Bar Council response to the Review of the Balance of Competences: Financial Services and the Free Movement of Capital

1. This is a response by the General Council of the Bar of England and Wales ("The Bar Council") to the Government's review of the balance of competences as between the EU and the UK in the area of the Internal Market, in particular, the Call for Evidence concerning financial services and the free movement of capital, published in October 2013.

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. Some of the questions posed in the Call for Evidence are outside the Bar's areas of expertise, namely questions 2, 3, 6, 8 and 10, and thus are not dealt with below. There is also some degree of overlap between the issues raised by some of the remaining questions, and so our response is structured to deal with those together.

5. We underline at the outset our concerns as to whether all of the EU's legislative and other activity in the field of financial services is undertaken on a proper legal basis. Disregard of this matter is of concern not only on constitutional grounds but also because failure to have regard to many of the important matters considered here has an impact on substantive quality of the legislation and overall legal certainty.

6. We note also that much of what is said in this submission expands on observations made by the Bar Council in its submission to BIS in the context of the call for evidence on the Internal Market Synoptic review in the first semester of this process. That response focussed on questions of the appropriate legal basis for EU action and touched on matters dealt with in

more detail here. That earlier submission may usefully be re-read alongside this submission as it adds further context to the points made here, not least in respect of other matters where the Bar Council has had and continues to have concerns about the EU's approach to the selection of the legal basis for its legislation.

Response to the Call for Evidence Questions

Q1 – How have EU rules on financial services affected you or your organisation? Are they proportionate in their focus and application? Do they respect the principle of subsidiarity? Do they go too far or not far enough?

and

Q7 – What has been the impact of the shift towards regulation and supervision at the EU level, for instance, with the creation of the European Supervisory Authorities? Should the balance of supervisory powers and responsibilities be different?

Subsidiarity

7. Financial services regulation is an area where competence is shared between the EU and Member States. However, EU financial legislation since the 2008 crisis has tended increasingly to encroach on Member States' competences, and towards prescriptive, centralised decision-making. This gives rise to cause for significant concerns about subsidiarity and the balance of competences, as well as legal basis and institutional balance.

8. The powers conferred on the European Supervisory Authorities (ESAs) are a significant aspect of this. Articles 9, 17, 18 and 19 of the European Securities and Markets Authority ("ESMA") Regulation (Regulation 1095/2010), for example, confer wide powers on ESMA[1], including powers to intervene if it considers that a Member State's competent authority has applied EU financial legislation *"in a way which appears to be a breach of Union law"* (Art 17(1)), in emergency situations (Art 18) or where different Member States' competent authorities disagree, including in that instance action *"requiring them to take specific action or to refrain from action"* (Art 19(3)). ESMA may even, in such circumstances, adopt individual decisions addressed to financial market participants (Articles 17(6), 18(4) and 19(4))[2].

9. Similarly, under Article 28 of the short selling regulation (Regulation 236/2012), which was the subject of an unsuccessful challenge by the UK, ESMA is empowered to prohibit, impose conditions on, or require disclosure of, short positions.

10. Powers of this nature represent a shift from EU financial regulation at a general and high level, to direct intervention in the supervision by Member States' competent authorities of their markets.

[1] The European Securities and Markets Authority.

[2] The regulations establishing the other two ESAs, the European Banking Authority and the European Insurance and Occupational Pensions Authority, contain the same provisions.

11. Such intervention is hard to square with the principle of subsidiarity (and arguably also the principle of proportionality), and the accepted balance of powers between the EU and Member States, as well as between the EU institutions themselves.

12. We are also concerned that insufficient *analysis* is provided as to whether the measures that have been taken in pursuit of harmonisation are compatible with the principle of subsidiarity. Article 5 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality (the "Subsidiarity Protocol") annexed to the Lisbon Treaty requires that: *"Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. ...The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. "*

13. In the Impact Assessments produced to accompany its proposals establishing the European System of Financial Supervision, the Commission did not engage in any real discussion of subsidiarity, with only passing reference being made to the principle, and then only where the Commission considered it to have been satisfied. The Explanatory Memoranda contained only one paragraph on this topic.

