

### ABSTRACT

*Il contributo esamina l'interpretazione da dare alle previsioni in materia di vigilanza prudenziale relative al SEBC, alla luce del dato storico della loro inclusione nel Trattato CE e nello Statuto del SEBC. Si osserva che tali previsioni implicano un campo di competenza più ampio di quanto talora ritenuto. Si descrivono alcuni dei contributi offerti dalla BCE, in funzione consultiva, nel campo dell'evoluzione degli standards prudenziali e della vigilanza sul rispetto dei medesimi. Il testo, in linea con l'opinione della BCE, suggerisce un maggiore ricorso allo strumento dei Regolamenti al fine di stabilire standards a livello europeo per l'industria dei servizi finanziari e argomenta in favore di un intenso coinvolgimento del SEBC nell'ambito di un processo evolutivo orientato verso una più accentuata allocazione a livello europeo delle responsabilità per la vigilanza su banche, assicurazioni e imprese finanziarie. Tale maggiore accentramento delle responsabilità non dovrebbe peraltro portare ad un ulteriore livello di burocrazia, bensì basarsi sulle autorità nazionali aventi funzioni di vigilanza, in un contesto di stretta cooperazione e condivisione di informazioni - che le entità commerciali operanti sul mercato interno potrebbero così preferibilmente fornire ad un'autorità soltanto - e svolgendo tale attività sotto l'egida di un'Autorità dotata di un mandato esteso all'intero mercato in Europa.*

## Memories of Paolo Zamboni

*As a member of the Legal Committee (LEGCO) of the European System of Central Banks (ESCB) until September 2001, I witnessed many interventions by the head of the Banca d'Italia delegation, Paolo Zamboni. Paolo did not ask the floor on every subject we discussed, but, when he spoke, it was with conviction and clarity. Indeed, his interventions were made even more eloquent by his use of the Italian language, interspersed with English terms from the European Central Bank (ECB) documents that formed the basis for our discussions. Paolo was forthright in proposing solutions which the non-legal audience that LEGCO worked for (i.e. the Governing Council and Executive Board of the ECB) would accept. I will never forget his staunch support for my personal project, the writing of a thesis on the ECB's institutional aspects – of which he kept saying that an Italian version had to be made – and his welcome every time I visited Rome for lectures on Economic and Monetary Union at LUISS University, when he had a vegetarian lunch prepared for me at the Banca d'Italia. His early departure from life was a loss for the central banking legal world and, for many, a personal one too.*

## I INTRODUCTION

In this paper, I will sketch the provisions on the involvement of the European System of Central Banks (ESCB) in the prudential supervision of the banking industry, evoke the origins of these provisions, and offer my own interpretation of what they mean. I will also try to elaborate how they can best be put to use in an integrating European financial market.

## 2 HISTORY AND FUTURE OF THE RELEVANT PROVISIONS

### A FIRST PROPOSAL

Since central banks have traditionally always been involved in the prudential supervision of banks or, in the wording of the legal acts<sup>1</sup> of the European Community (EC) on this matter, “credit institutions”, a role for the ESCB in this area would seem a logical extension of the history of the national central banks (NCBs) that form the majority of the legal entities in the ESCB. In the preparations for Economic and Monetary Union (EMU), a role in banking supervision was, indeed, envisaged. An academic proposal for legal provisions to be inserted into the European Economic Community (EEC) Treaty<sup>2</sup> envisaged

1 Notably, Directive 2000/12/EC of the European Parliament and the Council of 20 March 2000 on the taking up and pursuit of the business of credit institutions, OJ L 126, 26.5.2000, p. 1, as most recently amended by Directive 2005/1/EC of the European Parliament and of the Council of 9 March 2005 amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organisational structure for financial services committees, OJ L 79, 24.3.2005, p. 9.

2 Study group chaired by J.-V. Louis, *Vers un système européen de banques centrales – Projet de dispositions organiques* (Études européennes, Éditions de l'Université Libre de Bruxelles, 1989).

giving the European Central Bank (ECB) a basic task to contribute to the proper functioning of the financial markets.<sup>3</sup> The study further proposed to entrust the ECB with the task of coordinating the supervision of credit institutions with their seat or a branch within the Community, as well as similar undertakings placed on the same footing under EC law. The ECB was to ensure a coordinated interpretation and implementation of Community legislation in this area by the national supervisory authorities, as well as making sure that credit institutions and similar undertakings respect these norms. The ECB should be given the right to intervene in individual cases. The national supervisory authorities were to be placed under the ECB's authority for the application of this provision. A further role that this study proposed to give to the ECB concerned the adoption of general decisions in the implementation of Community legislation in this area. Finally, in the proposals put forward by the "Groupe Louis", the ECB should be entrusted with its own direct role as a supervisor of credit institutions if an organic law<sup>4</sup> were adopted to this effect. Furthermore, it should have the capacity to enter into agreements with authorities of third countries or international organisations to facilitate its supervisory function and, by regulation, could be given tasks concerning credit institutions in difficulty or undergoing restructuring, whereas further tasks could also be given to the ECB.

