

Caroline Bradley*

The EU's single market (in financial services) is still a goal rather than a fact despite decades of more or less focused effort to achieve it.¹ Over the years the EU has moved in the direction of achieving a single market, harmonizing rules for securities, banking and insurance regulation, and developing an EU-level infrastructure for the organization of regulatory supervision. But, whereas a true EU single market in financial services would arguably require centralized supervision as well as some harmonized rules of financial regulation, the EU as a whole has not yet established such a system. The establishment of the European Banking Union for the eurozone in November 2014 introduced a system of centralized supervision of banks (but not of securities, insurance and pensions markets) for a subset of EU Member States.² Thus in two ways the Banking Union involves separations between the eurozone and the rest of the EU's financial markets: as a more intense system of financial supervision for only some of the EU Member States, and as a system of financial supervision focusing on one sector of financial activity.³

* Professor of Law, University of Miami School of Law, PO Box 248087, Coral Gables, FL, 33124, cbradley@law.miami.edu ; <http://blenderlaw.umlaw.net/> . © Caroline Bradley 2016. All rights reserved..

¹ See, e.g., Mario Mariniello, André Sapir & Alessio Terzi, the Long Road Towards the European Single Market, Bruegel Working Paper 2015/1, 2 (Mar, 2015) (noting that a “commonly held opinion among observers today is that the single market is far from being complete.”) And see also, e.g., *id.* (noting fragmentation of financial markets since the financial crisis.)

² See, e.g., David Howarth & Lucia Quaglia., *Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary Union*, 51(S1) J.Common Mkt. Stud. 103 (2013).

³ This separation between banking and other sectors of finance is less than ideal given that insurance, securities and banking activity is often hard to separate and in particular because of the post-crisis focus on the need for financial regulators to address the risks involved in shadow banking, being banking type activity carried on by entities which are not regulated as banks. See, e.g., Financial Stability Board, *Global Shadow Banking Monitoring Report 2015* (Nov. 12, 2015) at 1 (“Intermediating credit through non-bank channels can have important

These developments raise a fundamental question of how a single market in financial services for the twenty-eight EU Member States can co-exist with a banking union for the nineteen members of the euro area (together with non-eurozone states which opt in to the European Banking Union),⁴ and this question is a complex one.⁵ A move from a Europe in which all countries had their own currencies to a Europe in which a group of countries agreed to a common currency was originally seen as a move towards further integration. Economic and Monetary Union was intended to be a component of the European single market⁶ in which all Member States would ultimately participate.⁷

advantages and contributes to the financing of the real economy, but such channels can also become a source of systemic risk, especially when they are structured to perform bank-like functions (e.g. maturity and liquidity transformation, and leverage) and when their interconnectedness with the regular banking system is strong.”)

⁴ Cf. Pia Hüttl & Dirk Schoenmaker, *Should the ‘Outs’ Join the European Banking Union?*, *Bruegel Policy Contribution*, Issue 2016/03 (Feb. 2016).

⁵ See, e.g. Niamh Moloney, *European Banking Union: Assessing its Risks and Resilience*, 51 COMMON MKT. L. REV. 1609, 1612 (2014) (noting that “[i]nstitutional reform directed to executive supervisory governance—and primarily to the euro area—is a constitutional and political novelty.”)

⁶ See, e.g., Charles R. Bean, *Economic and Monetary Union in Europe*, 6 J. ECON. PERSPECTIVES 31, 32 (1992); Jean-Claude Trichet, *The Euro After Two Years*, 39 J. COMMON MKT. STUD. 1, 7 (2001) (“The euro is the crowning achievement of the single market.”)

⁷ See, e.g., Regulation (EEC) No. 907/73 establishing a European Monetary Cooperation Fund, OJ No. L 89/2 (Apr. 5, 1973) (noting that “the purpose of the Fund must be to contribute to the progressive establishment of an Economic and Monetary Union between the Member States of the European Economic Community, which, in its final stage as regards its monetary aspects will have the following characteristics: - either the total and irreversible convertibility, at irrevocable parities, of Community currencies against each other, or the introduction of a common currency”)

By November 2015 the European Banking Union had been in operation for a year.⁸ From the time that a European Banking Union was proposed in 2012⁹ the UK repeatedly expressed concern that the European Banking Union would disrupt the EU's single market in financial services.¹⁰ And this concern found new expression in the UK's attempts to renegotiate the terms of its relationship with the rest of the EU.¹¹ In February 2016 the European Council reached agreement on new arrangements for the UK's relationship with the EU which included an agreement on financial services.¹² The European Council acknowledged that EU "processes make possible different paths of integration for different Member States, allowing those that want to deepen integration to move ahead, whilst respecting the rights of those which do not want to take such a course."¹³ The Decision stated commitments to the single market and to the euro area,

⁸ Danièle Nouy: the Single Supervisory Mechanism after One Year: The State of Play and the Challenges Ahead, Speech by Danièle Nouy, Chair of the Supervisory Board of the Single Supervisory Mechanism, Banca d'Italia conference "Micro and macroprudential banking supervision in the euro area", at the Università Cattolica, Milan, 24 November 2015

⁹ Herman Van Rompuy, President of the European Council, Report: Towards a Genuine Economic and Monetary Union (Jun. 26, 2012).

¹⁰ *See, e.g.*, Review of the Balance of Competences between the United Kingdom and the European Union, 10, Cm 8415 (Jul. 2012) ("the Government will: continue to encourage and support the steps needed to ensure stability and strengthened governance in the Eurozone; ensure that action to tackle the crisis in the Eurozone protects the unity and integrity of the single market; ...work for more effective regulation of the financial sector which ensures financial stability and protects UK interests".)

¹¹ *See, e.g.*, HM Government, The Best of Both Worlds: The United Kingdom's Special Status in a Reformed European Union, 15 (Feb. 2016) ("The UK supports the Eurozone's efforts to reform. However, as the Eurozone takes the steps it needs to succeed, it is equally important that the UK is not forced to participate and does not have its interests undermined. In the past, this has not always been clear. For example, when the Eurozone agreed to establish a Banking Union, the UK had to negotiate to ensure that it would not include the UK.")

¹² Decision of the Heads of State or Government meeting within the European Council, Concerning a New Settlement for the United Kingdom Within the European Union, Annex I to European Council Conclusions, EUCO 1/16 (Feb. 19, 2016).

¹³ *Id.*

cited mutual respect and sincere co-operation between the euro-area and non-euro-area States, and declared that:

“It is acknowledged that Member States not participating in the further deepening of the economic and monetary union will not create obstacles to but facilitate such further deepening while this process will, conversely, respect the rights and competences of the non-participating Member States.”¹⁴

The attempt to co-ordinate the requirements of protecting both the euro area and the single market focuses on prohibiting discrimination between people and firms based on currency (rather than on the basis of objective reasons) and on identifying the entities to be subject to Banking Union rules.¹⁵ A Draft Council Decision would provide for a Member State that does not participate in the banking union to give its reasoned opinion opposing the adoption of legislation by qualified majority, leading to additional discussion of the issue.¹⁶

The February 2016 Decision has both political and legal implications. And although UK authorities have been concerned to emphasise that an agreement between Heads of State and Government is legally binding,¹⁷ it is unclear how useful its language is as a legally binding text

¹⁴ *Id.*

¹⁵ *Id.* (“Union law on the banking union conferring upon the European Central Bank, the Single Resolution Board or Union bodies exercising similar functions, authority over credit institutions is applicable only to credit institutions located in Member States whose currency is the euro or in Member States that have concluded with the European Central Bank a close cooperation agreement on prudential supervision, in accordance with relevant EU rules and subject to the requirements of group and consolidated supervision and resolution.”)

¹⁶ *Id.* at Annex II (Draft Council Decision on Specific Provisions Relating to the Effective Management of the Banking Union and of the Consequences of Further Integration of the Euro Area.)