The powers of EU agencies

14. The increasing "agentification" (adopting the word used by AG Jääskinen in the short selling case (Case C-270/12)) of EU financial regulation raises serious concerns about the exercise of wide-ranging powers by EU bodies when there is no Treaty basis for those powers to be exercised.

15. This issue makes it necessary to consider the correct meaning and application of the *"Meroni"*[3] doctrine. This doctrine is one of the bases on which the UK challenged Article 28 of the short selling regulation.

16. The Commission in the short selling case accepted that the *Meroni* jurisprudence remains of "*particular relevance for the constitutional order of the Union*". The Court of Justice in *Meroni* itself referred to the *"fundamental guarantee"* as to *"the balance of powers which is characteristic of the institutional structure of the Community"*, and said *"[t]o delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective"*.

17. It is therefore very troubling that in its very recent judgment in the short selling case (Judgment dated 22 January 2014), the Court of Justice, while purporting to adhere to *Meroni*, has applied it in such a way as to deprive it of any real effect. The Court concluded that the *Meroni* principle was satisfied because the power given to ESMA to regulate short selling in an emergency requires ESMA to *"examine a significant number of factors"*, ESMA can take only

[3] Case 9/56 *Meroni v High Authority* [1957 & 1958] ECR 133.

certain types of measure, and ESMA has duties to consult and notify various bodies. On any realistic view, however, the extremely broad nature of the factors to be weighed up, and the far-reaching nature of the measures available to ESMA, make Article 28 of the short selling regulation a very clear breach of *Meroni*. It is difficult to understand the Court's decision on any basis other than pure expediency.

18. Moreover, given that Articles 290 and 291 narrowly and exhaustively circumscribe the circumstances in which even the Commission can be empowered *"to adopt non-legislative acts of general application"* or to exercise implementing powers, we find it hard to see how such a power can validly be delegated to a mere agency. In this respect, it is of concern that the Court of Justice concluded that the conferral of the Article 28 intervention powers on an agency was valid even though it did not (in the Court's words) *"correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU"*. The Court's reasoning as to how in those circumstances the delegation of powers was consistent with the Treaties is opaque.

Legal base

19. The Bar Council has concerns over the Treaty bases that have been relied upon by the Commission in proposing EU financial services legislation, particularly those relied upon since the global financial crisis in 2008. As Annex B of the Call for Evidence makes clear, the default basis now appears to be Article 114 TFEU.

20. However, it is questionable whether such powers may properly be conferred on EU institutions by non-unanimous decision under Article 114(1) TFEU. That provision allows the Parliament and the Council to adopt *"measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States"* which have as their object the establishment and functioning of the internal market.

21. As Advocate General Jääskinen pointed out in his Opinion in the short selling challenge the conferral of decision-making powers on ESMA *"in substitution for the assessments of the competent national authorities"* cannot be considered as approximation measures within Article 114 (Opinion para 37), and in substance inappropriately bypasses the need for unanimity under Article 352 TFEU (Opinion paras 54-58). The Court of Justice's rejection of that view, in its decision on the short selling challenge is regrettable.

22. Equally, ESMA measures directed at individual financial institutions, overriding the determinations made by national competent authorities, cannot readily be seen as Article 114 harmonisation measures. In substance, they are a form of direct regulation by an EU agency of individual citizens in Member States.

23. A specific aspect of the legal base problem concerns EU regulation of the financial sector for the purpose of consumer protection. We agree with the observation made at paragraph 2.22 in the Call for Evidence which suggests, in the context of financial services legislation, that there has been a shift at the EU level from *"identifying and removing obstacles to the free movement of financial services to a new…focus on enshrining financial stability and consumer protection and addressing the risk of regulatory and supervisory arbitrage."*

24. Ensuring the functioning of the internal market requires the Union to take measures to abolish unjustified restrictions on the exercise of the four freedoms. Ensuring the functioning of the internal market in this sense does, of course, have a consumer pay-off. But measures adopted to ensure the functioning of the internal market are not consumer protection measures. The legal basis for measures designed to promote consumer protection is, rather, Article 169 TFEU.

25. It is true that consumer protection is referred to in Article 114 (3) TFEU:
"The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective."

