

## II. *Toward an EU Banking Union*

### A. Introduction

On October 19, 2012, all twenty-seven heads of state<sup>1</sup> in the European Council approved the European Commission's ("the Commission") proposal (the "Proposal") that would create a "Single Supervisory Mechanism" ("SSM") to oversee banks in all seventeen euro countries.<sup>2</sup> In creating a single supervisor, the Commission, the European Union's executive branch, has two overarching goals. First, the Commission believes that integration of national supervisors will provide better and broader supervision,<sup>3</sup> and as a result prevent further bank bailouts leading to sovereign bailouts.<sup>4</sup> From 2008 to 2011, European taxpayers spent €4.5 trillion bailing out struggling banks.<sup>5</sup> Bank bailouts add to a country's national debt, creating a negative feedback loop<sup>6</sup> that makes it difficult, if not

---

<sup>1</sup> See generally *European Council*, EUR. UNION, [http://europa.eu/about-eu/institutions-bodies/european-council/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/european-council/index_en.htm) (discussing the composition of the European Council).

<sup>2</sup> *EU Summit: Compromise Deal on Eurozone Bank Supervisor*, BBC NEWS, (Oct. 19, 2012), <http://www.bbc.co.uk/news/world-europe-19999998>.

<sup>3</sup> *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 1093/2010 Establishing a European Supervisory Authority (European Banking Authority) As Regards Its Interaction With Council Regulation (EU) No.../... Conferring Specific Tasks on the European Central Bank Concerning Policies Relating To the Prudential Supervision of Credit Institutions*, at 2, COM (2012) 512 final (Sept. 12, 2012) [hereinafter *EBA Proposal*], available at [http://ec.europa.eu/internal\\_market/finances/docs/committees/reform/20120912-com-2012-512\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/committees/reform/20120912-com-2012-512_en.pdf).

<sup>4</sup> *Plans For Common Supervision Could Easily Turn Messy*, ECONOMIST, Sept. 15, 2012, at 37; see *Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions*, at 11 ¶10, COM (2012) 511 final (Sept. 12, 2012) [hereinafter *ECB Proposal*], available at [http://ec.europa.eu/internal\\_market/finances/docs/committees/reform/20120912-com-2012-511\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/committees/reform/20120912-com-2012-511_en.pdf).

<sup>5</sup> Michel Barnier, *A New Year's Banking Union*, PROJECT SYNDICATE (Oct. 15, 2012), <http://www.project-syndicate.org/commentary/european-bank-supervision-by-january-by-michel-barnier> (quantifying the total).

<sup>6</sup> Joe Kirwin, *European Commission Unveils Proposal for ECB to Oversee Eurozone's 6,000 Banks*, BANKING REP. (BNA) No. 99, at 443 (September 18, 2012).

impossible, for both the government and banks to raise capital.<sup>7</sup> Rather than benefiting from the EU's financial integration, these countries become increasingly isolated,<sup>8</sup> and their financial woes threaten the stability of the common currency.<sup>9</sup> In the worst cases, they require a sovereign bailout from the European Central Bank ("ECB"), as did Italy in August of 2011.<sup>10</sup>

Second, the Commission hopes to take the first step toward a full euro-country banking union,<sup>11</sup> necessary to truly cure the banking irregularities at the root of the current crisis.<sup>12</sup> For this reason, the Commission has chosen the Frankfurt-based ECB as supervisor.<sup>13</sup> At present, the ECB manages just monetary and economic policy,<sup>14</sup> but if all twenty-seven ministers in the Council of Economic and Finance Ministers ("ECOFIN") unanimously adopt the European Council's nonbinding agreement,<sup>15</sup> the ECB will become the euro-zone's largest regulator.<sup>16</sup> Part B of this article will discuss the legal basis behind the proposal for an SSM; Part C will discuss the European Banking Authority ("EBA"), the EU's current supervisor; Part D will discuss the mechanics and expected impact of future ECB supervision; Part E will discuss the remaining challenges standing in the way of the Proposal's passage; and, finally, Part F

---

<sup>7</sup> Landon Thomas, Jr., *Worried Banks Resist Fiscal Union*, N.Y. TIMES, June 17, 2012, at B1; see Nicolas Véron, *Europe's Single Supervisory Mechanism and the Long Journey Towards Banking Union*, Policy Brief, BRUEGEL, 2012/16 (Oct. 2012) at 4, available at <http://www.bruegel.org/publications/publication-detail/publication/752-europes-single-supervisory-mechanism-and-the-long-journey-towards-banking-union/>.

<sup>8</sup> See Thomas, *supra* note 7.

<sup>9</sup> See *EBA Proposal*, *supra* note 3, at 2.