¹⁷ *See, e.g.*, Letter from Mark Carney, Governor of the Bank of England, to Rt Hon Andrew Tyrie MP, Chairman of the Treasury Select Committee (Mar. 7, 2016) available at <http://www.bankofengland.co.uk/publications/Documents/other/treasurycommittee/other/governorletter070316.pdf> at p 6 (“The section on economic governance and the emergency brake are clearly intended by the parties to be legally binding and will enter into force upon notification of the UK's intention to remain in the EU, which would be expected to occur if there is a vote in the referendum favour of doing so. The International Law decision is an agreement concluded in accordance with Article 31 of the Vienna Convention on the Law of Treaties and consequently has interpretative effect. The European Court of Justice accepts that such international

as its provisions are amenable to different interpretations. The language of the Decision is likely to influence the way in which the Member States discuss policy relating to financial regulation. From a legal perspective the Decision's suggestion that it should be possible to identify which potential European Banking Union measures would be consistent or inconsistent with the single market is more problematic. Does the single market merely prohibit the ECB from establishing barriers to the freedom to provide services into the euro area that would be prohibited to an individual Member State, or does the logic of the single market restrict the ability of the ECB to provide support to euro-zone banks that allow them to compete on unequal terms with non-eurozone banks? The Decision addresses this issue by defining separate spheres of support for the euro and non-euro spheres, but focusing on the responsibility for bearing the costs of such support rather than on the impact of the support on conditions of competition in the single market.¹⁸ The Court of Justice's tolerance of emergency measures adopted by the ECB so far¹⁹ suggests that it may be willing to defer to the ECB when it acts to promote financial stability.

The Development of EMU and the Single Market

Economic and Monetary Union (EMU) is a component of the EU in which all of the Member States participate, although they do so in different ways. The Maastricht Treaty specified EMU as an EU goal, although the UK and Denmark negotiated opt-outs.²⁰ Nevertheless

agreements entered into by the signatories to the Treaties are instruments of interpretation which must be taken into account.); The Best of Both Worlds, *supra* note [11](#), at 8 ("All EU Member States have signed up to these principles in a decision under international law, giving us far greater certainty than we have ever had in the past that the UK's rights as a country that does not use the euro will be respected. These principles will be incorporated into the Treaties when they are next revised.")

¹⁸ Decision Concerning a New Settlement for the United Kingdom, *supra* note [12](#),

¹⁹ *See, e.g.*, Gauweiler and Others [2015] EUECJ C-62/14 (16 June 2015) .

²⁰ *See, e.g.*, Rebecca Adler-Nissen, *OPTING OUT OF THE EUROPEAN UNION*, 5 Cambridge: Cambridge University Press (2014).

the UK and Denmark are subject to the European Semester, the mechanism for coordination of economic policies of the EU Member States which was introduced in 2011.²¹

Until the onset of the financial crisis the eurozone and the EU single market in financial services did not seem to be inconsistent with each other. Financial regulation was an area of the internal market in which the EU institutions developed harmonized rules, subject to subsidiarity. Some commentators suggested that this failure to think about financial regulation as a component of economic and monetary union was significant and problematic,²² and others suggested that the ideal situation was one in which all Member States were also in the euro area²³ (which would have had a similar effect of conforming financial regulation and economic governance). But developing co-ordination in the eurozone and in the context of the single market arguably reduced the number of barriers within the broader market rather than erecting new barriers.²⁴ In

²¹ See, e.g., Claire A. Dunlop & Claudio M. Radaelli, *Policy Learning in the Eurozone Crisis: Modes, Power and Functionality*, *Policy Sciences* (2015) DOI 10.1007/s11077-015-9236-7. One component of the European Semester is country reports on the Member States. See, e.g., EU Commission Staff Working Document, Country Report United Kingdom 2016, SWD (2016) 96 final (Feb. 26, 2016); EU Commission Staff Working Document, Country Report Denmark 2016 SWD (2016) 74 final (Feb. 26, 2016).

²² See, e.g., Victoria Chick & Sheila Dow, *Regulation and Differences in Financial Institutions*, 30 J. ECON. ISSUES 517, 518-9 (1996) (“The question of bank supervision gets barely a mention in the Maastricht Treaty. It is seen as separable from the issue of monetary control. And yet there are plans for deposit insurance, and one hopes that the ECSB will, at least *in extremis*, be prepared to act as lender of last resort. To separate these matters is bizarre and irresponsible.”) Jean Dermine has written that under the Maastricht Treaty it was “only in very special circumstances, and with unanimity in the European Council, that the ECB will be allowed to regulate or supervise financial institutions.” Jean Dermine, *European Banking Integration: Don't Put the Cart before the Horse*, 15 FINANCIAL MARKETS, INSTITUTIONS AND INSTRUMENTS 57, 61 (2006)

²³ See, e.g., Trichet, *supra* note 6.

²⁴ Although cf. Nicole Scicluna, *When Failure isn't Failure: European Union Constitutionalism after the Lisbon Treaty*, 50 J. COMMON. MKT. STUD. 441, 452 (2012) (“the very projects that were meant to unite European citizens and promote their common identity, such as the euro, are now straining transnational solidarity and producing a rise in nationalist and protectionist sentiments.”)

2004 the Commission wrote that the euro was contributing to financial market integration.²⁵ The UK was content to be inside the (incomplete) single market yet outside the euro area.²⁶ Commentators noted that in the US, with a single currency and a national market there were discrepancies between economic conditions in different parts of the country.²⁷ Indeed, the rationale of the single market is that factors of production should be able to move to the locations where they can be put to best use. The opening up of the national markets to the forces of competition would increase consumer welfare and inefficient, uncompetitive businesses would fail. However, this “creative destruction dynamic” has never operated fully in the EU.²⁸ Regulatory barriers to entry persisted over time,²⁹ the Commission was slow to take action with respect to state aids,³⁰ and the EU had programs for regional and sectoral financial support, all

²⁵ See, e.g., European Commission, EMU After Five Years, European Economy Special Report No. 1/2004 (2005) at p. 14.

²⁶ Cf. David Barr, Francis Breendon & David Miles, *Life on the Outside: Economic Conditions and Prospects Outside Euroland*, 18 ECON. POLICY 573, 601-2 (2003) (evaluating whether the ins or outs had done better after the introduction of the euro, but noting “no evidence that EMU has yet influenced financial market location, and that London’s position as the principal financial centre in Europe appears to have been unaffected by its being outside of the euro zone.”)

²⁷ See, e.g., Bean, *supra* note [6](#).

²⁸ See, e.g., Mariniello et al. *supra* note [1](#), at 17.

²⁹ See, e.g., Federica Mustilli & Jacques Pelkmans, *Access Barriers to Services Markets: Mapping, Tracing, Understanding and Measuring*, CEPS Special Reports No. 77 (Jun. 2013) at 3 (noting that the “combination of intra-EU ‘free exchange’, EU regulation and EU competition policy yields a market environment that is radically distinct from worldwide exchange. And yet, there are still barriers in the EU services markets, albeit far less than (say) a decade ago, let alone two decades ago.”)

³⁰ See, e.g., Commission Communication, Progress Report Concerning the Reduction and Reorientation of State Aid, COM (2002) 555 final (Oct. 16, 2002) at 2 (noting that the Stockholm European Council had in 2001 stated that the level of state aids must be reduced.). Cf. Michael Blauburger, *Of ‘Good’ and ‘Bad’ Subsidies: European State Aid Control through Soft and Hard Law*, 32 W. EUR. POLITICS 719, 720 (2013) (noting that, in “balancing the general prohibition on state aid against possible exceptions, the Commission has always had to assess, at least implicitly, not only the effects that a certain state aid measure would have on competition, but also its potential contributions to other policy goals such as competitiveness or cohesion.”)

alongside a rhetoric of competitiveness.³¹ Notably, a demand for increasing the EU's focus on competition and competitiveness was part of the UK's renegotiation with the EU in 2016 and was reflected in the European Council's Decision.³²

The financial crisis tended to emphasize geographic borders within the EU and increase fragmentation in the EU's financial markets³³ as Member State Governments intervened to support their own financial firms.³⁴ The Commission reacted by developing guidelines for the provision of state aid to financial institutions under stress, recognizing that crisis conditions made financial support inevitable.³⁵ The crisis also led to a new focus among the G20 countries on financial stability as an objective of financial regulation³⁶ (a focus which encompasses

³¹ See, e.g., EU Commission, Single Market Integration and Competitiveness in the EU and its Member States: Report 2015 (2015).