## THE DELORS COMMITTEE

Similarly, the Delors Committee Report (1988) had proposed that, in line with traditional central bank tasks in the area of the stability of the financial system, the ESCB should be entrusted with a "macro-prudential" role and should "participate in the coordination of banking supervision policies of the supervisory authorities".

## THE INTERGOVERNMENTAL CONFERENCE LEADING TO MAASTRICHT

The Intergovernmental Conference (IGC) which led to the adoption of the 1992 Maastricht Treaty on European Union (EU), the legal instrument which, *inter alia*, amended the EEC Treaty by inserting the provisions on EMU, had worked on the basis of a draft text for the Statute of the ESCB ("the Statute") proposed by the Committee of Governors of the Central Banks of the EEC (the "Committee of Governors").<sup>5</sup> In their proposal, the Governors had envisaged that the ESCB should participate in the formulation, coordination and execution of

3 In Article 4 ("*Missions de base*") the ECB is entrusted with the basic tasks of conducting the Community's internal and external monetary and credit policy, of safeguarding the stability of the currency, of managing the Community's reserve assets, of ensuring the proper functioning of money markets and payments systems and, to these ends, of contributing to the proper functioning of the financial markets. (The last two tasks are described as follows: "Elle veille au bon fonctionnement des marchés monétaires et des systèmes de paiements. A ces fins, elle contribue au bon fonctionnement des marchés financiers."). See *Vers un système européen de banques centrales* (op. cit., footnote 2), p. 42.

4 I.e. a legal act to be adopted by the European Parliament and the Council, acting with qualified majority, on a proposal of the European Commission. See Article 3 of the draft provisions of the Groupe Louis (footnote 2).

5 See *Europe*, Document Nos 1669/1670, 8 December 1990 for the draft sent by the Committee of Governors to the Italian Presidency of the Council on 27 November 1990. The Committee of Governors also submitted an explanatory note to its proposals.

banking supervisory policies. After much discussion<sup>6</sup>, the IGC adopted less far-reaching texts. Reluctant to attribute to the ECB more than an auxiliary role, the authors of the EMU provisions of the EC Treaty (“the Treaty”)<sup>7</sup> and of the Statute<sup>8</sup> refrained from explicitly mentioning those coordinating tasks proposed by the Study Group headed by Professor Louis, the Delors Committee and the Committee of Governors.

## THE TEXTS AS ADOPTED

Without going further into the details of the legislative history, the texts that were adopted mention as tasks of the ESCB (note: not of the ECB alone) that it

“shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.”

To that end, Article 25.1 of the ESCB Statute, the sole provision in Chapter V headed “Prudential supervision”, entrusts the ECB (alone) with the following advisory functions:

“The ECB may offer advice to and be consulted by the Council, the Commission and the competent authorities of the Member States on the scope and implementation of Community legislation relating to the prudential supervision of credit institutions and to the stability of the financial system.”

In line with Article 105 (6) of the Treaty, Article 25.2 of the Statute provides that the Council may entrust the ECB (again: the ECB alone) with the task of performing

“specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings”.

## APPLICABILITY

These provisions entered into force on 1 November 1993, the date on which the Maastricht Treaty became effective. Nevertheless, their actual application would have to wait until the date that the ESCB was to assume full powers. In the interim period (1994-1999), the so-called Stage Two of EMU, the European Monetary Institute (EMI) prepared the ground for Europe’s new monetary

6 For an overview of the history of the provisions on prudential supervision, see C. C. A. van den Berg, “The Making of the Statute of the European System of Central Banks – An Application of Checks and Balances” (thesis, Vrije Universiteit, Amsterdam, 2004), pp. 271-287.

7 In Article 105 (5). Note that the Maastricht Treaty renamed the EEC Treaty as “The Treaty establishing the European Community”, leaving out the adjective “Economic” from the Community’s name. Hence, after 1993, all references are to the EC Treaty (henceforth “the Treaty”).

8 In Article 3.3.

authority. The EMI had itself been entrusted with a supervisory task among its six main functions of a coordinating and preparatory character.<sup>9</sup> It was to:

“hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets”.<sup>10</sup>

This was a function that its predecessor, the Committee of Governors, had also performed.<sup>11</sup>

With the establishment of the ESCB and the ECB on 1 July 1998, the EMI’s powers were taken over by these new EC bodies.<sup>12</sup> They only assumed the “full exercise of their powers”<sup>13</sup> on the first day of Stage Three, i.e. on 1 January 1999. In view of the monetary split of the EU, with the (then) majority of Member States<sup>14</sup> adopting the single currency with a few remaining, for the time being, outside monetary union, these powers were limited in respect of the non-participating or “out” Member States.<sup>15</sup> As Article 122 (3) of the Treaty and Article 43.1 of the Statute make clear, the task-setting provisions concerning prudential supervision, i.e. Article 105 (5) of the Treaty and Article 3.3 of the Statute, do not apply to Member States with a derogation.<sup>16</sup> Nevertheless, the provision which was considered to implement this task-setting provision, i.e. Article 25 of the Statute, does apply to the “out” Member States<sup>17</sup>, as does the provision containing a potential own supervisory function for the ECB (Article 105 (6) of the Treaty, reflected in Article 25.2 of the Statute).