<sup>10</sup> Zoe Chase, *The European Central Bank's Guide to Influence*, NPR's PLANET MONEY BLOG (July 13, 2012), <http://www.npr.org/blogs/money/2012/07/13/156705409/the-european-central-banks-guide-to-influence?sc=emaf>.

<sup>11</sup> *ECB Proposal*, *supra* note 4, at 11 ¶10.

<sup>12</sup> See Véron, *supra* note 7, at 1.

<sup>13</sup> *ECB Proposal*, *supra* note 4, at 11 ¶10–11.

<sup>14</sup> See generally *European Central Bank*, EUR. UNION, [http://europa.eu/about-eu/institutions-bodies/ecb/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/ecb/index_en.htm) (last visited Oct. 10, 2012).

<sup>15</sup> Kirwin, *supra* note 6.

<sup>16</sup> David Enrich, *EU's Banks Must Keep Shields Up*, WALL ST. J., Oct. 4, 2012, at C3.

will discuss whether the future holds the possibility of a full banking union.

**B. Legal Basis for the Granting Greater Supervisory Powers to the ECB**

As the legal basis for unitary supervision, the Commission plans to use Article 127(6) of the Treaty on the Functioning of the European Union (“TFEU”),<sup>17</sup> which reads:

The Council [of the European Union], 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.<sup>18</sup>

Article 127(6)’s express grant of power to the Council of the European Union (a.k.a. the Council of Ministers, one of the EU’s two legislative bodies) greatly simplifies the legislative process, by not only obviating the need for a treaty amendment but also going one step further and allowing the Commission to bypass a vote by the European Parliament.<sup>19</sup> Rather than the usual bicameralism, this “special legislative procedure” permits a single vote by Council of Ministers,<sup>20</sup> which in this case would be taken by the ministers in the ECOFIN.<sup>21</sup> Based on Article 127(6), the Commission and Council hope to get quick approval of a final version of the Proposal set to be ready by the end of 2012.<sup>22</sup>

---

<sup>17</sup> *ECB Proposal*, *supra* note 4, at 3 ¶3.

<sup>18</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 127(6), Mar. 30, 2010, 2010 O.J. (C 83) 103.

<sup>19</sup> *See* Kirwin, *supra* note 6.

<sup>20</sup> *See id.*

<sup>21</sup> *See generally European Council*, *supra* note 1.

<sup>22</sup> Press Release, Brussels European Council, The European Council Discusses Deeper EMU and Mandates the President to Explore New Avenues Before December (Oct. 18, 2012), *available at* <http://www.european-council.europa.eu/home-page/highlights/the-european-council->

### C. Current Supervision by the European Banking Authority

Under the Commission's plan, the ECB would replace the European Banking Authority as euro-zone supervisor.<sup>23</sup> Since January of 2011, the EBA, which is composed of members from each of the EU's twenty-seven national banks or other supervisory authorities,<sup>24</sup> has supervised banks via stress tests.<sup>25</sup> The EBA faced significant criticism<sup>26</sup> for missing excessive debt at the Spanish bank Bankia which, despite passing an EBA stress test in 2011, required two bailouts, in May and September of 2012.<sup>27</sup> However, the EBA was never granted investigatory authority, and relied entirely on data provided by its own members.<sup>28</sup> The decision to pass over the EBA likely stems from four practical constraints. First, to expand the scope of the EBA's authority would require a full legislative process, since its powers must be modified via the same mechanism with which it was created.<sup>29</sup> As described *supra*, the only existing provision allowing the Commission to choose a supervisor without a vote by Parliament already essentially names the ECB as supervisor.<sup>30</sup> Second, in taking the first step toward a full EU

---

discusses-deeper-emu-and-mandates-the-president-to-explore-new-avenues-before-december?lang=en.

<sup>23</sup> The EU has other supervisors, including the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority, but it is the EBA who is primarily responsible for bank oversight. Press Release, European Commission, Towards a Banking Union (Sept. 10, 2012), available at [http://europa.eu/rapid/press-release\\_MEMO-12-656\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-656_en.htm).

<sup>24</sup> See generally Press Release, European Banking Authority, EBA's Statement of Publication on the Spanish Stress Tests, (Sept. 28, 2012), available at <http://www.eba.europa.eu/News--Communications/Year/2012/EBA-s-statement-on-the-publication-of-the-Spanish-.aspx>.

<sup>25</sup> Christopher Bjork, *Four Spanish Banks, Including Popular, Pass EBA Stress Test*, WALL ST. J. (Oct. 3, 2012 1:10 PM), <http://online.wsj.com/article/BT-CO-20121003-709657.html>.

<sup>26</sup> *Plans For Common Supervision Could Easily Turn Messy*, *supra* note 4.