³² Decision Concerning a New Settlement for the United Kingdom, *supra* note [12](#)

³³ See, e.g., Howarth & Quaglia, *supra* note [2](#), at 104-7.

³⁴ This development is not unique to the EU. Generally the financial crisis tended to undermine the internationalization of the financial markets as states intervened to support domestic financial firms and sought to protect national markets from risks associated with foreign firms. See, e.g., Louise C. Bennetts & Arthur S. Long, *The New Autarky? How U.S. and UK Domestic and Foreign Banking Proposals Threaten Global Growth*, Cato Institute Policy Analysis, No 743 (Nov 21, 2013). Transnational policy-makers' emphasis of interconnectedness as a source of risk to financial stability arguable encouraged this balkanization. See, e.g., Nicolas Arregui, Mohamed Norat, Antonio Pancorbo & Jodi Scarlata, *Addressing Interconnectedness: Concepts and Prudential Tools*, IMF Working Paper WP/13/199 (Sep. 2013).

³⁵ See, e.g., Commission Communication on the Application, from 1 August 2013, of State Aid Rules to Support Measures in Favour of Banks in the Context of the Financial Crisis, OJ No C 216/1, at 1-2 (Jul. 30, 2013) ("The evolution of the crisis has required the adaptation of some provisions of the State aid framework dealing with the rescue and restructuring of firms in difficulty while not ruling out the possibility of accessing, exceptionally, significant public support.")

³⁶ See, e.g., Financial Stability Board, Global Shadow Banking Monitoring Report 2015, *supra* note [3](#).

increasing numbers of policy issues).³⁷ But state support of financial firms in the EU led to the development of a European sovereign debt crisis.³⁸ The financial crisis and European sovereign debt crisis prompted the EU to act³⁹ to preserve confidence in the financial markets,⁴⁰ and, in particular, to reinforce economic governance and banking regulation for the euro area.⁴¹ The financial crisis required the EU to conform its developing system of financial regulation to the transnational standards developed through the Financial Stability Board and transnational standard setting bodies (the Basel Committee for Banking Supervision, the International Organisation of Securities Commissions and the International Association of Insurance

³⁷ See, e.g., G20 Finance Ministers and Central Bank Governors, Communiqué, Washington DC, (April 17, 2015) at <http://www.g20.utoronto.ca/2015/150417-finance.html> ("We ask the FSB to convene public- and private-sector participants to review how the financial sector can take account of climate-related issues. ")

³⁸ See, e.g., Nicholas Dorn, *Regulatory Sloth and Activism in the Effervescence of Financial Crisis*, 33 L. & POLICY 428, 428 (2011) ("In 2010 it became clear that sovereign states, which had "bailed out" the banking sector, were themselves becoming targets of a mixture of speculation and genuine fears and uncertainties over their financial health".)

³⁹ See, e.g., European Commission Communication, COM (2011) 777 final (Nov. 15, 2011) (Commission Work Programme 2012: Delivering European Renewal) at 2 ("The European Union is confronted with the challenge of a generation. An economic challenge, that affects families, businesses and communities across Europe. But also a political challenge, to show that the European Union is equal to the task. The European Union can and should make a real difference to how Europeans face up to today's crisis.")

⁴⁰ See, e.g., Sebastian Schich, *Financial Crisis: Deposit Insurance and Related Financial Safety Net Aspects*, 95 FIN. MKT. TRENDS (OECD 2008/2) (noting changes to deposit insurance schemes in response to the crisis, including, at 19-20, proposed changes in the EU).

⁴¹ See, e.g., Jean-Claude Juncker, Donald Tusk, Jeroen Dijsselbloem, Mario Draghi & Martin Schulz, COMPLETING EUROPE'S ECONOMIC AND MONETARY UNION (Jun. 22, 2015) (Five Presidents' Report). Cf. International Monetary Fund, Euro Area Policies: 2012 Article IV Consultation, IMF Country Report No.12/181 (Jul. 2012) at 10 ("Only a convincing and concerted move toward a more complete EMU could arrest the decline in confidence engulfing the region. A credible roadmap toward a full banking union and fiscal integration will make the short-term crisis measures more effective. Structural reforms throughout the euro area will also be necessary to revive growth in the long run, while macroeconomic policies can smooth the needed adjustment in the short run.")

Supervisors).⁴² But the sovereign debt crisis required a particular focus on the supervision of euro area banks.⁴³

The euro area crisis emphasized the distinctions between the euro area countries and the EU Member states outside the euro area. Solidarity between the stronger and weaker euro area countries was hard enough to achieve, although work on developing economic and monetary union since the crisis emphasizes solidarity.⁴⁴ Countries outside the eurozone felt even less solidarity with eurozone countries in difficulty.⁴⁵ Moreover, the reinforcement of the euro area

⁴² See, e.g., Financial Stability Board, FSB Framework for Strengthening Adherence to International Standards (Jan. 9, 2010). The ECB and the Commission are members of the FSB. See Charter of the Financial Stability Board (Jun. 2012), Annex A (List of FSB Members (as amended on 26 March 2015)).

⁴³ See, e.g., Barry Eichengreen & Charles Wyplosz, *Minimal Conditions for the Survival of the Euro*, 51 INTERECONOMICS 24-28, 26 (2016) (“As the point is sometimes put, monetary union without banking union will not work.”); Rishi Goyal et al., *A Banking Union for the Euro Area*, IMF Staff Discussion Note SDN/13/01 (Feb. 13, 2013).

⁴⁴ See, e.g., Five Presidents’ Report, *supra* note [41](#), at 4 (“This common destiny requires solidarity in times of crisis and respect for commonly agreed rules from all members”)

⁴⁵ Consider, for example the way the UK Chancellor spoke about Greece’s problems in the summer of 2015. See HM Treasury Press Release, Chancellor’s Statement on Greece: 6 July 2015 (Jul. 6, 2015) (“Britain will be affected the longer the Greek crisis lasts, and the worse it gets. There is no easy way out. But even at the eleventh hour we urge the Eurozone leaders and Greece to find a sustainable solution.”)

with new harmonized rules of banking regulation⁴⁶ and new supervisory arrangements⁴⁷ does potentially set up new barriers between the eurozone and the rest of the EU. Financial stability demands protecting the market or markets for which a policy-maker is responsible from risks generated elsewhere (as well as preventing the market(s) for which the policy-maker is responsible from being a source of risk to other markets. If the need to ensure financial stability within the eurozone were to lead to restrictions on relationships between eurozone and non-eurozone banks, the freedom of the non-eurozone banks to operate within the EU single market would be restricted. The UK originally tried to address this type of risk by negotiating specific protections for its financial markets by means of a requirement for double majority voting.⁴⁸

By 2016 the question of how the European Banking Union and the EU single market could operate together was still an issue—at least for the UK, as it renegotiated the terms of its relationship with the EU and prepared for a referendum on the issue of whether the UK would

⁴⁶ See, e.g., Regulation (EU) No 806/2014 establishing a Single Resolution Mechanism for the Banking Union, OJ No. L 225/1 (Jul. 30, 2014). The Regulation is an internal market measure based on Article 114 of the TFEU, and participation in the Single Resolution Mechanism is open to all EU Member States, although it is specifically designed as a component of the European Banking Union. See also, e.g., Proposal for a Regulation Amending Regulation (EU) 806/2014 in Order to Establish a European Deposit Insurance Scheme, COM (2015) 586 final (Nov. 24, 2015). The proposal, which is also based on Article 114 TFEU, argues that the introduction of a eurozone deposit insurance scheme would benefit non-eurozone banks. *Id.* at 4 (“Risks would be spread more widely, enhancing financial stability not only in the Member State concerned but also in other participating and non-participating Member States, by limiting potential contagion effects. Moreover, it will help restore the level playing field in the internal market by limiting the competitive disadvantage that sound banks are suffering because of their place of establishment.”)