Although the ESCB, when performing tasks for those Member States that have adopted the single currency, is known as the “Eurosystem”<sup>18</sup> in order to distinguish it from the ESCB in its overarching functions for the EU as a whole – a term that comprises the ECB and the NCBs of the “in” Member States only –, this contribution will mainly use the term employed in the Treaty and the Statute. This is based on the fact that, whereas Article 105 (5) applies only to the “in” Member States, Article 25.1 applies to all States within the Union, as does the enabling clause.

9 See Article 117 (2) of the (EC) Treaty (numbering following the Amsterdam Treaty’s renumbering of EC Treaty provisions) and Article 4.1 of the Statute of the EMI.

10 Article 117 (2), fourth indent of the Treaty, and Article 4.1, fourth indent of the EMI Statute.

11 Pursuant to Article 3 of Decision 64/300/EEC on cooperation between the central banks of the Member States of the European Economic Community (OJ No 77, 21.5.1964) establishing the Committee of Governors, as amended by Decision 90/142/EEC (OJ L 78, 24.3.1990, p. 25), the decision which inserted new language into the original basic charter of the Committee of Governors with a view to enhanced cooperation during Stage One of EMU (1 July 1990-31 December 1993).

12 Article 123 (2) of the Treaty.

13 Article 123 (1), *in fine*, of the Treaty.

14 Since then, the members of the euro area have numerically become in a minority, as the ten States that acceded on 1 May 2004 have the status of Member States with a derogation pursuant to Article 4 of the 2003 Act of Accession (OJ L 236, 23.9.2003, p. 33).

15 Officially, Member States with a derogation (Article 122 (1), *in fine*, of the Treaty), or States with an opt-out (i.e. Denmark and the United Kingdom (UK); see, respectively, Protocol Nos 25 and 26 (current numbering) to the Treaty).

16 For the UK, see paragraphs 5 and 8 of its Opt-out Protocol. The Danish Opt-out Protocol makes it clear that Denmark is to be treated as a Member State with a derogation.

17 Note, however, that the general consultative function of the ECB in respect of draft legislation in its fields of competence (Article 105 (4) of the Treaty and Article 4 of the Statute) does not apply to the UK.

18 The European Constitution – on which more below – mentions, in Article III-30 (1), the Eurosystem.

## THE EUROPEAN CONSTITUTION

The European Convention was called upon to reframe the EU's founding Treaties into a single constitutional text, while enhancing the transparency, democratic legitimacy and efficiency of the Union. The Convention did not come forward with amendments to the texts adopted in Maastricht.<sup>19</sup> The IGC that adopted the Treaty establishing a Constitution for Europe ("the European Constitution")<sup>20</sup> likewise largely refrained from altering the provisions, except in consequence of general amendments. Thus, the European Constitution requires a "European law" to make use of the enabling clause on specific supervisory tasks for the ECB (Article III-185 (6)). However, the text of the enabling provision has been changed in that, whereas the Council, acting unanimously, nowadays needs the assent of the European Parliament, the European Constitution still requires it to act unanimously but only to consult (rather than seek the assent of) the European Parliament, as well as the ECB itself.<sup>21</sup> Just as a Commission proposal is required under Article 105 (6) of the Treaty, the European Constitution requires an initiative from the European executive to make use of the enabling clause. This follows from the general provisions on law-making.<sup>22</sup> Furthermore, the Statute, as amended, will refer to the provisions of the European Constitution rather than to the Treaty. As is the case at present, the Member States with a derogation will not be bound under the Constitution to the objectives of the ESCB, meaning that the general supervisory objective of Article III-185 (5) does not apply to them.<sup>23</sup> The enabling clause will still apply to the "out" Member States.

### 3 INTERPRETATION

A narrowly historic view of Article 105 (5) of the Treaty and Article 25.1 of the Statute might imply that the supervisory task of the ESCB exhausts itself in the mere possibility for the ECB to give advice. As set out before<sup>24</sup>, my reading of the provisions, both on textual and contextual grounds, suggests a wider interpretation. The discrepancies between Article 105 (5), entrusting the ESCB to contribute to the smooth conduct of supervisory policies, and Article 25.1, allowing the ECB alone to offer and to be sought advice from on Community legislation relating to prudential supervision and to the stability of the financial system, are too great to accept that the two provisions fully overlap.<sup>25</sup> It cannot be assumed that the Treaty authors intended the ESCB to perform a task without

19 See Article III-77 (5) and (6) of the Draft Treaty establishing a Constitution for Europe, 18 July 2003, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>.

20 OJ C 310, 16.12.2004.

21 In view of the general thrust of the European Constitution towards enhancing the role of the European Parliament, this change introduces a regrettable novelty in the area of EMU. On further EMU aspects of the Constitution, see R. Smits, "The European Constitution and EMU", 42 CML Rev. (2005), pp. 425-468.

22 Article I-34 of the European Constitution on legislative acts.

23 See Article III-197 (2) (c) of the European Constitution and Article 42.1 of the Statute in the version of Protocol No 4 attached to the Constitution. For the UK, see Articles 4 and 7 of Protocol No 13 to the Constitution; for Denmark, see Protocol No 14. In the area under consideration, both provide for the same applicability of prudential provisions as the Treaty and the relevant Protocols thereto. For the ten new Member States since 1 May 2004, see Article 4 of Protocol No 9 to the Constitution.