26. However, this is not a basis for adopting consumer protection legislation per se. As explained earlier, Article 114(1) is only a basis for adopting legislation that ensures the functioning of the internal market. The division of competence appears clearly from Article 169(2) TFEU which provides:

"The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
(a) measures adopted pursuant to Article 114 <u>in the context of the completion of the internal market</u>;…"
(emphasis added)

27. Thus only measures that have as their aim the completion of the internal market (i.e. measures that remove impediments to the exercise of the four freedoms) can legitimately be dealt with under Article 114 TFEU.

28. "Competence creep" of this kind is a concern in relation to Article 114 TFEU, as it was with the predecessor provision, Article 95 EC. Article 95 was sometimes used to "harmonise" national laws simply on the ground that national divergences existed, with little or no inquiry into whether such divergences adversely affected the functioning of the internal market. In the *Tobacco Advertising Case* (Case C-376/98 *Germany v European Parliament and Council*), the ECJ appeared to rein in this practice, stating that mere divergence in national laws was insufficient to generate competence under Article 95 EC and that it was necessary to show some more discrete impact on the functioning of the internal market. However, subsequent ECJ decisions have held EU regulatory competence to exist precisely because divergent national laws constitute an impediment to the functioning of the internal market such as to justify EU harmonisation.[4]

29. Moreover, in the Impact Assessments accompanying its proposals for key EU financial services legislation, the Commission has on a number of occasions failed properly to consider the legal base of the proposed legislation. An example is the Commission's Impact Assessment

[4] See C-377/98 *Netherlands v Parliament and Council*; C-491/01 *The Queen v S/S for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453; C-210/03 *R v S/S for Health ex parte Swedish Match* [2004] ECR I-11893; C-380/03 *Germany v European Parliament and Council* [2006] ECR I-11573.

accompanying its proposals for the European System of Financial Supervision (Regulations 1092, 1093, 1094, 1094 and 1096/2010). Despite the fact that these proposals entail important and wide-reaching changes to the regulation of financial services the Commission did not fully explain its reasons for adopting the Treaty bases upon which the proposed legislation is to be promulgated. The Bar Council remains concerned that the Commission has insufficient regard to the legal justification for its proposed measures.

30. A clear statement of the legal base is important, not least because failure to adopt an adequately reasoned IA may entitle a state to judicially review the EU measure adopted. An Impact Assessment ought to explain clearly why divergent national laws have led to impediments in the proper functioning of the markets for financial goods and services, so as to justify measures under Article 114. As Professor Craig has observed:

"If the justificatory reasoning to this effect in the impact assessment is wanting then the ECJ should invalidate the relevant instrument and thereby signal to the political institutions that the precepts in the Treaty are to be taken seriously. This is equally the case in relation to subsidiarity. If the verification or justification for EU action contained in the impact assessment appear merely formally, scant or exiguous then the ECJ should not hesitate so to conclude, thereby indicating that the enhanced role accorded to subsidiarity in the Lisbon Treaty will be taken seriously."[5]

Implications for regulatory policy

31. Aside from legal objections, the tendency towards centralisation undercuts Member States' autonomy to determine which type of regulation best suits their various markets. For example, a Member State may legitimately form the view, based on its knowledge of the workings of (and problems with) a market, that principles-based regulation, as opposed to detailed prescription of rules, is the most effective. The encroaching powers of EU institutions and agencies threaten to remove competent authorities' ability to act on judgments of that nature.

32. The Court of Justice's decision in C-270/12 has wider significance and has immediate read across in the context of both financial services regulation and other areas of EU law where agencies are being given increasing powers. We note, for example, that the newly agreed but not yet adopted Markets in Financial Instruments Regulation[6] contains provisions which mirror Article 28 of the short selling regulation. One provision permits ESMA temporarily to prohibit or restrict the marketing, distribution or sale of certain financial instruments and practices. The other confers powers on ESMA to request information from persons on position limits and exposures entered into via a derivative; to require a person or class of person to take steps to reduce the size of or to eliminate the position or exposure; and to limit the ability of a person to enter into a commodity derivative. These provisions are likely to raise the same legal concerns as Article 28 of the short selling regulation. In addition, the proposal for a Single Resolution Mechanism[7], which is currently in trialogues, includes provisions to create

[5] P Craig, The Lisbon Treaty: Law, Politics and Reform (2010)
[6] COM(2011)0652, 2011/0296(COD)
[7] COM(2013)520, 2013/0252 (COD)

a new EU agency, a Single Resolution Board, which would determine the application of resolution tools and the use of any single resolution fund.