⁴⁷ See, e.g., Council Regulation (EU) No 1024/2013 Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions, OJ No. L 287/63 (Oct. 29, 2013).

⁴⁸ See, e.g., House of Commons Foreign Affairs Committee, *The Future of the European Union: UK Government Policy*, First Report of Session 2013–14 HC 87-I, Volume I (Jun. 11, 2013) at 7. Cf. Howarth & Quaglia, *supra* note 2, at 114-116 (discussing developments leading up to agreement of the double majority voting system in the EBA).

remain in the EU or not (Brexit).⁴⁹ From a political perspective the UK's concerns make sense, as the UK is the site of one of the world's major financial markets and UK Governments have been determined to ensure that EU measures relating to financial regulation should not harm those markets.⁵⁰

The Eurozone is not the only aspect of the EU that involves different Member States participating in the EU on different terms in ways that may have an impact on the single market.⁵¹ For example, the Commission proposed a directive for eleven Member States to introduce a financial transactions tax after it became apparent that the EU as a whole was unlikely to agree to such a tax.⁵² Denmark has opted out of some EU home affairs legislation,⁵³ and in a 2015 referendum the Danish people voted to continue this opt-out. The UK and Ireland both have a right to choose whether to opt in to justice and home affairs measures. These opt-outs have implications for regulation of the internal market as well as for home affairs, to the extent that the criminal law is used to regulate the markets. In 2014 the EU adopted a Directive on criminal sanctions for market abuse (insider trading and market manipulation): Denmark is not subject to the Directive, the UK chose not to opt in, so is also not subject to the Directive, but

⁴⁹ *See, e.g.*, European Union Referendum Act 2015 c. 36; House of Lords European Union Committee, *The EU Referendum and EU Reform*, HL 122 (Mar. 30, 2016).

⁵⁰ The UK government is committed to encouraging financial activity in the UK. *See, e.g.*, Harriett Baldwin, Economic Secretary to the Treasury, in Ernst & Young, *UK FinTech: On the Cutting Edge* (Feb. 24, 2016) at 3 (“The UK Government is committed to supporting the development of the UK’s FinTech sector.”) Trade Groups advocate action to protect London as a financial centre. *See, e.g.*, TheCityUK, *Key Facts about the UK as an International Financial Centre Report 2015* (Jul. 2015).

⁵¹ *See, generally, e.g.*, Rebecca Adler-Nissen, *OPTING OUT OF THE EUROPEAN UNION*, Cambridge: Cambridge University Press (2014).

⁵² EU Commission, *Proposal for a Directive Implementing Enhanced Cooperation in the Area of Financial Transaction Tax*, COM(2013) 71 final (Feb. 14, 2013), at 3. As of early 2015 it was not clear that the eleven Member States would agree to the proposal. *See, e.g.*, *France Says Financial Transaction Tax Talks Deadlocked*, Reuters Business (mar. 10, 2016).

⁵³ *See, e.g.*, *Denmark Votes No on Adopting EU Rules* (Dec 54, 2015) at <http://www.bbc.com/news/world-europe-35002158>.

Ireland did choose to opt in.⁵⁴ For years, commentators on the EU have argued about the benefits and detriments of variable geometry⁵⁵ or a two or more speed Europe. The Schengen Area, currently challenged by the EU's refugee crisis,⁵⁶ includes four EFTA countries and twenty-four of the EU Member States.

Closer co-operation between some Member States of the EU in some areas means that the different Member States are subject to different rules, but other arrangements do not raise the same possibility of conflict with the single market that the Banking Union does. Although the UK has not opted into the EU's requirements for criminal sanctions for market abuse the UK does impose criminal sanctions for insider trading and market manipulation and has successfully prosecuted insider traders for violations of the law. But the ECB's responsibility for supervising eurozone banks may lead it to distinguish between financial firms based in the euro area and outside on the basis of concerns about financial stability. Although the Decision of February precludes discrimination based on currency it does not preclude discrimination "on the basis of objective reasons."⁵⁷ The meaning of this phrase is unclear. The Governor of the Bank of England has suggested that he is happy that the February 2016 Decision prohibits discrimination based on currency, as an addition to existing legal restrictions on discrimination based on nationality.⁵⁸ Perhaps especially as the Chair of the Financial Stability Board,⁵⁹ Mark Carney is

⁵⁴ Directive 2014/57/EU on Criminal Sanctions for Market Abuse, OJ No. 173/179 (Jun. 12, 2104) Recitals 29-31.

⁵⁵ See, e.g., J. A. Usher, Variable Geometry or Concentric Circles: Patterns for the European Union, 46 Int'l & Comp. L. Q. 243 (1997); Fabrizio Tassinari, Variable Geometries: Mapping Ideas, Institutions and Power in the Wider Europe, CEPS Working Document No 254 (Nov. 2006).

⁵⁶ See, e.g., EU Commission, Seventh bi-annual report on the functioning of the Schengen area 1 November 2014 - 30 April 2015, COM (2015) 236 final (May 29, 2015); EU Commission, Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM (2016) 85 final (Feb. 10, 2016).

⁵⁷ See *supra* text at note [15](#).

⁵⁸ Carney, *supra* note [17](#), at 9 ("it is welcome that the Settlement reinforces the principle that discrimination, including on grounds of currency, is not permitted in the EU. Taken together with the existing Treaty prohibitions on discrimination on the grounds of nationality, paragraph 1 of Section A also provides protection against discrimination based on place of incorporation or

unlikely to be able to imagine circumstances in which the ECB might take action based on “objective reasons” which might limit the rights of a particular bank regulated by the UK financial regulators to be involved in financial activity in the euro area. The problem would arise if UK regulators took different views of the risk profile of a particular UK-based and regulated financial institution from those of the ECB where the ECB wished to limit the interactions of that financial institution with euro area banks. The Gauweiler decision⁶⁰ suggests that the Court of Justice might be inclined to defer to the judgments of the ECB in circumstances implicating issues of financial stability.

Before the establishment of the European Banking Union, in July 2011 the ECB published a Eurosystem Oversight Policy Framework which argued that the Eurosystem’s responsibility under Article 127 (2) TFEU to promote the smooth operation of payment systems, as a component of financial stability, meant that “the development of major euro financial market infrastructures that are located outside of the euro area” would be a problem.⁶¹ The document stated that:

As a matter of principle, infrastructures that settle euro-denominated payment transactions should settle these transactions in central bank money and be legally incorporated in the euro area with full managerial and operational control and responsibility over all core functions for processing euro denominated transactions, exercised from within the euro area.⁶²

Exceptions to this policy would be accepted only “in very specific circumstances and only on

the currency of the place of incorporation.”)

⁵⁹ See <http://www.fsb.org/profile/mark-carney/> .

⁶⁰ *Supra* note 19. Cf. Valia Babis, *The Power to Ban Short-selling and Financial Stability: the Beginning of a New Era for EU Agencies?*, 73 CAMBRIDGE L. J.266, 269 (2014) (noting, with respect to a different decision, that “the judgment re-confirms the view that the Court will be very reluctant to strike down mechanisms put in place to safeguard financial stability, even if this means stretching the existing legal framework.”)

⁶¹ European Central Bank, Eurosystem Oversight Policy Framework (Jul. 2011) at 9.

⁶² *Id.* at 10.

a case-by-case basis.”⁶³ In addition, Central Counterparties (CCPs) “that hold on average more than 5% of the aggregated daily net credit exposure of all CCPs for one of the main euro-denominated product categories... should be legally incorporated in the euro area with full managerial and operational control and responsibility over all core functions, exercised from within the euro area.”⁶⁴ The UK challenged the document and in March 2015 the General Court held that the Policy Framework was an act that could be challenged as an act intended to have legal effects and that the ECB’s jurisdiction to promote the smooth operation of payment systems under Article 127 TFEU related to the payment of funds and not to securities transactions:

a ‘payment system’ within the meaning of Article 127(2) TFEU falls within the field of the transfer of funds. Therefore, whilst such a definition may include the ‘cash’ leg of clearing operations, that is not true of the ‘securities’ leg of the clearing operations of a CCP, since while such securities may be regarded as being the subject-matter of a transaction giving rise to the transfer of funds, they do not, however, in themselves constitute payments.⁶⁵

The ECB did not benefit from any implied power to regulate securities clearing systems, and if it desired such a power it should ask the legislature to grant the power.⁶⁶

After the judgment the ECB and the Bank of England announced that they had reached agreement on the exchange of information and cooperation with respect to UK CCPs with significant euro-denominated business.⁶⁷ The UK announced that it would therefore withdraw two remaining challenges to the ECB location policy.⁶⁸

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ United Kingdom v European Central Bank, Case T-496/11 (Mar. 4, 2015) ¶¶97.