24 R. Smits, *The European Central Bank – Institutional Aspects* (The Hague: Kluwer Law International, 1997) (2000 reprint), Chapter V.

25 In addition, the divergent field of applicability (euro area versus EU) argues in favour of a teleological reading.

equipping it with the necessary powers. Therefore, I read Article 105 (5) as making the ESCB competent to use more instruments to perform its prudential task. Not only will the NCBs, as well, have to ensure that Article 105 (5) is implemented<sup>26</sup>, but the ECB will also have to make use of more instruments than just its consultative role under Article 25.1. For the ESCB to pursue its prudential task, various methods may be put to use, such as its required advice in draft legislation at the Community and national levels<sup>27</sup>, its statistical function<sup>28</sup>, the largely market-oriented operations which the ECB and the NCBs are competent to perform under Chapter IV of the Statute<sup>29</sup>, the possibility for the ECB to take part in international monetary<sup>30</sup> institutions, as well as other, more informal methods. The close connection of prudential and financial stability concerns with the fourth basic task, i.e. to promote the smooth operation of payment systems<sup>31</sup>, forms an additional argument in favour of reading more into Article 105 (5) than purely what is stated in Article 25.1.

One element that may be considered to be implicit in the financial stability-related task set out in Article 25.1, i.e. operation in crisis management, including the function of lender of last resort, is not further explored here, for two main reasons. First, I consider providing lender-of-last-resort assistance a core central banking function that also pertains directly to its monetary functions, as it may both concern general liquidity supervision to the financial system and assistance to individual financial institutions experiencing liquidity problems.<sup>32</sup> Second, the debate on the proper system of supervision is not focused on the crisis element – which, moreover, has been covered by specific measures.<sup>33</sup> Rather, the issue is how to organise the prudential supervision of the EU's financial sector.<sup>34</sup>

Broadly in line with the ECB's memorandum on "The Role of Central Banks in Prudential Supervision"<sup>35</sup>, a distinction can be made between:

- investor protection activities, focusing on conduct-of-business rules and disclosure of information;

26 Moreover, Article 109 of the Treaty requires that national legislation is made compatible with the (EMU provisions of) the Treaty and the Statute before the establishment of the ESCB. Note that Article III-189 of the European Constitution states this requirement without reference to the date of 1 July 1998.

27 Article 105 (4) of the Treaty (Article III-185 (4) European Constitution) and Article 4 of the Statute. See also Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions, OJ L 189, 3.7.1998, p. 42.

28 Article 5 of the Statute.

29 Articles 17-24 of the Statute.

30 Article 6 ESCB of the. As set out in my thesis, the term "monetary" needs to be read as encompassing all central banking tasks of the ESCB. See *The European Central Bank – Institutional Aspects*, op. cit. (footnote 24), pp. 426-427.

31 Article 105 (2), fourth indent of the Treaty (Article III-185 (2) (d) European Constitution) and Article 3.1, fourth indent of the Statute.

32 Hence, I read it as subsumed under Article 18.1 of the Statute. See *The European Central Bank – Institutional Aspects*, op. cit. (footnote 24), pp. 269-271.

33 See the ECB's Press Release of 10 March 2003 on the Memorandum of Understanding on the high-level principles of cooperation between the banking supervisors and central banks of the European Union in crisis management situations, available at [http://www.ecb.int/press/pr/date/2003/html/pr030310\\_3.en.html](http://www.ecb.int/press/pr/date/2003/html/pr030310_3.en.html).

34 It should be acknowledged that any assistance beyond the granting of lender-of-last-resort facilities may exceed the competence of the ESCB, as it might imply that public funds should be channelled to financial institutions. In addition, the European Commission may have to play a role in any lending that would amount to public aid, which is prohibited in principle pursuant to Article 87 of the Treaty. Collateralised lending is certainly permitted under the Statute. These wider issues, however, cannot be discussed in the context of this contribution.

35 See "The Role of Central Banks in Prudential Supervision", 30 March 2001. This paper sets out the views of the Governing Council of the ECB and is available at [http://www.ecb.int/pub/pdf/other/prudential\\_supcbrole\\_en.pdf](http://www.ecb.int/pub/pdf/other/prudential_supcbrole_en.pdf).

- micro-prudential supervision, geared towards the safety and soundness of individual financial services providers in the interest of depositors and other creditors;
- macro-prudential supervision, geared towards the avoidance and containment of systemic risk, and therefore concerned with macroeconomic and financial market developments and market infrastructures.

