

# *Novos passos no sentido da integração da regulação e supervisão financeira na UE*



## **Further steps of integration of financial regulation and supervision in the EU**



Presentation by

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before the Summer Conference of the

*Centro de Investigação sobre Regulação e Supervisão Financeira,*

*Instituto Europeu da Faculdade de Direito da Universidade de Lisboa*

*Estado actual e Perspectivas de Reforma da Regulação Financeira na UE e em Termos Internacionais*

The current state and prospects of  
reform of financial regulation  
in the EU and worldwide

Friday 29 June 2012

*Fundação Calouste Gulbenkian, Lisboa*



# Introduction

- Further steps of integration.....
- while financial sector is retreating within State boundaries...
- ... partially encouraged by Member States (conditions for state aid, Project Merlin,...)
- Nevertheless, ‘banking union’ is on agenda

# “A real banking union can save the eurozone”

“A banking union would need to include four centralised components: a resolution and recapitalisation fund; a fund for joint deposit insurance; a central regulator; and a central supervising power.”

“A bank resolution facility should be backed by a commitment of, say, €1tn, which will eventually have to be funded by a joint and several debt security – a eurozone bond. To kick-start this process, one could use the existing rescue umbrella, but this can only be a temporary solution.”



**Wolfgang Münchau,**

*A real banking union can save the eurozone,*  
Financial Times, 3 June 2012

“The European Commission’s resolution proposal last week was entirely useless because it stuck to the principle that each country resolves its own banks. This is utter madness in a monetary union.”

“A monetary union without a full banking union is unthinkable in an internal market. But there are different plausible constructs of a wider fiscal union.”

**Wolfgang Münchau**

*How to save Spain’s banks – and the eurozone, 10 June 2012*

Financial Times

# An ECB perspective on the key issues of the crisis

“There is one broad area, however, where a good strategy is still missing. This is the area of financial markets. Let me mention just one concern which needs to be addressed: the negative feedback loops between banks and national governments. The recapitalisation of a troubled bank by its government may lead to a deterioration of the government’s fiscal position. The deteriorating fiscal position in turn further weakens banks’ balance sheets, through their holdings of sovereign bonds.”

“[There] is an argument in favour of the single European rulebook without loop-holes and a supervisory authority at the European level for systemically relevant financial institutions with a cross-border business model.”

Speech by **Jorg Asmussen**,  
Member of the Executive Board of the ECB,  
European Financial Congress,  
Sopot, Poland, 24 May 2012



# Europe needs to move towards a “financial union”

“More is needed for the euro area to break the link between fiscal imbalances, financial fragmentation and financial instability. Europe needs to move towards a “financial union”, with a single euro area authority responsible for the supervision and resolution of large and complex cross-border banks.”

Speech by **Peter Praet**, Member of the Executive Board of the ECB,  
at the ICMA Annual General Meeting  
and Conference, Milan, 25 May 2012



# IMF Article IV consultation, June 2012

5. The immediate priority is concrete action toward a banking union for the euro area. The proposed EU framework for harmonized national bank resolution processes is a necessary first step. But it needs to go further.

A deposit guarantee scheme needs to be established at the regional level to help break the links between domestic banks and their sovereigns, and support depositor confidence. A common bank resolution authority is also needed. It should be backed by a common resolution fund to ensure burden sharing and to limit fiscal costs. These efforts should be supported by a common supervisory and macro-prudential framework to forestall further financial fragmentation. While a banking union is desirable at the EU27 level, it is critical for the euro 17.

# BIS

**Bank for International Settlements 82nd Annual Report, 24 June 2012**

(...) the global economy is still unbalanced and seemingly becoming more so as interacting weaknesses continue to amplify each other (...)

balanced growth, balanced economic policies and a safe financial system still elude us.

the particularly vicious cycles currently bedevilling Europe, where the monetary union faces the above challenges [the ongoing challenges of *structural adjustment*, *monetary* and *fiscal* policy risks, and *financial reform*] plus those of an incomplete institutional setup.

The feedback between the financial and the government sectors thus made a key contribution to accelerating fiscal decay; and the connection between banking stress and market pressures on sovereign credit has tightened considerably in the past couple of years, especially in Europe.

full resolution of the euro area crisis also requires strengthening the institutional foundations of the currency union itself - a pan-European financial market and a pan-European central bank require a pan-European banking system. Put slightly differently, a currency union that centralises the lender of last resort for banks must unify its banking system. Banks in Europe must become European banks.