⁶⁶ *Id.* at ¶¶ 107-109.

⁶⁷ European Central Bank Press Release, European Central Bank and Bank of England Announce Measures to Enhance Financial Stability in Relation to Centrally Cleared Markets in the EU (Mar. 29, 2015).

⁶⁸ HM Treasury Press Release, Government to Withdraw Remaining Legal Challenges to ECB Location Policy (Mar. 29, 2015).

Since the publication of the Eurosystem Policy Framework the regulation of financial market infrastructures has been a visible component of evolving transnational standards for financial stability⁶⁹ and within the EU CCPs regulated in one of the EU member states are authorised under the European Market Infrastructure Regulation (EMIR) to provide services throughout the EU.⁷⁰ The European Securities Markets Authority (ESMA) is working on promoting common supervisory approaches and practices in the application of EMIR in the EU.⁷¹ And the EU has also worked with the US to develop a common approach for the regulation of transatlantic CCPs.⁷² To the extent that EU rules relating to CCPs are effectively harmonized and enforced in a consistent manner this should reduce the ECB's desire to exercise its power in this area.

However, although the question of the extent of the ECB's powers to regulate CCPs was resolved in a way that allowed for an accommodation between preserving financial stability in the euro area and the demands of an EU single market the case does illustrate some of the problems that an intensified focus on financial stability in the eurozone poses for financial regulation and the single market in financial services more generally. The ECB argued that the UK did not even have standing to challenge the Policy Framework as an actor outside the euro

⁶⁹ *See, e.g.*, Financial Stability Board, Implementation and Effects of the G20 Financial Regulatory Reforms, Report of the Financial Stability Board to G20 Leaders (Nov. 9, 2015) at 1 (noting that implementation of reforms of the OTC derivatives markets was progressing); Financial Stability Board, OTC Derivatives Market Reforms: Tenth Progress Report on Implementation (Nov. 4, 2015) at 1 (“International work is also underway to ensure the robustness and resilience of central clearing, and there are ongoing multilateral and bilateral discussions to address cross-border regulatory issues.”)

⁷⁰ Regulation No 648/2012 OTC Derivatives, Central Counterparties and Trade Repositories, OJ No. L 201/1 (Jul. 27, 2012).

⁷¹ *See, e.g.*, European Securities Markets Authority, Questions and Answers: Implementation of the Regulation (EU) No 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories (EMIR), ESMA/2016/242 (Feb. 4, 2016).

⁷² *See, e.g.*, European Commission Press Release, European Commission and the United States Commodity Futures Commission: Common Approach for Transatlantic CCPs (Feb. 10, 2016)

area.⁷³ The General Court rejected this argument.⁷⁴ But more significantly, in a world in which financial stability is conceptualized in broad, all-encompassing terms, the ECB's decision to deal with the implications of securities settlement systems for euro payment systems seems self evident.⁷⁵ The General Court's decision suggests that the ECB would need to deal with such issues through negotiation with financial regulators outside the euro area, or seek new formal powers from the EU legislature, but the issues will not disappear entirely. The development of the Banking Union empowered the ECB,⁷⁶ and it is not clear yet how it will use its powers. To some extent the separation within the ECB between responsibilities for financial policy and for financial supervision may help address these issues,⁷⁷ although it is not clear conceptually to what extent financial stability (now recognized as an important component of financial regulation) can be separated from financial supervision.

The Member States outside the euro area do have an interest in the maintenance of financial stability within the eurozone as financial instability originating in the eurozone could spread through the EU more generally. This is especially the case for the UK, but could affect

⁷³ United Kingdom v European Central Bank, Case T-496/11 (Mar. 4, 2015) ¶69 (“The ECB contends that, even if it is concluded that the Policy Framework is a binding act, the United Kingdom does not have standing to bring an action against it, on the ground that it does not participate in certain aspects of economic and monetary union. The ECB refers, in this connection, to the fact that Protocol No 15 to the FEU Treaty on certain provisions relating to the United Kingdom excludes the application in the United Kingdom’s regard of certain provisions of the FEU Treaty and the Statute, including Article 127(1) to (5) TFEU.”)

⁷⁴ *Id.* at ¶73.

⁷⁵ See, e.g., Andrew Large, *Financial Stability Governance Today: A Job Half Done*, Group of 30 Occasional Paper 92 (2015)

⁷⁶ See, e.g., Rachel A Epstein & Martin Rhodes, *The Political Dynamics Behind Europe’s New Banking Union*, 39 W. EUR. POLITICS 415, 417-8 (2016).

⁷⁷ See, e.g., <https://www.bankingsupervision.europa.eu/organisation/decision-making/html/index.en.html> (“To prevent conflicts of interest between monetary policy and supervisory responsibilities, the ECB ensures a separation of objectives, decision-making processes and tasks. This includes strict separation of the Governing Council’s meetings.”)

other Member States outside the euro area also.⁷⁸ Thus some actions which the ECB might take to prevent financial instability would be beneficial to the non-eurozone EU Member States.

The adoption of more uniform rules for the EU generally would be one way of addressing the issue of difference between the euro and non-euro areas. The EU's financial services rules have already become more uniform since the financial crisis, through the introduction of new, more uniform rules, through increasing use of regulations rather than directives, and through allowing EU agencies to regulate some financial market activity directly rather than by negotiating with national regulators. But the idea of a single market generally, and with respect to financial services specifically, is one which is rather amorphous and difficult to specify: different stakeholders imagine the necessary rules for the single market in very different ways. The next section of this article considers what the EU has meant by the idea of a single market.

A Single Market in Financial Services

In prospect the single market has often been characterized as requiring a limited set of new rules or the elimination of specific identified barriers.⁷⁹ Harmonization of the laws of the Member States has been achieved to varying degrees with respect to different subject matters, incrementally, and in a piecemeal fashion. Over time the requirements of the European rules have changed as well as the relationship between European level and national level decision-making and administration. Some level of regulatory harmonization is assumed to be necessary to facilitate the movement of factors of production across the geographic borders between the Member States, but how much harmonization or how much regulatory differentiation is consistent with the idea of a single market has never been completely clear. These issues arise in the context of negative integration (what rules of the Member States are permissible despite the Treaty freedoms of goods, persons, services and capital) and positive integration (what powers do the EU institutions have to establish harmonized rules for the internal market. In some cases

⁷⁸ See, e.g., Carney, *supra* note [17](#), at 11 (noting that work on euro area financial stability enhances UK financial stability.)

⁷⁹ See, e.g., Commission White Paper: Completing the Internal Market, COM(85) 310 final (Jun. 14, 1985).

the Court of Justice is invited to consider whether EU rules are impermissible infringements of the Treaty freedoms.⁸⁰

The plan to achieve a single market by the beginning of 1993 was based on an idea of agreed minimum standards for banking, securities and insurance, combined with a principle of mutual recognition which would allow financial firms authorized in one Member State to do business in other Member States on the basis of their home state authorization.⁸¹ At the same time EU measures to achieve this single market allowed host Member States to apply some public interest measures to financial activity within their territory.⁸² But Member States took advantage of some uncertainty about the extent to which EU directives permitted them to regulate banks and other financial firms authorized in other Member States. EU directives did not always apply to specific circumstances, such that sometimes the question fell to be considered by reference to the general Treaty rules on freedom of establishment.⁸³ The Commission acted to try to discourage Member State regulation of the activities of firms from other Member States. After carrying out a consultation exercise, in 1997 the Commission published an interpretative communication which it described as providing “a reference document defining the legal framework within which, in the view of the Commission, banking activities benefiting from mutual recognition should be pursued..”⁸⁴

⁸⁰ See, e.g., *Swedish Match* [2004] ECR I-11893, ¶¶ 33-4; *Alliance for Natural Health v Secretary of State for Health* [2005] ECR I-6451, [2005] EUECJ C-154/04, ¶ 33 ; *Inuit Tapiriit Kanatami, v European Commission*, [2013] EUECJ T-526/10 at ¶ 33.