Q4 – Is the volume and detail of EU rule-making in financial services pitched at the right level? Has the use of Regulations or Directives and maximum or minimum harmonisation presented obstacles to national objectives in any cases?

33. This in a large part is a matter of policy on which it may not be appropriate for us to comment. As a general observation, it seems to us that the volume and detail of EU financial regulation contributes to the concern expressed above about an over-prescriptive "one size fits all" approach to regulation.

Q5 – How has the EU's approach to Third Country access affected the ability of UK firms and markets to trade internationally?

34. The EU has historically based its approach to Third Countries on the principle of equivalence. For example, the Prospectus and Transparency Directives require that historical financial information included in a prospectus or annual or semi-annual reports of a company must comply with EU International Financial Reporting Standards or, where the EU Commission has issued a regulation deeming a Third Country to have equivalent standards, those standards. Post financial crisis, however, the EU has introduced the principle of reciprocity into some equivalence decisions so that not only is EU recognition of the equivalence of the Third Country's regulatory regime required but that third country jurisdiction must also give reciprocal access to EU firms.

35. For example, pursuant to the European Market Infrastructure Regulation (EMIR), a financial institution incorporated in the EU can only use central counterparties (CCPs) and report to trade repositories (TRs) recognised by ESMA in relation to derivative transactions. The recognition decision in respect of CCPs requires reciprocity: that the Third Country provides for an effective equivalent system for the recognition of CCPs in the EU. Should CCPs not be recognised by ESMA, the consequences of this are two-fold. First, an inability to provide clearing services to clearing members which are established in the EU could take a Third Country CCP out of the global market. Second, EU financial institutions that conduct business through branches in Third Countries where CCPs have not been recognised by ESMA will not be able to carry out derivative transactions with any counterparties in that country and may have to cease doing that business and potentially shut down the branch.

36. Non-EU TRs will still be permitted to provide services to EU members if they are not recognised under EMIR but those EU members will not be able to satisfy their reporting obligation under EMIR by reporting to that trade repository. This could leave EU financial institutions doing business with counterparties in a jurisdiction whose TRs have not been recognised by ESMA facing conflicting or duplicative reporting requirements.

Q9 – How effective and accountable is the EU policy-making process on financial services legislation, for example, how effective are EU consultations and impact assessments? Are you satisfied that democratic due process is properly respected?

37. Post financial crisis the effectiveness and accountability of the EU policy-making and legislative process has assumed greater significance for the following reasons:

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a. increased use of directly applicable regulations, as opposed to directives (which require implementation into the domestic legislative framework);

b. increased use of maximum harmonisation where directives are still used;

c. increased amount of financial services legislation;

d. increased prescription in financial services legislation, favouring a rules-based approach over a principles-based approach to supervision; and

e. the single rule-book.

39. There are positive aspects of the policy-making and legislative processes. The Commission is required to consult widely and to carry out impact assessments under the Treaties (Articles 2 and 5 of the Subsidiarity Protocol). However, the requirements to consult and carry out impact assessments do not mean that such consultations and impact assessments are always of a high standard. Such concerns have already been expressed earlier in connection with Questions 1 and 7.

40. In addition, for reasons related to the policy-making process, the provisions which are subject to the consultation and impact assessments are not always the provisions which are adopted in the legislative act. This is because:

a. at level 1, the legislature is entitled to make amendments to the Commission's original proposal and these amendments are rarely, if ever, subject to pre-legislative scrutiny[8]; and

b. in respect of level 2 financial services legislation (binding technical standards or BTS), the Commission can amend or reject the draft produced by the ESAs and its amendments are not subject to pre-legislative scrutiny[9].

41. In an arena in which innovative regulation is being proposed[10], the value to be obtained from pre-legislative scrutiny can be reduced to mere speculation.