## 4 PRACTICE AND TRENDS

### BANKING SUPERVISION COMMITTEE

The ESCB has been an active contributor to developments in the area of prudential supervision. Among the committees which have been established to assist the decision-making bodies of the ECB, a special committee representing all NCBs and the ECB, as well as supervisory agencies in those States where these are not the respective NCB, has been created, following a similar committee that previously existed under the Committee of Governors and the EMI.<sup>36</sup> The Banking Supervision Committee (BSC), which combines central bankers and outside supervisory agencies from across the EU, is one of the main fora for the coordination of supervisory policies. In addition, the ECB has issued many opinions on draft legislation in the area of supervision. It actively promoted the role of central banks in the ongoing debate about the proper place of prudential supervision.<sup>37</sup>

### THE DEBATE ON THE PROPER PLACE OF PRUDENTIAL SUPERVISION

The current debate on the proper place of supervision, whereby the third area of concern mentioned above is almost invariably that of the central bank, but the first hardly ever so, roughly began with the entry into force of the new arrangements for monetary policy. It seemed to have purely a national dimension. In many Member States, the proper organisation of supervision was the subject of study and debate, with departments of finance often taking a stance against the (continuation of) attribution of (micro-)prudential tasks to the now independent NCBs.<sup>38</sup> Developments in Belgium, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the UK over the past seven years all involved a restructuring of the supervisory landscape and, in some instances, a hiving-off of prudential tasks from the central bank.<sup>39</sup> In most of these States, central banks are in either still in charge of or are involved in banking

<sup>36</sup> See Article 9 of the ECB's Rules of Procedure in the version as adopted in Decision ECB/2004/2 of 19 February 2004, OJ L 80, 18.3.2004, p. 33, and Article 8 of the Rules of Procedure of the General Council of the ECB in the version as adopted in Decision ECB/2004/12 of 17 June 2004, OJ L 230, 30.6.2004, p. 61, available at <http://www.ecb.int/pub/pdf/other/ecbinstitutionalprovisions2004en.pdf>.

<sup>37</sup> See most notably the paper mentioned in footnote 35.

<sup>38</sup> Of course, many central banks had enjoyed independence to a greater or lesser degree before 1998, but by that time their independence had become established as guaranteed in the Treaty and defined in Convergence Reports. (The Commission and the ECB [previously, the EMI] investigate the measure of legal convergence pursuant to the Treaty requirement of a two-yearly study into the progress towards meeting the convergence criteria for adopting the single currency. See Articles 121 (1) and 122 (2) of the Treaty, and Article III-198 of the European Constitution.)

<sup>39</sup> For a defence of the establishment of single national supervisory agencies, see C. Briault, "The Rationale for a Single National Financial Services Regulator", *JIFM* (November 1999), pp. 249-256.

supervision. A European dimension is only slowly entering the debate. Especially in the field of securities regulation and supervision, the search for greater consistency and the desire to alleviate the regulatory burden on players points in the direction of a further strengthening of cooperation mechanisms. Calls for a Europe-wide supervisor have even been voiced.<sup>40</sup> The euro area represents a special case in the debate as the single currency is helpful in the integration of payments systems and has stimulated the formation of large banking groups, although a single market and monetary union do not necessarily require a single regulatory framework, as the US example proves. However, the integration of payments systems and the creation of financial conglomerates make it more likely than before that disturbances will affect other markets, and not only that of the State in which a difficulty arises. The EU-wide mandate for monetary policy that the NCBS of the “in” States have may help in seeking a coordinated solution to any risk-related problems that may arise.<sup>41</sup>

## THE LAMFALUSSY APPROACH

In the field of securities regulation, a new approach to regulation and supervision was adopted, the Lamfalussy approach, named after the Chairman of the Committee of Wise Men which had been asked to investigate the possibilities of speedier adaptation of European rules to market change.<sup>42</sup> The Lamfalussy approach practically coincided with the adoption of the Financial Services Action Plan (FSAP)<sup>43</sup>, a set of proposed (and, by now, almost entirely adopted) legislative measures to supplement the 1992 internal market programme and to achieve integrated, efficient and stable financial markets in the EU.

The Lamfalussy approach entails the following:

- 1) Framework principles are adopted in basic EU legislation, for which the Council and the European Parliament are responsible according to the so-called co-decision procedure<sup>44</sup>;
- 2) Implementing legislation setting out the technical details is to be adopted by the Commission after consultation of a regulatory committee, composed of representatives of the ministries of finance and the national supervisory agencies<sup>45</sup>;

40 For an early proposal for a Europe-wide securities commission, see G. Thieffry, “Vers la creation d’une commission européenne des marchés de valeurs mobilières”, *Banque et Droit*, 68 (1999), pp. 19-25, English version: “Towards a European Securities Commission”, *JIFM* (1999), pp. 300-307. For a more critical approach towards centralisation, see R. M. Lastra, “The Governance Structure for Financial Regulation and Supervision in Europe”, *Columbia Journal of European Law*, 10 (2003), pp. 49-68. For a recent compilation of views, see J. J. M. Kremers, D. Schoemaker and P. J. Wierst (eds), *Financial Supervision in Europe* (Cheltenham: Edward Elgar, 2003).

41 This reasoning is derived from the ECB’s paper of 30 March 2001 mentioned above.

42 See the “Final Report of the Committee of Wise Men on the Regulation of European Securities Markets”, 15 February 2001, available at [http://europa.eu.int/comm/internal\\_market/securities/docs/lamfalussy/wisemen/final-report-wise-men\\_en.pdf](http://europa.eu.int/comm/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf).