⁸¹ See, e.g., Caroline Bradley, *1992: The Case of Financial Services*, 12 NW. J. INT'L L. & BUS. 124 (1991).

⁸² See, e.g., Niamh Moloney, *New Frontiers in EC Capital Markets Law: From Market Construction to Market Regulation*, 40 COMMON MKT. L. REV. 809, 810 (2003).

⁸³ See, e.g., *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie*, Case C-442/02 [2004] ECR I-8961, [2004] EUECJ C-442/02; Eleanor Spaventa, *Case C-442/02, Caixa-Bank France v. Ministère de l'Économie, des Finances et de l'Industrie.*, 42 COMMON MARKET LAW REVIEW 1151 (2005) (critiquing the decision).

⁸⁴ Commission, *Interpretative Communication: Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive*, SEC(97) 1193 final (Jun. 20, 1997) at 3.

Since 1997 the EU has adopted more detailed harmonized rules to protect consumers of financial services, thus limiting more explicitly the Member States' ability to apply their own, distinct rules which could reduce competition in the financial markets. The Markets in Financial Instruments Directive (MiFID)⁸⁵ replaced the earlier Investment Services Directive and included new provisions for conduct of business rules which the home Member State was obliged to apply to the firms it authorized although host states were allowed to supervise branches based in their territory.⁸⁶ Member States were required to co-operate with each other where necessary.⁸⁷ The EU has also adopted other specific measures that are designed to protect the interests of financial services customers.⁸⁸ More harmonization reduces the space within which the Member States may regulate unilaterally.

The intensity of harmonization varies between retail and wholesale market activity. Member States have retained the ability to regulate to protect consumers of financial services, although there are some harmonization measures in this area, such as the Payment Accounts

⁸⁵ Directive 2004/39/EC on Markets in Financial Instruments, OJ No. L 145/1 (Apr. 30, 2004) (MiFID). This Directive was replaced by Directive 2014/65/EU on Markets in Financial Instruments, OJ No. L 173/349 (Jun. 12, 2014) (MiFID 2) and Regulation (EU) No 600/2014 on Markets in Financial Instruments, OJ No. L 173/84 (Jun. 12, 2014) (MiFIR). The difficulties of implementing MiFID 2 led the Commission to propose postponing the date for implementation. Commission Press Release, Commission Extends by One Year the Application Date for the MiFID II Package (Feb. 10, 2016).

⁸⁶ See MiFID, supra note 85, at recital 32 (“By way of derogation from the principle of home country authorisation, supervision and enforcement of obligations in respect of the operation of branches, it is appropriate for the competent authority of the host Member State to assume responsibility for enforcing certain obligations specified in this Directive in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch, and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.”) and Art 32 (7).

⁸⁷ See *id.* at Art. 56.

⁸⁸ See, e.g., Directive 2014/92/EU on the Comparability of Fees Related to Payment Accounts, Payment Account Switching and Access to Payment Accounts with Basic Features, OJ. No. L 257/214 (Aug. 28, 2014).

Directive,⁸⁹ and the Mortgage Credit Directive,⁹⁰ a measure which took more than a decade to achieve.⁹¹ In 2015 the Commission moved towards further harmonization of the retail financial services market publishing a Green Paper on retail financial services which emphasized the gains to be made from opening up the EU's retail financial services market to more competition and cross-border activity:

Retail finance provides a number of services that are essential for citizens: where we keep our money, how we save for our old age, how we pay for a house or other purchases, how we insure ourselves or our property against health problems or accidents. Developing effective Europe-wide markets for these services will improve choice for consumers, allow successful providers to offer their services throughout the EU, and support new entrants and innovation. But Europe-wide markets in retail financial services do not really exist at present. Only a small minority of retail financial service purchases take place across borders. There are many good products which exist in domestic markets, but it is difficult for consumers in one EU Member State to buy products provided in another. This does not just limit choice. Evidence shows that prices vary widely across the EU: for example, motor insurance for the same customer can be twice as expensive in some Member States than in others.⁹²

But the lack of cross border activity involving consumers is not just an issue relating to financial services. Generally there is less cross border consumer transacting than the Commission would like to see, and the Commission's proposed solution in general is more regulatory

⁸⁹ *Id.*

⁹⁰ Directive 2014/17/EU on Credit Agreements for Consumers Relating to Residential Immovable Property, OJ No. L 60/34 (Feb. 28, 2014).

⁹¹ *See, e.g., id.* at recital no. 1 (“In March 2003, the Commission launched a process of identifying and assessing the impact of barriers to the internal market for credit agreements relating to residential immovable property.”)

⁹² Commission, Green Paper on Retail Financial Services: Better Products, More Choice, and Greater Opportunities for Consumers and Businesses, COM(2015) 630 final (Dec. 10, 2015) at p. 2.

harmonization.⁹³ Regulatory harmonization can be described in such a context as being consistent with Better Regulation— one set of EU rules is better than multiple different national rules.⁹⁴ And the Commission proposes to improve implementation, monitoring, compliance and enforcement with respect to EU law, which it also suggests is consistent with Better Regulation.⁹⁵ The logical end of this sort of argument would seem to be complete regulatory uniformity throughout the EU. Complete regulatory uniformity is likely neither desirable nor achievable. The Member States have not yet agreed to such uniformity, and they are unlikely to do so.

EU rules of financial regulation have become more detailed and more expansive over time, and increasingly limit the discretion of the Member States. Where the EU rules are established in directives they must be implemented in the legal systems of the Member States, even if the Member States have in fact no or very little discretion with respect to implementation. Over time the Commission has increasingly advocated more regulatory uniformity, rather than merely approximation, as necessary to achieve the single market.⁹⁶ Where directives allow the Member States to exercise discretion in implementation their exercises of discretion can create disincentives for businesses and consumers to transact across geographic borders. Uniform rules are less apt to constitute barriers to cross-border trade. Regulatory uniformity may be expressed in directives which leave little discretion to the Member States, or it may be expressed in regulations which are directly applicable in all of the Member States without implementation. Sometimes the aim of uniformity may be accepted as an objective but not be achievable: differences in behavior in different Member States may lead the Commission to accept the need

⁹³ Cf. Commission Communication, Upgrading the Single Market: More Opportunities for People and Business, COM(2015) 550 final (Oct. 28, 2015) at 2 (“In many cases, one set of EU rules replaces a patchwork of 28 different national rules, making life easier for citizens and businesses, simplifying the legal framework, reducing regulatory burden across the Single Market and increasing regulatory predictability.”) Cf. OECD, Recommendation on Consumer Protection in E-commerce (2016).

⁹⁴ Upgrading the Single Market, *supra* note [93](#).

⁹⁵ *Id.* at 16.

⁹⁶ See, e.g., Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal O J No. L 149/22 (Jun. 11, 2005) (noting the need for uniform rules to encourage cross border commerce).

for stronger measures in some Member States.⁹⁷ Uniform rules may not in fact operate uniformly if there are differences in enforcement, so the Commission focuses on reinforcing compliance by the Member States.⁹⁸

Just as harmonization of substantive rules of EU law relating to financial services has intensified over time, so has the EU developed more complex structures for the development and application of law in this area. In 1999 the Commission published a Financial Services Action Plan which argued that the introduction of the euro created a new opportunity to reduce the cost of capital and benefit users of financial services while creating new challenges for financial regulators.⁹⁹ The Commission proposed an “aspirational programme for rapid progress towards a single financial market.”¹⁰⁰ Subsequently the Lamfalussy Report developed details for the implementation of the new plan to make financial regulation more flexible, using different levels of regulation, so that the rules could be adapted to deal with innovation and technological change and in order to improve implementation and enforcement of the rules in the Member States.¹⁰¹ The EU institutions proceeded to put the plan into effect, and adopted a number of new measures more expeditiously than had been the case with earlier financial regulation measures.¹⁰² The plan

⁹⁷ See, e.g., Commission Communication, on the Application of the Unfair Commercial Practices Directive, Com (2013) 138 final (Mar. 14, 2013) at p. 6 (“The results of the investigation reveal that it would not be appropriate, for the time being, to remove the possibility, foreseen by the Directive, for Member States to go beyond the level of harmonisation set by it in these specific sectors “ (financial services and immoveable property))

⁹⁸ See, e.g., *supra* text at note [95](#).