42. The legislative process itself can be jeopardised by political tensions. Legislative proposals originate with the Commission but are adopted by the legislature, generally the Council and the Parliament. The proposals are sent to the co-legislature simultaneously, which commence their own negotiations so that each institution can agree a text to enter the

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[8] Recent examples are the cap on bankers' bonuses introduced by the Parliament during the trialogue process in CRD IV (Articles 92 – 96 of 2013/36/EU) and the approximately 4,000 amendments proposed by the Parliament to MiFID II / MiFIR (2011/0298 (COD) and 2011/0296 (COD). Amendments introduced by the Council have the same shortcoming. Paragraph 30 of the Inter-institutional Agreement on better law-making (2003/C 321/01) provides, however, that " Where the co-decision procedure applies, the European Parliament and Council may, on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage..."

[9] In the context of AIFMD (2011/61/EU) and EMIR (Regulation No. 648/2012), the Commission rejected BTS proposed by one of the ESAs (ESMA) after ESMA had conducted its pre-legislative scrutiny and delivered its expert opinion.

[10] Examples include regulating an entirely new sector (alternative investment funds or shadow banking) or activities that have not previously been regulated as prescriptively (short selling, high frequency trading and dark pool trading).

trialogue process. In this stage of the process the first set of amendments referred to in paragraph 40 are made. In both the Council and Parliament amendments may be made for political reasons. In Council, where it is necessary to secure the agreement of (usually) a qualified majority of 28 Member States, it is inevitable that compromises have to be made. These compromises are often based on political rather than sound legal or policy rationale[11]. The situation is similar in the European Parliament. The resulting texts can differ dramatically from the Commission's original proposal.[12]

43. By the time that the trialogue process is commenced, there are three (usually very different texts) to reconcile. Doing so inevitably involves further compromise but is time-consuming and often counter-productive to the original objectives of the proposal. There is a danger that political lobbying can exacerbate this problem[13].

44. The scale and speed of the financial services agenda post-financial crisis has put an added burden on the institutions and it is not clear that they have sufficient resources to cope with the burden. Major developments, such as banking union, change regulatory priorities. The recent focus on financial stability has meant that banking union, including bank resolution and deposit guarantee schemes, the capital requirement legislation (CRD IV) and fiscal discipline ("the two pack") are given priority. Although dossiers like the new Markets in Financial Instruments legislation (MiFID II and MiFIR), are already over a year behind the envisaged schedule, they must still wait their turn and all other dossiers slide further down the agenda.

45. Solvency II was proposed on 10 July 2007 but not adopted until 25 November 2009. It was due to come into force on 1 January 2013. It was amended, however, by Omnibus II which was proposed on 19 July 2011 and not agreed until 14 November 2013. Solvency II will not now come into force until 1 January 2016. Such delays create additional uncertainty, increase the likelihood of the regulation being out of date and out of touch with current industry practices and shorten the implementation time: yet the Commission still proposes new pieces of legislation, increasing the backlog and the burden on those who must remain up to date with regulatory developments.

46. Unsurprisingly, there is little ability to amend level 1 legislation quickly if the need arises either because of an error or a change in market practice.

47. The quality of legal drafting at EU level also suffers as a result of this process. The Commission's original proposal is not drafted by lawyers, the Commission Legal Service only

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[11] Examples are probably subjective in this instance, but one notable point is the reduction of the scope of the ECB's direct supervision of banks in the Eurozone from all 6000 or so banks in the Eurozone when the Single Supervision Mechanism proposal was originally published and to around 130 of the most significant banks in the regulation that which was eventually adopted.

[12] Note the Parliamentary amendments to PRIPS (2012/0169 (COD)) which arguably changed the purpose of the measure.

[13] Omnibus II (2011/0006 (COD)) amends Solvency II (2009/138/EC). During its negotiation the Parliament opened the issue of the treatment of long term guarantee products which contributed to a delay in the adoption of Omnibus II which in turn led to a 3-year delay in the coming into force of Solvency II.

has a right of review, and the legislation is often drafted by someone whose mother tongue is not English. That in itself creates problems. By the time the text that is eventually adopted has been amended in Council, in Parliament and in trialogues, the quality of the drafting has deteriorated further. The jurist linguist stage occurs too late in the day (after political agreement) to make any significant difference and is rarely attended by legal draftsmen. The process also remains highly political. A dedicated office of non-political legal draftsmen who hold the pen throughout the legislative process (akin to the Office of Parliamentary Counsel) would be a significant improvement.