<sup>27</sup> Sarah Gordon, *Spain's Bank Bailouts Continue to Raise Concerns*, FIN. TIMES, Sept. 8, 2012, at 14.

<sup>28</sup> See *Plans for Common Supervision Could Easily Turn Messy*, *supra* note 4.

<sup>29</sup> See *EBA Proposal*, *supra* note 3, at 3 ¶ 3.

<sup>30</sup> See Véron, *supra* note 7, at 5.

banking union, the Commission could only select a supervisor from within the euro zone. Third, the Commission's choice acknowledges the connection between banking and monetary policy, in which the lender-of-last-resort ECB is already expert.<sup>31</sup> Finally, German demands for ECB supervision in exchange for direct recapitalization in future bank bailouts may have played a role.<sup>32</sup>

Even after the ECB takes over the role of supervisor in euro countries, the Proposal would allow the EBA to continue serving as primary supervisor of non-euro country banks,<sup>33</sup> at least until a review in 2014.<sup>34</sup> For cross-border banks established in euro countries, the EBA will assist the ECB as host supervisor.<sup>35</sup> In a separate proposal meant to reassure EBA supporters, the Commission suggests leaving other pan-European functions performed by the EBA intact. For example, the EBA would continue developing a single rulebook of technical standards,<sup>36</sup> much like the Federal Financial Institutions Examination Council ("FFIEC") in the U.S.<sup>37</sup> Finally, the Commission intends to protect the EBA's autonomy by strengthening its mediation powers, which would make it the EU's arbitrator in disputes involving all twenty-seven countries.<sup>38</sup>

#### **D. Proposed Supervision by the ECB**

In order effectively to break the negative feedback loop between sovereigns and banks and restore confidence in the euro, the ECB's role will be to provide better and broader supervision than the

---

<sup>31</sup> *Id.* at 2, 6.

<sup>32</sup> Kirwin, *supra* note 6. A separate piece of legislation, direct recapitalization represents another important step in breaking the negative feedback loop by disbursing bailout funds directly to banks rather than to national governments. Jan Strupczewski, *Spain to Switch to Direct Bank Recapitalization When ESM Has That Capability-Official*, REUTERS, (June 29, 2012), <http://www.reuters.com/article/2012/06/29/us-spain-recapitalisation-direct-idUSBRE85S0J120120629>.

<sup>33</sup> See *ECB Proposal*, *supra* note 4, at 4 ¶ 4.1.3.

<sup>34</sup> Véron, *supra* note 7, at 7.

<sup>35</sup> *Id.*

<sup>36</sup> *EBA Proposal*, *supra* note 3, at 3; Véron, *supra* note 7, at 7.

<sup>37</sup> See generally FED. FIN. INSTS. EXAM'N COUNCIL, <http://www.ffiec.gov/> (last visited Nov. 11, 2012).

<sup>38</sup> *EBA Proposal*, *supra* note 3, at 3–4.

previous system of informal information-sharing by national supervisors and loose oversight by the EBA.<sup>39</sup> To improve supervision, the Commission establishes the ECB's mandate as "direct oversight of banks, to enforce prudential rules in a strict and impartial manner," thus "[e]nsuring that banking supervision across the Euro area abides by high common standards."<sup>40</sup> To ensure broader supervision, the ECB will supervise banking conglomerates at all levels and across national borders.<sup>41</sup> In a sense, the EU will be doing what the Clinton administration and parts of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") tried to do for the U.S. banking system:<sup>42</sup> cutting back on the number of regulators,<sup>43</sup> shoring up capital,<sup>44</sup> and expanding regulators' reach over conglomerates.<sup>45</sup>

## 1. Oversight

The ECB will assure "high common standards" by overseeing the current network of national supervisors.<sup>46</sup> National supervisors would continue to collect data from banks, conduct on-site inspections, and implement the ECB's acts, but the ECB will serve as clearinghouse for this data and ultimate decision-maker with respect to whether a bank meets EU prudential requirements.<sup>47</sup> These requirements include (1) maintenance of sufficient capital, including

---

<sup>39</sup> See Towards a Banking Union, *supra* note 23, at ¶ 1.1.

<sup>40</sup> EBA Proposal, *supra* note 3, at 2.

<sup>41</sup> ECB Proposal, *supra* note 4, at 12 ¶ 20.

<sup>42</sup> See RICHARD CARNELL ET AL., THE LAW OF BANKING AND FINANCIAL INSTITUTIONS 64 (4th ed. 2009).

<sup>43</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 312(b)(2)(B)(i); 12 U.S.C. § 5412(b)(2)(B)(i) (Supp. V 2011).