⁹⁹ Communication of the Commission, Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM (1999) 232 (May1999) at p. 3.

¹⁰⁰ *Id.* at 4.

¹⁰¹ Final Report of The Committee of Wise Men on the Regulation of European Securities Markets (Feb. 15, 2001) (Lamfalussy Report).

¹⁰² See, e.g., Commission Staff Working Document, *The Application of the Lamfalussy Process to EU Securities Markets Legislation: A Preliminary Assessment by the Commission Services*, SEC(2004) 1459 (Nov. 15, 2004) at p. 6. The measures were a Market Abuse Directive, a Prospectus Directive, a Markets in Financial Instruments Directive and a Transparency Directive. *Id.*

was limited in scope as the new measures were designed to apply to trading of securities in regulated markets, rather than to the trading of securities generally.¹⁰³

During the financial crisis the Lamfalussy committee structure evolved into a set of EU level authorities.¹⁰⁴ These new authorities represented an evolution of the Lamfalussy committee structure rather than the creation of entirely new agencies, but the new authorities had new powers,¹⁰⁵ although the involvement of national regulators in their work does create some risks that conflicts of interest may interfere with decision-making.¹⁰⁶

The European Securities Markets Authority (ESMA) even became an EU-level regulator, first of credit rating agencies, and then later of trade repositories.¹⁰⁷ And ESMA also has intervention powers with respect to short selling.¹⁰⁸ The UK challenged these powers, arguing that they constituted an impermissible delegation of authority to ESMA. The Court of Justice held that “the powers available to ESMA under Article 28 of Regulation No 236/2012 are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority. Accordingly, those powers comply with the requirements laid down in

¹⁰³ See, e.g., Luca Enriques & Matteo Gatti, *Is There a Uniform EU Securities Law After the Financial Services Action Plan?*, 14 STAN. J. L., BUS. & FIN. 43, 53-4 (2008).

¹⁰⁴ See, e.g., Niamh Moloney, *Reform or Revolution - The Financial Crisis, EU Financial Markets Law, and the European Securities and Markets Authority*, 60 INT’L & COMP. L. Q 521 (2011); The High-Level Group on Financial Supervision in the EU, Report (Feb. 25, 2009) (De La Rosière Report).

¹⁰⁵ See, e.g., Madalina Busuioc, *Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope*, 19 EUR. L. J. 111, 112 (2013) (“While not entirely new, in light of their institutional predecessors, in terms of their powers however, the Authorities are regarded as a significant shift both within the context of EU agencification phenomenon and also for the regulation of financial markets.”)

¹⁰⁶ See, e.g., *id.* at 120-122.

¹⁰⁷ See, e.g., ESMA, *Esma’s Supervision of Credit Rating Agencies and Trade Repositories 2015 Annual Report and 2016 Work Plan*, ESMA/2016/234 (Feb. 5, 2016).

¹⁰⁸ EU Regulation 236/2012 on Short Selling and Certain Aspects of Credit Default Swaps, OJ No L 86/1 (Mar. 24, 2012).

Meroni v High Authority.”¹⁰⁹ In addition, the powers conferred on ESMA to control short selling were “in fact to improve the conditions for the establishment and functioning of the internal market in the financial field” and were therefore validly adopted under Art 114 TFEU.¹¹⁰ Although the court’s judgment does seem to be influenced by a perceived need to allow ESMA to respond to situations of crisis,¹¹¹ it represents a relatively expansive view of the role of EU agencies and of the scope of Art 114.¹¹²

An additional issue of complexity within the EU’s structure of financial regulation is that it involves a number of sectoral agencies which have responsibilities with respect to different areas of financial regulation. The EU institutions separate out responsibilities with respect to insurance, banking and securities activities although some of the most complex issues in financial regulation involve overlaps and interconnections between different sectors of finance and their regulation.¹¹³ The EU’s sectoral agencies do work together through a Joint Committee to address issues of common concern,¹¹⁴ just as the transnational standard setting bodies

¹⁰⁹ United Kingdom v European Parliament, (Judgment of the Court) [2014] EUECJ C-270/12 (22 January 2014) ¶ 53.

¹¹⁰ *Id.* at ¶¶ 116-7.

¹¹¹ *See, e.g., id.* at ¶ 108 (“It should be noted that, faced with serious threats to the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU, the EU legislature sought, by Article 28 of Regulation No 236/2012, to provide an appropriate mechanism which would enable, as a last resort and in very specific circumstances, measures to be adopted throughout the EU which may take the form, where necessary, of decisions directed at certain participants in those markets.”)

¹¹² *See, e.g.,* Babis, *supra* note 60, at 268 (2014) (arguing that “the Court’s wide interpretation creates the risk that the scope of “harmonisation measures” could be expanded almost indefinitely, depriving Article 114 TFEU of its inherent limits, and thus stretching the principle of legality and the compliance of EU legislation with the principle of conferral.”).

¹¹³ *See, e.g.,* IMF, Strengthening the International Monetary System—A Stocktaking; IMF Policy Paper, (Feb. 22, 2016) at 2 (noting that the “build-up of financial risks, particularly in nonbank financial institutions, has highlighted imperfections in the oversight of the global financial system.”)

¹¹⁴ *See, e.g.,* Final Draft Regulatory Technical Standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) of Regulation (EU) No 648/2012 (Mar. 8, 2016).

sometimes work together in a Joint Committee.¹¹⁵ Even closer integration of regulation across the sectors would likely help to enhance financial stability.

The architecture of financial services regulation in the EU has evolved over time, in response to a perceived need for greater flexibility (Lamfalussy) or in response to crisis. The EU regime involves a mix of centralized and decentralized elements. Commentators have argued that the EU's responses to the financial crisis led in some ways to increasing centralization, empowering the ECB and the Commission.¹¹⁶ But in other respects centralization was limited by the fact that even the EU agencies which are responsible for developing technical standards and administering the rules are combinations of EU and national actors. The system relies on cooperation between the EU institutions and the Member States for the development and implementation of policy.

The Commission's 2015 proposal for an EU Capital Markets Union¹¹⁷ in name seems to echo the European Banking Union, although it is designed for all of the Member States, rather than for the eurozone, and aims to encourage financing of economic activity through the capital markets because of weaknesses in the banking sector.¹¹⁸ The Action Plan sets out the Commission's objective "to remove the barriers which stand between investors' money and

¹¹⁵ See, e.g., Joint Forum, *Developments in Credit Risk Management Across Sectors: Current Practices and Recommendations* (Jun. 2015).

¹¹⁶ See, e.g., Epstein & Rhodes, *supra* note [76](#).

¹¹⁷ Commission Communication, *Action Plan on Building a Capital Markets Union*, COM(2015) 468 final (Sep. 30, 2015) ("Capital Markets Union Action Plan.") Some commentators have suggested that the idea of a Capital Markets Union (and putting the UK Commissioner, Jonathan Hill, in charge of the Financial Services portfolio in the Commission) was an attempt to pacify the UK with respect to the Banking Union. But the Capital Markets Union proposals will not be firmed up by the time the UK Brexit referendum occurs.