43 See the Commission’s document “Financial Services: Implementing the Framework for Financial Markets”, 11 May 1999, available at [http://www.europa.eu.int/comm/internal\\_market/finances/docs/actionplan/index/actionen.pdf](http://www.europa.eu.int/comm/internal_market/finances/docs/actionplan/index/actionen.pdf).

44 Article 251 of the Treaty (Article III-396 of the European Constitution).

45 Based on Articles 202, third indent and 211, fourth indent of the Treaty and the Comitology Decision of the Council (Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 26, as amended). In the European Constitution, see Article I-36 and the Declaration on Article I-36, which notes the Commission’s intention to continue to consult national experts in the preparation of draft delegated European regulations in the area of financial services.

- 3) Enhanced cooperation and networking of supervisory authorities should ensure a uniform approach in all Member States to the rules thus adopted;
- 4) Strengthened enforcement of implementation with a central role for the Commission in overseeing the implementation.<sup>46</sup>

Although the Lamfalussy approach is widely seen as a success<sup>47</sup>, allowing the Union to provide a regulatory response to market change with greater speed and efficiency, and in a more transparent fashion<sup>48</sup>, it should not be forgotten that it still entails a five-level system of preparation of rules, as follows:

- 1) Global agreement on the norms and standards at G10 level, in the International Organization of Securities Commissions (IOSCO), the Basel Committee, the FATF<sup>49</sup>, etc.;
- 2) EU directives, adopted in co-decision by the Council and the European Parliament (Lamfalussy level 1);
- 3) EU implementing legislation, adopted by the Commission in cooperation with regulatory committees (Lamfalussy level 2);
- 4) National legislation (national Acts of Parliament);
- 5) National regulatory implementation, i.e. rules and standards adopted by regulators and supervisors, with this implementation overseen by the Commission (Lamfalussy levels 3 and 4).

The Lamfalussy approach has meanwhile been expanded to the other segments of the financial services industry, leading to the establishment of a new European Banking Committee, in which the ECB has observer status<sup>50</sup>, and the Committee of European Banking Supervisors (CEBS)<sup>51</sup>, in which the ECB sits.<sup>52</sup> Very recently, a Directive amending the supervisory directives with the aim of creating “a new organisational structure for financial services committees” has been adopted and has entered into force.<sup>53</sup>

As the above steps indicate, the preceding five-step approach usually has to be followed before any change in market practice can be reflected in new rules applying to those same markets. Not only is the Lamfalussy approach still time-consuming, but it does not guarantee uniform trading rules either, since the

46 Based on the Commission’s “guardian of the Treaty” function (Article 226 of the Treaty; Article III-360 of the European Constitution).

47 See the ECB’s “Review of the Application of the Lamfalussy Framework to EU Securities Markets Legislation”, 17 February 2005, available at <http://www.ecb.int/pub/pdf/other/lamfalussy-reviewen.pdf>.

48 This is because of the required consultation mechanisms, which are modelled in such a way that the industry and other interested parties can make their voices heard in the preparation of both framework rules and detailed standards.

49 Financial Action Task Force (*Groupe d’action financière sur le blanchiment de capitaux*) is an independent forum for cooperation on measures to combat money laundering. It was initiated by the G7, and has its secretariat at the OECD in Paris. See <http://www.fatf-gafi.org/>.

50 See Article 3 of Commission Decision 2004/10/EC of 7 November 2003 establishing the European Banking Committee, OJ L 3, 07.1.2004, p. 36.

51 See the Commission’s Decision of 5 November 2003 establishing the Committee of European Banking Supervisors, OJ L 3, 7.1.2004, p. 28. For a graphic depiction of the role of the London-based CEBS, see its website at <file:///D:/Documenten%20en%20Settings/Ren%E9%20Smits/Local%20Settings/Temporary%20Internet%20Files/Content.IE5/UHOZUHU5/594,8,CEBS>.

52 As one of “the central banks which are not directly involved in the supervision of individual credit institutions, including the European Central Bank”; see Article 3 sub c of the Decision establishing the CEBS.

53 See Directive 2005/1/EC of the European Parliament and of the Council of 9 March 2005 amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organisational structure for financial services committees, OJ L 79, 24.3.2005, p. 9.

possibility remains of different interpretation of the EU-wide framework standards, the addition of State-specific rules, or of the divergent application of the standards by national enforcement agencies. For this reason, new ideas have developed to counter the extent of regulatory divergence and to ensure a true level playing-field for financial services providers and clients alike.

## RECENT IDEAS DEVELOPING IN THE SUPERVISION OF THE SECURITIES INDUSTRY

After tracking the progress of the FSAP<sup>54</sup>, and in the midst of the implementation phase, the focus now is on new methods of ensuring uniform rule-making and their consistent application. In this context, I intend to sound out a few voices among the many tones that can be heard in the current concert accompanying the supervisory landscaping.

