | 9.73                            |

|                                                                                                                                                                                                                                                             |                                                                                                      |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
| art 107(2)–(5) . . . . .                                                                                                                                                                                                                                    | 9.94                                                                                                 | 593/2008 Regulation (EC) on the law<br>applicable to contractual obligations<br>[2008] OJ L 177/6                                                                                                                                                                                                                               |                                                                                     |
| art 108 . . . . .                                                                                                                                                                                                                                           | 3.24                                                                                                 | art 3 . . . . .                                                                                                                                                                                                                                                                                                                 | 11.44                                                                               |
| art 109 . . . . .                                                                                                                                                                                                                                           | 3.25, 12.69, 12.70                                                                                   | <b>1092/2010 Regulation (EU) of the<br/>European Parliament and of the<br/>Council of 24 November 2010 on<br/>European Union macro-prudential<br/>oversight of the financial system<br/>and establishing a European<br/>Systemic Risk Board [2010]<br/>OJ L 331/1 (ESRB Regulation)</b>                                         |                                                                                     |
| art 118 . . . . .                                                                                                                                                                                                                                           | 12.55                                                                                                | art 1(4) . . . . .                                                                                                                                                                                                                                                                                                              | 16.06                                                                               |
| art 123 . . . . .                                                                                                                                                                                                                                           | 1.49, 8.69, 8.81, 8.105,<br>8.107, 8.129                                                             | art 3 . . . . .                                                                                                                                                                                                                                                                                                                 | 16.06                                                                               |
| art 130(1), 3 <sup>rd</sup> para . . . . .                                                                                                                                                                                                                  | 9.06                                                                                                 | <b>1093/2010 Regulation (EU) of<br/>24 November 2010 establishing a<br/>European Supervisory Authority<br/>(European Banking Authority)<br/>amending Decision 716/2009/EC<br/>and repealing Commission Decision<br/>2009/78/EC (European Banking<br/>Authority Regulation (2010 EBA<br/>Regulation) COM(2013) 520 . . . . .</b> | 3.05,<br>4.14, 4.17, 5.65, 5.72,<br>5.73, 9.06, 9.07, 11.03,<br>13.85, 16.06, 16.29 |
| <b>2014/65/EU Directive of 15 May 2014<br/>on markets in financial instruments<br/>and amending Directive 2002/92/<br/>EC and Directive 2011/61/EU<br/>[2014] OJ L 173/349 (Markets<br/>in Financial Instruments<br/>Directive II (MiFID II)) . . . . .</b> | 4.05, 6.01,<br>6.11, 6.67, 9.87, 16.03, 16.12,<br>16.14, 16.29, 16.30, 16.31,<br>16.55, 16.58, 16.71 | Recitals (21)–(23) . . . . .                                                                                                                                                                                                                                                                                                    | 5.12                                                                                |
| Recital 37 . . . . .                                                                                                                                                                                                                                        | 6.56                                                                                                 | art 2(2)(f) . . . . .                                                                                                                                                                                                                                                                                                           | 16.06                                                                               |
| Recital 53 . . . . .                                                                                                                                                                                                                                        | 6.11                                                                                                 | art 4(2)(iv) . . . . .                                                                                                                                                                                                                                                                                                          | 16.29                                                                               |
| Recital 55 . . . . .                                                                                                                                                                                                                                        | 6.28, 6.48, 6.74                                                                                     | art 8 . . . . .                                                                                                                                                                                                                                                                                                                 | 16.73                                                                               |
| art 1(3)(a) . . . . .                                                                                                                                                                                                                                       | 6.11, 6.15                                                                                           | art 8, para 1(a)(b) . . . . .                                                                                                                                                                                                                                                                                                   | 5.23                                                                                |
| art 1(4)(a) . . . . .                                                                                                                                                                                                                                       | 6.11, 6.15                                                                                           | arts 10–15 . . . . .                                                                                                                                                                                                                                                                                                            | 5.71                                                                                |
| art 4(1)(1) . . . . .                                                                                                                                                                                                                                       | 6.11                                                                                                 | art 15, para 1 . . . . .                                                                                                                                                                                                                                                                                                        | 5.24                                                                                |