# Outline of presentation

1. Where do we stand in EU's supervision, including an analysis of the R&R proposals of June 2012
2. Relationship with 'agencification' of EU ('Meroni')
3. Other 'banking union' legal issues, such as:
  - o ECB's specific power: Article 127 (6) TFEU
  - o enhanced cooperation
  - o separate Treaty (EFSF, ESM, 'fiscal compact'-like)
  - o Treaty change (TFEU)
4. Concluding remarks

# 1. Supervisory arrangements

ESFS: ESAs (EBA, ESMA, EIOPA) + ESRB



*Welcome  
to  
The European Science Fiction Society*

# 1. Supervisory rules 1

## Commission proposals adopted by the EU:

- CRD3: New rules on remuneration, prudential requirements and governance of financial institutions (July 2011)
- Introduction of the European Systemic Risk Board (ESRB) and the European Supervisory Authorities for Banking, Securities and Markets, and Insurance (September 2010)
- Revision of framework on credit rating agencies reforms (December 2010)

# 1. Supervisory rules 2

Commission proposals being discussed in the Parliament and Council:

- Revision of capital requirements for banks (CRD4) (July 2011)
- Revision of framework credit rating agencies (November 2011)

Upcoming legislative proposals:

- Proposal for a framework for crisis prevention and management for banks
- Solvency II implementing measures
- Review of the insurance mediation framework

REFORMS PROPOSED BY THE EUROPEAN COMMISSION, ADOPTED & IN THE PROCESS OF BEING ADOPTED BY THE EUROPEAN PARLIAMENT AND THE COUNCIL OF MINISTERS			
	BANKS AND INSURANCE UNDERTAKINGS	FINANCIAL MARKETS	CONSUMERS
July 2010	CRR: NEW RULES ON REMUNERATION, PRUDENTIAL REQUIREMENTS AND GOVERNANCE OF FINANCIAL INSTITUTIONS*		REVISION OF DEPOSIT GUARANTEE SCHEMES* REVISION OF INVESTOR COMPENSATION SCHEMES
September 2010	INTRODUCTION OF THE EUROPEAN SYSTEMIC RISK BOARD AND THE EUROPEAN SUPERVISORY AUTHORITIES FOR BANKING, SECURITIES AND MARKETS, AND INSURANCE*		
		PROPOSAL ON OVER-THE-COUNTER DERIVATIVES*	
		PROPOSAL ON SHORT SELLING AND CERTAIN ASPECTS OF CREDIT DEFAULT SWAPS*	
October 2010		PROPOSAL ON HEDGE FUNDS AND PRIVATE EQUITY*	
December 2010	REVISION OF FRAMEWORK ON CREDIT RATING AGENCIES REFORMS (PART 2)*		SRP/PROPOSAL (SINGLE EURO PAYMENTS AREA)
March 2011			PROPOSAL ON MORTGAGE CREDIT
July 2011	REVISION OF THE CAPITAL REQUIREMENTS FOR BANKS (CRD IV)*		RECOMMENDATION ON ACCESS TO A BASIC BANK ACCOUNT

	BANKS AND INSURANCE UNDERTAKINGS	FINANCIAL MARKETS	CONSUMERS
October 2011		REVIEW OF THE FRAMEWORK FOR MARKETS IN FINANCIAL INSTRUMENTS OFFERING AND MARKET ABUSE*	
		REVIEW OF THE FRAMEWORK FOR RULES ON ACCOUNTING AND THE TRANSPARENCY	
November 2011	REVISION OF FRAMEWORK CREDIT RATING AGENCIES (PART 3)*		
		REFORM OF THE KIBET SECTOR	
December 2011		PROPOSAL FOR A VENTURE CAPITAL REGIME	
March 2012		PROPOSAL FOR CENTRAL SECURITIES DEPOSITORIES	
UPCOMING			
	PROPOSAL FOR A FRAMEWORK FOR CRYSTAL PREVENTION AND MANAGEMENT FOR BANKS*		
	REVISION OF THE INSURANCE MEDIATION FRAMEWORK	PROPOSAL ON PACKAGED RETAIL INVESTMENT PRODUCTS (PRIIPs)	
		REVIEW OF THE UCITS FRAMEWORK FOR COLLECTIVE INVESTMENT IN FINANCIAL SECURITIES	