The Committee of European Securities Regulators (CESR)<sup>55</sup> has published a report that sets out which supervisory tools may be useful in the coming years. The consultation report<sup>56</sup> is firmly wedded to the Lamfalussy approach, yet includes proposals such as a database of supervisory decisions to ensure consistency, the use of joint teams of supervisors, the possible future attribution of “one-stop shop” decision-making powers in certain fields where, nowadays, 25 agencies decide matters<sup>57</sup>, sometimes without EU rules to base themselves on.<sup>58</sup> Although a different tune can be heard from across the Channel<sup>59</sup>, with the Financial Services Authority (FSA) and the Bank of England advocating no new supervisory arrangements<sup>60</sup>, it is clear that a discussion of how best to organise the supervisory landscape is developing in an EU-wide setting.<sup>61</sup>

The ECB itself, in its contribution to the public consultation on the application of the Lamfalussy process to securities market legislation<sup>62</sup>, has made several proposals that would enhance supervisory consistency and introduce a single set of Europe-wide standards. Specifically, the ECB welcomes alterations to the Lamfalussy process that would “develop a common set of harmonised technical rules that would satisfy the needs both of regulators and market participants”. It calls for the adoption of regulations as a means to implement the framework principles set out in the level 1 directives, so that “a unique source of rights and obligations in the EU harmonised regulatory fields” would ensue. Thus, the long

54 See the last progress report of 2 June 2004, available at [http://www.europa.eu.int/comm/internal\\_market/finances/docs/actionplan/index/progress10-annex\\_en.pdf](http://www.europa.eu.int/comm/internal_market/finances/docs/actionplan/index/progress10-annex_en.pdf).

55 See <http://www.c-esb.org/>.

56 CESR (2004), “Himalaya Report” – Which Supervisory Tools for the EU Securities Markets? Preliminary Progress Report”, 25 October 2004, available at <http://www.cesr-eu.org/>. One can find the responses to the consultation document on CESR’s website.

57 The admission of prospectuses is mentioned as an example where single decisions for the entire market may make sense.

58 The supervision of rating agencies is a case in point.

59 CESR’s headquarters are in Paris.

60 See the discussion paper issued by the FSA and the Bank of England, “Supervising Financial Services in an Integrated European Single Market: A Discussion Paper – January 2005”, available at [http://www.fsa.gov.uk/pubs/other/tripartite\\_dp.pdf](http://www.fsa.gov.uk/pubs/other/tripartite_dp.pdf).

61 Some of the responses, e.g. that of the European Banking Federation, indicate that the banking industry itself prefers to see CESR focus on the current framework rather than proposing “one-stop shop” decision-making, as this would imply a rewriting of recent directives. See CESR’s website at: <http://www.cesr-eu.org/>.

62 See footnote 47.

implementation process and the inconsistencies in national implementation could be remedied.

The ECB, in its Opinion on the implementation in the EU of the so-called Basel II agreement<sup>63</sup>, the set of standards that will replace the current Basel solvency rules<sup>64</sup>, calls for more consistency and a single source of EU-wide rules based on so-called level 2 measures (i.e. the implementing measures of the framework directives), as it did in its earlier Opinion on the proposed extension of the Lamfalussy approach to the other sectors of the financial services industry.<sup>65</sup> Quoting from the latter Opinion, the ECB endorses a development under which Level 2 acts would emerge

“as the main body of technical rules applicable to EU financial institutions. At the same time, those aspects that could be more appropriately dealt with in EU legislation could be transferred from national legislation to Level 2 acts. The ECB is convinced that such a harmonised, simplified set of European rules would contribute significantly to further integrating financial markets, would considerably reduce regulatory costs for financial institutions and would enhance consumers’ rights in relation to financial services.”

Its most recent Opinion specifically calls for Community regulations to be used for implementation.

Apart from the issue of a single and consistent source of financial market regulation, the question of coordination among supervisors is a recurring theme in the papers and opinions mentioned above.

The coordinating role played by the supervisor on a consolidated basis of financial conglomerates<sup>66</sup>, and the possibility of group-wide use of the internal ratings-based (IRB) approach to solvency<sup>67</sup>, requiring coordinated competences of national supervisors, are examples of cases which alter the supervisory landscape.

63 Basel II: International Convergence of Capital Measurement and Capital Standards: a Revised Framework, adopted by the Governors of the Central Banks and heads of banking supervision of the G10 on 26 June 2004. See the BIS’s website at <http://www.bis.org/publ/bcbs107.pdf>.

64 Opinion of the European Central Bank of 17 February 2005 at the request of the Council of the European Union on a proposal for directives of the European Parliament and of the Council, recasting Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions (CON/2005/4) (2005/C 52/10), OJ C 52, 2.3.2005, p. 37.

65 Opinion of the ECB of 20 February 2004 at the request of the Council of the European Union on a proposal for a Directive of the European Parliament and of the Council amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 93/6/EEC and 94/19/EC and Directives 2000/12/EC, 2002/83/EC and 2002/87/EC of the European Parliament and of the Council, in order to establish a new Financial Services Committee organisational structure (COM (2003) 659 final) (CON/2004/7) (2004/C 58/11), OJ C 58, 6.3.2004, p. 23. See footnote 53 for this Directive.

66 According to Article 10 of Directive 2002/87/EC 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, OJ L 35, 11.2.2003, p. 1, a single coordinator, responsible for coordination and exercise of supplementary supervision, shall be appointed from among the competent authorities of the Member States concerned.