| art 9(1) . . . . .                                                                                                                                                                                                                                          | 6.11, 6.14, 6.33                                                                                     | art 16 . . . . .                                                                                                                                                                                                                                                                                                                | 4.38, 5.70, 5.71                                                                    |
| art 9(2) . . . . .                                                                                                                                                                                                                                          | 6.14                                                                                                 | art 16(1) . . . . .                                                                                                                                                                                                                                                                                                             | 5.24                                                                                |
| art 9(3) . . . . .                                                                                                                                                                                                                                          | 6.15                                                                                                 | art 16(3) . . . . .                                                                                                                                                                                                                                                                                                             | 5.24                                                                                |
| art 9(3)(a)–(c) . . . . .                                                                                                                                                                                                                                   | 6.15                                                                                                 | art 17(4) . . . . .                                                                                                                                                                                                                                                                                                             | 4.40                                                                                |
| art 9(4) . . . . .                                                                                                                                                                                                                                          | 6.14                                                                                                 | art 17(6) . . . . .                                                                                                                                                                                                                                                                                                             | 4.40                                                                                |
| art 9(6)(2) . . . . .                                                                                                                                                                                                                                       | 6.14                                                                                                 | art 19(4) . . . . .                                                                                                                                                                                                                                                                                                             | 4.40                                                                                |
| arts 10–13 . . . . .                                                                                                                                                                                                                                        | 6.29                                                                                                 | art 44 . . . . .                                                                                                                                                                                                                                                                                                                | 4.17, 5.72                                                                          |
| art 13(2) . . . . .                                                                                                                                                                                                                                         | 6.25                                                                                                 | <b>1094/2010 Regulation (EU) of<br/>24 November 2010 establishing a<br/>European Supervisory Authority<br/>(European Insurance and<br/>Occupational Pensions Authority)<br/>amending Decision 716/2009/EC<br/>and repealing Commission<br/>Decision 2009/79/EC . . . . .</b>                                                    | 4.14                                                                                |
| art 16 . . . . .                                                                                                                                                                                                                                            | 6.25                                                                                                 | <b>1095/2010 Regulation (EU) of<br/>24 November 2010 establishing a<br/>European Supervisory Authority<br/>(European Securities and Markets<br/>Authority) amending Decision<br/>716/2009/EC and repealing<br/>Commission Decision 2009/77/EC</b>                                                                               |                                                                                     |
| art 16(2) . . . . .                                                                                                                                                                                                                                         | 6.25                                                                                                 |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |
| art 94(2) . . . . .                                                                                                                                                                                                                                         | 6.11                                                                                                 |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |
| Annex IV . . . . .                                                                                                                                                                                                                                          | 6.11                                                                                                 |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |
| <b>Proposal for a Council Directive<br/>implementing enhanced<br/>cooperation in the area of financial<br/>transaction tax, 14 February 2013,<br/>COM(2013) 71 Final . . . . .</b>                                                                          | 4.13                                                                                                 |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |
| <b>Regulations</b>                                                                                                                                                                                                                                          |                                                                                                      |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |
| <b>259/68 Council Regulation (EEC,<br/>Euratom, ECSC) of 29 February<br/>1968 [1968] OJ L 56 . . . . .</b>                                                                                                                                                  | 9.30                                                                                                 |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |
| <b>1346/2000 Council Regulation (EC)<br/>of 29 May 2000 on insolvency<br/>proceedings [2000] OJ L160/1<br/>art 1(2) . . . . .</b>                                                                                                                           | 13.47                                                                                                |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |
| <b>44/2001 Council Regulation (EC) of 22<br/>December 2000 on jurisdiction and<br/>the recognition and enforcement of<br/>judgments in civil and commercial<br/>matters [2001] OJ L 12/1 (Brussels<br/>I Regulation) . . . . .</b>                          | 13.90                                                                                                |                                                                                                                                                                                                                                                                                                                                 |                                                                                     |