Proposals adopted by the European Union; the date is that of the Commission proposal

Commission proposals being discussed in the Parliament and the Council

Upcoming Commission proposals

\*G20 proposals

FINANCIAL REGULATORY REFORMS OF THE EUROPEAN UNION

10 (PREFACE TO THE FINANCIAL CRISIS AND THE CONSEQUENCES)

# 1. EBA

(only a random sample)

- **Stress testing and requirement of minimum capital** (“2011 EU Capital Exercise”): creation and supervisory oversight of temporary capital buffers to restore market confidence in respect of 58 EEA banks by end-June 2012
- **EBA Internal Governance Guidelines**, based on Article 22 of Directive 2006/48/EC
- **Discussion paper on recovery plans** (consultation ended mid-June 2012) to develop an EU view on the essential elements of a recovery plan
- **Selected supervisory disclosure pages of national supervisors**
  - Portugal: clicking on EBA ad BIS sites made possible 
  - Netherlands: overview of transposition but no English translation 
  - France, Germany: clear overviews of rules, use of discretion  
  - UK: “sorry, page not found” 
  - Spain – page on national discretions shows: 

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## 1. ESRB



### Recommendations:

- o on lending in foreign currencies
- o on US dollar denominated funding of credit institutions
- o the macro-prudential mandate of national authorities
- o *Principles for the development of a macro-prudential framework in the EU in the context of the capital requirements legislation:*

*“Under a single rule book, this approach to risks requires a framework that permits constrained discretion, with workable safeguards, for macro-prudential authorities at both Member State and Union level to tighten calibrations (while leaving definitions untouched) of commonly-defined prudential requirements. (...)*

- *flexibility in the set of available policy tools to both prevent and mitigate specific risks*
- *scope to act early and effectively before the build-up of significant imbalances or unstable interconnections*
- *efficient coordination as a safeguard to limit possible negative externalities or unintended effects for the sustainability of the single market in financial services or for the economies of other Member States” – in favour of “ex-ante exchange of information and coordination, rather than for an authorisation procedure by a European body”. [relevant for CRD-IV]*

# 1. R&R proposals June 2012 - 1

- ✓ well-devised proposals for Recovery and Resolution plans
- ✓ including for group resolutions
- ✓ strong powers to reduce (annul) liabilities, convert/cancel debt instruments, remove/replace senior management, bypassing usual consultation of shareholders
- ✓ effective exclusion of insolvency proceedings and interference by judicial review
- ✓ effects of resolution judicially challenged? compensation for loss suffered only
- ✓ protection of clearing and settlement systems, set off and netting arrangements



# 1. R&R proposals June 2012 - 2

- based on national resolution authorities instead of EU (€ area) liability
  - funded nationally (> 1% credit institutions' deposits)
  - with possible borrowing from other national financing arrangements
  - mutualisation of national financing arrangements in case of group
- no adequate insight into corporate structure (resolution authorities “may request” a list of all legal entities for preparing resolution plan) – contrary to existing legal requirement (Art. 22 Directive 2006/48): “a clear organisational structure with well defined, transparent and consistent lines of responsibility”
- EBA to report to Commission on implementation of R&R planning by 2018 (!)
- .... including on divergences in implementation at national level....
- thus, inadequate in current circumstances

## 2. Agencification of EU

### ‘Meroni’ and agencies: Legal writing 1

*Edoardo Chiti*, ‘An important part of the EU’s institutional machinery: Features, problems and perspectives of European agencies’, CMLR 46: 1395-1442, 2019

- o ‘Agencification’: extensive use of agencies in executive function in EU
- o Term by Edoardo Chiti – study sponsored by ECB arguing T2S administrative body may be established by, and reporting to, ECB
- o Wide-ranging powers attributed to agencies, far beyond mere advisory or technical
- o Genuine final decision-making powers for trade mark, plant variety and chemicals agencies but other agencies also ‘orientate private conduct and behaviour’ and exercise de facto decision-making powers