Q11 – What may be the impact of future challenges and opportunities for the UK, for example, related to non-membership of the euro area or development of the banking union?

48. The development of groupings within the Union, pursuant to enhanced co-operation or as a result of increasing Eurozone integration, gives rise to legal as well as political issues. Prominent amongst the former are questions as to the legal impact on citizens in non-participating Member States of measures taken by or for the benefit of participating States. The proposed financial transaction tax (also subject to a current challenge by the UK) provides an illustration.

49. It is important that measures taken within such *"two speed Europe"* situations respect both the accepted limits of customary international law and relevant Treaty provisions (e.g. in the case of enhanced co-operations, the requirement under Article 327 TFEU to *"respect the competences, rights and obligations of those Member States which do not participate in it")*.

50. As Advocate General Kokott explained in Case C-366-10 *ATAA v DECC,* under international law the exercise of jurisdiction is in general justifiable only on the basis of the territoriality principle, the personality principle or – more rarely – the universality principle (Opinion para 149). None of those principles permits a state to exercise jurisdiction over a citizen of another state in respect of his actions in his own state, or a third state, merely on the basis that (for example) the citizen contracts with a person in the legislating state or trades in securities issued by a citizen in the legislating state.

51. The development of groupings within the EU also raises legal questions as to the appropriate legal basis for measures which apply only to a subset of the EU but where the enhanced co-operation mechanism is *not* used. This question is currently relevant, in the context of banking union, to the proposal for a Single Resolution Mechanism, and is discussed further below under Question 12.

Q12 – Do you have any other comments about issues in addition to those mentioned above?

52. The financial crisis has led to an increasing amount of EU financial services regulation and the replacement of national decision-making with EU-level decisions. This is raising legal, as well as political concerns.

53. The ESAs have, as discussed above in answer to question 7, been given an unprecedented ability to impose direct decisions on national competent authorities and individual financial services entities. ESMA has direct supervisory responsibility for credit

rating agencies and trade repositories. The European Central Bank has, in accordance with the Single Supervisory Mechanism ("SSM"), been given overall prudential supervisory responsibility for all banks within the SSM and direct responsibility for the most significant banks (Regulation 1024/2013). A European Stability Mechanism ("ESM") has been created outside the Treaties under an inter-governmental agreement. Discussions are (at the time of writing) ongoing as to the creation of a single resolution fund for all banks within the SSM, a Single Resolution Board and whether the Commission should be the resolution authority for the banks within the SSM[14]. These novel developments raise fundamental questions as to competence, legal basis and institutional balance but also as to the rights of individuals affected by the EU level decisions.

54. The Bar Council has already expressed concern about the increasing use of Article 114 TFEU (see above in relation to Question 7). This is a key point of contention in the negotiations on the Single Resolution Mechanism ("SRM") and raises a new point: whether the internal market harmonisation required by Article 114 TFEU can occur across a sub-set of the EU and whether the creation of an internal market within the internal market is permitted.

55. Although the Treaties envisage "an ever closer union" (Article 1 TEU), they do not appear to have been drafted with the recent developments in the financial services sector in mind. (It is noteworthy that the creation of the ESM outside the Treaties still required Treaty change (Article 136(3) TFEU).) A recent example of the difficulties that can arise when Treaty provisions are used in ways which were not intended is evident from the SSM. Under Article 127(6) the Council may confer specific tasks upon the European Central Bank concerning *policies* relating to the prudential supervision of credit institutions. The original intention behind Article 127(6) is not clear but the problems that arise with its use as the legal basis for the SSM suggest that it was probably not designed to convert the ECB into a bank supervisor. These problems include the following:

a. How can the monetary policy and supervisory responsibilities of the ECB be separated?
b. Is there an effective appeal mechanism from decisions of the ECB?
c. Which courts will enforce supervisory decisions?
d. Can there be equality of treatment within the SSM between the Eurozone and participating non-Eurozone countries?
e. Can the European Banking Authority treat the ECB in the same manner as other national regulators?