67 See paragraph 16 of the ECB’s Opinion on the EU’s implementation of Basel II, mentioned in footnote 64.

## 5 POTENTIAL DEVELOPMENTS

All of these developments and tentative scenarios still fall short of a European banking supervisory agency, or a Europe-wide financial services supervisory authority, in either case linked to or coinciding with the ESCB. Arguments in favour of such an agency have however been put forward. Information-related synergies between supervision and core central banking functions, the central banks' focus on systemic risk, their independence and expertise, as well as the historic involvement of central banks in supervision and the possibilities opened by the close networking of supervisors already in the Eurosystem, all argue in favour of central banks' close involvement in prudential supervision at the very least, if not of a full attribution of exclusive supervisory powers to central banks. They also suggest that a systematic and overall regulation of the facility of exchanging supervisory information is required, instead of the current patchwork of rules and roadblocks.<sup>68</sup> Regulatory and supervisory overlaps and the heavy regulatory burden for commercial undertakings in the financial services industry support the need for schemes that allow reporting to a single agency. Additionally, they argue for, if possible, a single agency to be the counterpart of an undertaking for the entirety of its supervisory compliance within the single market. Preferably, this agency should be "close at hand" yet should act in a coordinated fashion according to a European mandate with EU-wide responsibility for the proper execution of the single market's standards. Moreover, the necessity for home State supervisory authorities to include the externalities of their decisions which apply to a company's Europe-wide financial services provision should be brought into sharper focus. Stronger coordinating mechanisms and central responsibilities for the overall stance of supervision would be helpful in this respect, especially when cross-border financial services groups are concerned

Issues of accountability and the concentration of power are valid concerns that should be given careful consideration. It is submitted that accountability can be properly organised at the EU level as well. It may vary in relation to the area concerned, with the level of independence from other public bodies and institutions the greatest in the core Eurosystem task, namely the pursuit of price stability, with four basic tasks that form an exclusive European competence, and with far more involvement of non-central bank policymakers in the area of prudential supervision. In addition, the size of the European market, and the vastness of the area of supervision, should not lead to a large bureaucracy, but

<sup>68</sup> Although Article 12 of Directive 2000/12/EC, as amended by Article 29 (2) of the Directive on supplementary supervision in particular (mentioned in footnote 66), provides an exhaustive set of rules on exchange of supervisory information in the context of professional secrecy, other sets of supervisory rules contain different provisions. A comparison of this provision with Article 107 of the Prospectus Directive (Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, p. 1), as amended by Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, p. 16 (codified version available at <http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/consleg/2001/L/02001L0034-20030412-en.pdf>), and Article 13 of the latter Market Abuse Directive, shows marked differences. These, and the possibility of withholding information exchange for reasons of national sovereignty (Article 16 (2) of the Market Abuse Directive), must hinder cross-the-board supervisory information exchange in the case of integrated financial services undertakings.

rather should result in a central body responsible for overall decision-making that relies on local supervisors who know their parts of the market and their supervised undertakings best. The 2004 proposal by the European Financial Services Round Table (EFR) to designate a home State supervisory authority to oversee the EU-wide activities of financial services groups operating in various Member States represents an intermediate step towards more centralised responsibilities for prudential supervision.

The adoption of regulations as the main instruments for setting Europe-wide standards for the financial services industry would represent an important first step in the right direction, as this would create a common set of norms, no longer unduly influenced by the specific aspects woven into current financial services law in the process of national implementation. State-centred enforcement is the second element which should be tackled to end what can only be described as the current “balkanisation” of the single market in financial services, at least at the retail level.

In my view, the ESCB should be closely aligned with any developments towards enhancing Europe-wide regulatory and supervisory responsibilities. A legal basis for the establishment of central supervisory responsibilities can be found in Article 308 of the Treaty (Article I-18 of the European Constitution, the so-called flexibility clause). The ESCB’s involvement – whether directly or as closely involved in the supervisory authority’s activities – could, additionally, be based on its competences as discussed in this paper.<sup>69</sup> It should provide the coordinating role, bringing into instances of major decision-making a perspective which reflects the implications for the entire market and its citizens, as well as for the single currency. A further debate on the proper place of supervision of financial services industry in an integrated Europe is called for. To my mind, the single currency and the internal market provide important arguments for Europe-wide responsibilities that would make supervisors not only look at their national audience, but also to address a wider European constituency.<sup>70</sup>

69 Despite the fact that the continued exception for “insurance undertakings” from the enabling clause (Article III-185 (5) of the European Constitution and Article 25.6 of the Statute) is an anomaly, the more so when one acknowledges that this exclusion was proposed by the Dutch in 1991 even though in the Netherlands the central bank and the Insurance Inspection Board have since merged, making De Nederlandsche Bank competent for insurance supervision as well. Mario Grande, in his commentary on Article 25.2 of the Statute (in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 6th edition (Baden-Baden: Nomos Verlag, 2003), p. 487), remarks that the reasoning underlying this restriction, namely that the insurance sector is more remote from central bank functions than the banking and securities markets, is no longer valid in the view of recent developments in the financial markets.

70 For a proposal to give national supervisors a European mandate as well, see D. Schoenmaker, “Financial Supervision: From National to European?”, *Financial and Monetary Studies*, NIBESVV, 22:1, Rotterdam, 2003.