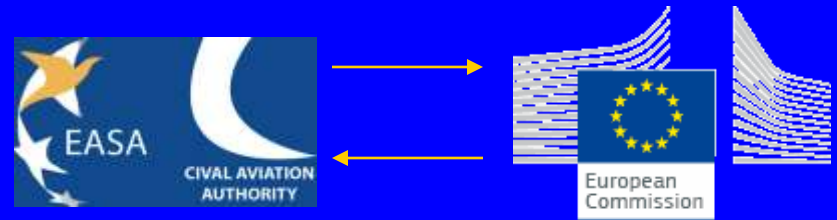
# Instrumental functions play a decisive role in the implementation of European policies

“For example, the European Aviation Safety Agency is called to carry out a technical assistance function vis-à-vis the Commission; but the exercise of the latter’s decision-making powers in the field rely formally and substantively on the technical activity of the European Aviation Safety Agency. In this sense, it would be erroneous to minimize the instrumental action carried out by the European agencies.”

**Edoardo Chiti**, *An important part of the EU’s institutional machinery:*

*Features, problems and perspectives of European agencies*

CMLR 46: 1395-1442 (2009)



## 2. Agencification of EU

### ‘Meroni’ and agencies: Legal writing 1

*Merijn Chamon*, ‘EU agencies between Meroni and Romano or the devil and the deep blue sea’,  
CMLR 48: 1055-1075, 2011

- Agencies in energy (ACER) and financial sectors (ESAs) have decision-making powers
- Meroni’s ‘balance of powers’ intended to protect against abuse of power > **judicial protection** was at issue in follow-on case law referring to Meroni
- Is reserving formal adoption of ESAs’ measures (regulatory and technical standards) by Commission whilst real decisions are made by ESAs in line with ‘Meroni’?
- Agencification of EU still on shaky legal grounds

## 2. Agencification of EU

### ‘Meroni’ and agencies: Legal writing 2

*Jonathan Faull, Ninth Slynn Foundation Lecture,  
delivered in London on 7 March 2011*

- o *“Meroni is still the standard against which delegation must be judged and the Parliament, Council and Commission have spent considerable time and effort to ensure the ESAs’ institutional set-up respects the Treaty and the Meroni principles in particular.”*
- o *“It is therefore the Commission which issues the binding technical standards developed by the new Authorities. Some may see this as an imperfection in the quest for supervisory autonomy – but it goes as far as possible in the framework of the EU Treaties.”*

## 2. Agencification of EU

### ‘Meroni’ and agencies: Legal writing 3

Commission declaration on Articles 290/291 TFEU  
adopted when the ESFS legal acts were adopted

“As regards the process for the adoption of regulatory standards, the Commission emphasises the unique character of the financial services sector, following from the Lamfalussy structure and explicitly recognised in Declaration 39 to the TFEU. However, the Commission has serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures are in line with articles 290 and 291 TFEU.”

*10 November 2010*

## 2. Agencification of EU

### ‘Meroni’ and agencies: Legal writing 4

- o Thus, even though Meroni may have to be read differently (requiring judicial protection only), case law, predominant academic writing and Articles 290-291 TFEU do not provide for executive powers exercised by other agencies than the EU institutions (including the ECB)

### 3. 'Banking union' legal issues

#### ECB Article 127 (6) TFEU

- The Council, acting by means of **regulations** in accordance with a special legislative procedure, may **unanimously**, and after **consulting** the European Parliament and the European Central Bank, **confer specific tasks upon** the European Central Bank concerning policies relating to the **prudential supervision of credit institutions and other financial institutions** with the exception of insurance undertakings



### 3. ‘Banking union’ legal issues

#### ECB Article 127 (6) TFEU

- o Procedurally: unanimous Council decision

(all 27 States as 127 (6) is applicable to all MS; see Art. 139 (2) and the UK Opt-out Protocol) / consultation of ECB and EP only (previously, assent of the EP)

BUT ECB acts do not apply in derogation or opt-out States

(Art. 132 excluded in Art. 139 (2) (e) TFEU; see, also, Art. 42 ESCB Statute and Para.7 UK Opt-out Protocol)