56. Many of the above problems have a legal source. For example, Article 12.1 of the Statute of the European System of Central Banks and of the European Central Bank ("the ESCB Statute") provides that the Governing Council is responsible for taking **all** decisions necessary to ensure the performance of the tasks entrusted to the ECB under the Treaties and Statute. So whereas separate internal bodies may prepare monetary policy and supervisory decisions, the ultimate decision-maker remains the same in both policy arenas. Accordingly, the Supervisory Board established under the SSM is empowered to carry out the preparatory works regarding the supervisory tasks conferred on the ECB, but then can only propose draft decisions to the Governing Council.

[14] The proposal for a Single Resolution Mechanism (2013/0253 (COD)).

57. Banks subject to supervision by the ECB will want to be able to challenge supervisory decisions speedily and transparently on their merits, just as is currently possible in respect of decisions taken by national supervisors. Article 6.1 of the European Convention on Human Rights requires that:

"In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

58. The Upper Tribunal (Tax and Chancery Chamber) review mechanism enables the UK to satisfy this requirement by permitting individuals and firms who disagree with certain supervisory decisions of the PRA and FCA to refer the disagreement to an independent judicial body established by the Tribunals, Courts and Enforcement Act 2007.

59. By contrast, the supremacy of the Governing Council[15] combined with Treaty provisions which expressly guarantee the independence of the ECB (Article 130 and Article 282(3) TFEU and Article 7 ESCB Statute) make the creation of an internal appeal mechanism difficult, which explains why the Administrative Board of Review can only express opinions not take appeal decisions: the Governing Council remains the taker of first instance and appellate decisions.

60. The Treaty provides that decisions of the ECB may be appealed to the Court of Justice of the EU ("ECJ") (under Article 263 TFEU) so that the ECJ may review the legality of acts of the ECB. However, this is not a merits / facts-based review but akin to judicial review (an application must be based on lack of competence, procedural impropriety or unlawfulness); and cases take, on average, around two years to be heard. This mechanism is clearly not appropriate to deal with a bank's concern about a technical supervisory decision yet is the only avenue of appeal from decisions of the Governing Council.

61. As explained above in relation to Question 7, the ESAs have the ability to impose direct decisions on national regulators. The European Banking Authority is required to treat the ECB as any other national regulator when doing so. Given the Treaty provisions which guarantee the independence of the ECB and provide for its decisions to be appealed to the ECJ, in addition to the difference in status between the two bodies[16], it is questionable whether the EBA has the legal ability to impose decisions on the ECB.

62. The concerns detailed jeopardise the effectiveness of the SSM and call into question its legal certainty. They also demonstrate the risks inherent in not having a firm legal basis for legislative proposals. Similar issues appear likely to arise in the context of the SRM and have already been raised during negotiations. Questions as to whether Article 114 TFEU is an appropriate legal basis to establish a single resolution fund, create a single resolution board and confer resolution powers on the Commission are currently being debated. The limits of the *Meroni* are being explored once more. The SRM will only apply to a subset of the internal

[15] As with the taking of supervisory decisions, an internal appellate body can carry out preparatory tasks and make recommendations but the Governing Council must be the ultimate decision-maker.

[16] The ECB is an EU institution established under the Treaty whereas the EBA is an agency established under secondary legislation.

market and this raises the question as to whether Article 114 can be used to create an internal market within an internal market.

63. It is hard to escape the conclusion that the only way to address the difficulties noted above and to create a credible, legally robust system which provides effective supervision is through Treaty change, making possible greater integration of the Eurozone, establishing the appropriate facilitative mechanisms and safeguarding the internal market for all 28 Member States. Yet the decision of the Court of Justice in Case-270/12 appears to indicate that the EU institutions prefer to push at the boundaries of what is legally permissible under the EU Treaties rather than contemplating such a possibility. As noted above, this is of concern both on constitutional grounds and because it has an impact on the substantive quality and legal certainty of the legislation.

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