¹¹⁸ Jonathan Hill, *Speech at the Seventh Bruges European Business Conference, Capital Markets Union*, (Mar. 18, 2016) ("European SMEs receive 75% of their funding from banks. European companies are four times more reliant on banks than American ones. And Europeans save at least three times as much in bank accounts as they do in capital markets. Does this matter? Well, the crisis taught us what happens if you put all your eggs in one basket. As the banking sector deleveraged, the liquidity needed to keep the European economy growing disappeared. And companies, particularly SMEs, could no longer get the funding they needed to invest, to launch new products, to compete.")

investment opportunities, and overcome the obstacles which prevent businesses from reaching investors.”¹¹⁹ The plan includes proposals to achieve “a simple, transparent and standardised securitisation market” in the EU.¹²⁰ The Action plan also discusses crowdfunding¹²¹ and amendments to the EU’s prospectus rules.¹²² With respect to crowdfunding the Commission writes:

The EU should strike a careful balance between the objectives of investor protection and continued expansion of crowdfunding. Premature regulation could hamper, not foster, the growth of this fast-growing and innovative funding channel.¹²³

Thus, whereas recent developments in banking regulation have been driven by a need to regulate banks more strictly to ensure financial stability and confidence in the banking system,¹²⁴ the idea of the Capital Markets Union is presented as being about Better Regulation in the sense of avoiding unnecessary regulation. When the Commission launched the Capital Markets Union idea it also issued a call for evidence on financial services regulation in the EU inviting information about rules affecting the ability of the economy to finance itself and growth, unnecessary regulatory burdens, interactions, inconsistencies and gaps, and rules giving rise to

¹¹⁹ Capital Markets Union Action Plan, *supra* note [117](#), at 4.

¹²⁰ Proposal for a Regulation Laying down Common Rules on Securitisation and Creating a European Framework for Simple, Transparent and Standardised Securitisation, COM(2015) 472 final (Sep. 30, 2015) at 2. *See also* Proposal for a Regulation amending Regulation (EU) No 575/2013 on Prudential Requirements for Credit Institutions and Investment Firms, COM(2015)/0473 final (Sep. 30, 2015).

¹²¹ Capital Markets Union Action Plan, *supra* note [117](#), at 7-8.

¹²² *Id.* at 12.

¹²³ *Id.* at 7.

¹²⁴ *See, e.g.*, Benoit Coeuré, Member of the Executive Board of the ECB, from Challenges to Opportunities: Rebooting the European Financial Sector, Speech at SZ (Süddeutsche Zeitung) Finance Day 2016 (Mar. 2, 2016) (“Clearly, the European financial sector is facing a profoundly changed regulatory environment after the crisis. That applies to quantity and quality of capital, to leverage, to funding profiles, to bail-in-able debt, to risk management practices. Derivatives markets and market infrastructures have also been subject to a comprehensive reform agenda.”)

unintended consequences.¹²⁵ The Commission received 287 responses to the call for evidence from governmental and non-governmental organizations, from individuals, firms and trade and consumer associations.¹²⁶ Unsurprisingly a number of the responses agreed with the idea that unnecessary regulation should be avoided.

UK actors are known for questioning whether more harmonization of financial regulation in the EU is really necessary, but they are not the only ones who argue for limits on harmonization. Subsidiarity and Better Regulation are acknowledgments of (indeterminate) limits on EU level action. These questions permeate financial regulation.¹²⁷ And rightly so, as regulatory uniformity might tend to impede desirable as well as undesirable innovation. Some commentators advocate more harmonization in financial regulation to address systemic risk, others advocate more flexibility,¹²⁸ yet others have suggested that a mix between harmonization and regulatory competition might be optimal.¹²⁹

In practice the EU's financial markets have involved a mix of harmonization and regulatory competition. In some areas this mix is changing in ways that may raise new questions about the single market idea. Before the financial crisis the EU had some harmonization with

¹²⁵ European Commission, Call for Evidence: EU Regulatory Framework for Financial Services (Sep. 30, 2015).

¹²⁶ See, e.g., the Commission's call for evidence web page at http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm; HM Treasury, Response to EU Commission's Call for Evidence on EU Regulatory Framework for Financial Services (Feb. 4, 2016).

¹²⁷ See, e.g., Marta Simoncini, *Legal Boundaries of European Supervisory Authorities in the Financial Markets: Tensions in the Development of True Regulatory Agencies*, 34 YEARBOOK OF EUROPEAN LAW 319, 322 (2015) (noting "the complexity of EU financial market regulations caught between the subsidiarity approach and the centralization of responsibilities and tasks. These institutional limits are fundamental to understanding the legal difficulties of integrating financial markets.")

¹²⁸ See, e.g., Roberta Romano, *For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture*, 31 YALE JOURNAL ON REGULATION 1 (2014).

¹²⁹ See, e.g., Jeanne-Mey Sun & Jacques Pelkmans, *Regulatory Competition in the Single Market*, 33 JOURNAL OF COMMON MARKET STUDIES 67 (1995).

respect to deposit guarantees for credit institutions, although the crisis showed that the differences between the different national systems threatened financial stability.¹³⁰ Since the crisis the EU rules for deposit guarantees have been reformed,¹³¹ and new deposit guarantee arrangements have been proposed for the eurozone.¹³² But even the new EU rules imagine that cross-border deposit guarantee schemes might emerge through merger or otherwise.¹³³

Harmonized deposit guarantee schemes, particularly schemes which are designed to achieve cross border support of financial institutions based in different Member States are complicated from the perspective of the single market. The idea of the single market is based in part on the idea that successful firms which meet consumers' needs and desires for goods and services at the right level of price and quality should be able to succeed and that firms which do not appropriately respond to consumers' desires should not be insulated from market forces. Because of the importance of banks within the financial system, and the need to protect bank depositors and banks generally from the risk of bank runs, bank regulation includes provision for deposit guarantees. In the period since the financial crisis regulators have tried to limit the moral hazard associated with implicit government support of banks (e.g. too-big-to-fail),¹³⁴ and the

¹³⁰ See, e.g. Howarth & Quaglia, *supra* note 2, at 108 (“It became evident that different national schemes across the EU potentially distorted level playing field competition and created the potential for bank runs because, in the event of financial crises, customers in some Member States were prone to shift deposits to a bank headquartered in those Member States with more generous guarantee schemes.”)

¹³¹ Directive 2014/49/EU on Deposit Guarantee Schemes, OJ, No. L 173/149 (Jun. 12, 2014).

¹³² See Commission Communication, Towards the Completion of the Banking Union, COM(2015) 0587 final (Nov. 24, 2015); Commission, Proposal for a European Deposit Insurance Scheme, COM 2015) 0586 final (Nov. 24, 2015).

¹³³ Directive 2014/49/EU on Deposit Guarantee Schemes, at recital 4.

¹³⁴ See, e.g., Financial Stability Board, Second Thematic Review on Resolution Regimes (Mar. 18, 2016) at 5 (Noting that “only a subset of the FSB membership – primarily home jurisdictions of global systemically important banks (G-SIBs) – has a bank resolution regime with a comprehensive set of powers that are broadly in line with the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions.”)

European Banking Union involves a Single Resolution Mechanism¹³⁵ to centralize the power of resolution for the eurozone. But deposit guarantee schemes remain an important component of bank regulation. Within the eurozone maintaining a reliable and well-financed deposit guarantee scheme would promote financial stability, but it would also operate as a subsidy to banks based in Member States less able than others to ensure the financing of a sound deposit guarantee scheme. In a true single EU financial market without unnecessary barriers between Member States and without inappropriate subsidies to uncompetitive firms, banks without access to reliable bank guarantee schemes might be expected to lose business and fail.

Conclusions

The question of ensuring that the European Banking Union does not undermine the EU's single market in financial services is a complex one, in part because the idea of the EU's single market has evolved over time and is in a continuing process of evolution. The EU has never had one idea of what the single market should be: the idea of the single market and of the rules that are necessary to construct it has evolved over time, in response to changing circumstances and politics. Meanwhile, financial regulation from a global or transnational perspective, rather than from the EU perspective alone, has evolved to include a focus on financial stability which demands that financial regulators and supervisors think about risk and regulation in new ways. The ECB with an overarching responsibility for ensuring financial stability in the eurozone is likely to run into issues where the demands of financial stability conflict with some conceptions of the single market.

¹³⁵ See *supra* note [46](#).