- o Materially: all financial institutions except insurance

undertakings – no restriction as to prudential task, even though ‘policies relating to’ seem to imply a restriction – executive functions may be attributed to the ECB forthwith – operational tasks – concept of ‘financial institutions’ may be interpreted by Union legislator without being confined to various meanings given to this term in secondary legislation (my thesis *The European Central Bank – Institutional Aspects*, 1997, page 359)

### 3. ‘Banking union’ legal issues

#### Enhanced cooperation

- Not based on Article 136 (specific economic policy coordination and budgetary surveillance for euro area Member States) – other € area-specific provisions not applicable either (Art 133: “the use of the euro as the single currency”; Art 138: “the euro’s place in the international monetary system”)
- Non-exclusive competences: monetary competences are exclusive but internal market – to which financial sector supervision belongs – is a shared competence (Article 4 TFEU)
- Open to all MS: so, also to non euro area MS - all have to adopt the single currency ultimately, but not DK and UK (opt-out but allowed to opt-in at any time > enhanced cooperation still feasible)
- “shall not undermine the internal market”: difficult in financial sector – London as a financial centre – UK insistence on guarantees for London
- Assent by unanimous Council and EP: strong position for dissenters, notably UK

### 3. 'Banking union' legal issues

#### Separate treaty

- o Circumventing of enhanced cooperation and TFEU > EU law precedence to be guaranteed as in TSCG (<fiscal compact>)
- o 17-only possible
- o Use of Union institutions an issue
- o Circumventing 'Meroni' and 127(6) exclusion of insurance undertakings by establishing financial sector-wide financial supervisor with strong operational powers: temporary solution

### 3. 'Banking union' legal issues TFEU amendment

- o Preferred route, legally
- o Fraught with political difficulties (27 MS, referendums)
- o Necessary anyway for stronger economic union (fiscal union), issue of Eurobonds
- o Provisions proposed in Frankfurt (October 2011)

European System of Financial Supervision (EFSF): key legal issues at <http://renesmits.eu/calendar/past-events/> or [http://www.ecb.int/events/conferences/html/reg\\_fs.en.html](http://www.ecb.int/events/conferences/html/reg_fs.en.html)

# Loosening financial links and removing conflicts of interest

“In order to be better prepared in a potential future crisis, therefore, the financial links between banking sectors and public finances must be loosened, and the conflict of interest between national crisis management and European rules must be removed.”

Speech by **Jorg Asmussen**, Member of the Executive Board of the ECB, *WELT-Währungskonferenz*, Berlin, 21 May 2012



# ESM

“Several ECB top officials have publicly backed the thrust of the proposal. Benoît Coeuré, an ECB executive board member, said this weekend

“if the ESM could inject capital directly into banks, with strong conditionality and control, this would also help to break the bank-sovereign loop.””

**Alex Baker**

*EU banking push gains ground*

Financial Times, 19 June 2012



## 4. Addressing the challenges now

- Banking union: yes, quickly (127 (6) TFEU), and over time (enhanced cooperation, Treaty change)
- Other measures:
  - ✓ Eurobonds (Euro T-Bills, ELEC proposal)
  - ✓ Quick disbursement of EU / EIB extra funding: hope for periphery
  - ✓ EU budget: own funds (FTT, CO<sub>2</sub> levy, VAT), automatic stabilisers
  - ✓ Internal market - free movement of persons: regulation, joint implementation (just as with teams in Greece), pension portability
  - ✓ Internal market – services: on-line, EU-wide digital payments,...
  - ✓ Cultural dimension: language education, shared media room
- Political union: legitimacy (directly elected Commission President, single chair of Council/Commission/Eurogroup)



## 4. Does the Van Rompuy Report do this?

- Positive:
  - ✓ “a genuine” EMU
  - ✓ long-term vision (“next decade”)
  - ✓ recognition of need for EU-wide supervision, resolution, deposit insurance
- Disappointing:
  - no strong signal now
  - absent: Eurobonds may enhance discipline by making governments instead of markets exercise discipline (democracies take back from market)
  - too timid a vision, emphasis on policy coordination in “E”
  - absent attention for internal market
  - too time-consuming a roadmap (reports, Treaty change ‘at some point of time’)
  - democratic legitimacy: bolder, creative steps needed
  - EMU is not a technical subject – this is about culture, too

# A manifest for Europe:

[www.amanifestforeurope.eu](http://www.amanifestforeurope.eu)