<sup>44</sup> See Margaret E. Tahyar, *Collins Amendment Sets Minimum Capital Requirements*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REGULATION BLOG (July 8, 2010 at 9:21 AM), <http://blogs.law.harvard.edu/corpgov/2010/07/08/collins-amendment-sets-minimum-capital-requirements>.

<sup>45</sup> Dodd-Frank Act § 618(a)(4)(A)(i), § 1850a(a)(4)(A)(i).

<sup>46</sup> See ECB Proposal, *supra* note 4, at 11 ¶ 10.

<sup>47</sup> *Id.* at 4 ¶ 4.2.1, 20 ¶ c. The Commission refers to all safety and soundness requirements as "prudential" requirements. *Id.* at 11 ¶ 10.

internal capital, own funds, and capital buffers; (2) leverage and counterparty exposure limits; and (3) liquidity.<sup>48</sup>

**a. Ensuring Adequate Capital**

As supervisor, the ECB will ensure that all banks meet current EU and future Basel III capital requirements, for now limited to calculating leverage ratios and defining common equity tier 1 capital.<sup>49</sup> By having the ECB regulate capital, the Commission aims to have banks store sufficient funds and limit risk ahead of time in order to be able to perform their normal transactional and lending functions in a crisis.<sup>50</sup> In addition to examining minimum capital, the ECB will assess whether banks have adequate mechanisms to ensure sufficient internal capital to cover their level of credit risk under current Basel II Pillar 2 rules.<sup>51</sup> Internal capital can be “reallocated across locations in response to their relative needs, helping conglomerates to respond to localized shortfalls.”<sup>52</sup> If the ECB finds a bank’s internal capital arrangements inadequate to its level of credit risk, it would impose additional own funds (capital owned “in its own right”<sup>53</sup>) and liquidity requirements tailored to the institution.<sup>54</sup>

Next, the proposed regulations, like the Dodd-Frank Act in the U.S.,<sup>55</sup> would have the ECB impose capital buffers beyond minimum requirements, including capital conservation and countercyclical capital buffers.<sup>56</sup> Capital conservation buffers are nest eggs of less risky common equity Tier 1 capital created during

---

<sup>48</sup> *ECB Proposal*, supra note 4, at 4 ¶ 4.2.1, 20 ¶ c.

<sup>49</sup> *Id.* at 17 ¶ 44.

<sup>50</sup> BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT’L SETTLEMENTS, COUNTERCYCLICAL CAPITAL BUFFER PROPOSAL, 1 (2010) available at <http://www.bis.org/publ/bcbs172.pdf>.

<sup>51</sup> *ECB Proposal*, supra note 4, at 4 ¶ 4.2.1.

<sup>52</sup> Nicola Cetorelli & Linda Goldberg, *Liquidity Management of U.S. Global Banks: Internal Capital Markets In the Great Recession* 3 (Fed. Reserve Bank of N. Y. Staff Report No. 511, 2012), available at [http://www.newyorkfed.org/research/staff\\_reports/sr511.pdf](http://www.newyorkfed.org/research/staff_reports/sr511.pdf).

<sup>53</sup> Prudential Requirements for Payment Institutions (S.I No. 383/2009) (Ir.), available at <http://www.centralbank.ie/regulation/industry-sectors/payment-institutions/Documents/020911%20Prudential%20Requirements%20for%20PIs%20rebranded.pdf>.

<sup>54</sup> *ECB Proposal*, supra note 4, at 12 ¶ 19.

<sup>55</sup> See Tahyar, supra note 44.

<sup>56</sup> *ECB Proposal*, supra note 2, at 12 ¶ 18.

good times that banks can draw from during bad times and still meet minimum capital requirements.<sup>57</sup> Countercyclical capital buffers perform the same function, but on a system-wide level, to moderate cycles of excessive risk-taking.<sup>58</sup> These buffers also have the effect of slowing bank risk-taking.<sup>59</sup>

### **b. Leverage, Counterparty Exposure Limits, and Liquidity**

With leverage restrictions, the Commission likely looks to limit banks' debt<sup>60</sup> and asset riskiness by mandating that they keep a sufficient portion of their assets as Tier 1 capital.<sup>61</sup> Additionally, the Proposal tasks the ECB with monitoring a bank's "exposures to individual counterparties."<sup>62</sup> Exposure is the "liabilities of a particular institution (counterparty) to others in the financial system."<sup>63</sup> Where institutions owe each other too much liability, default by one can cause a domino effect leading to the collapse of many.<sup>64</sup> The aim of the Commission, like the Dodd-Frank Act in the U.S.,<sup>65</sup> is to prevent "cumulative loss to the financial system from a counterparty that fails to deliver on its . . . obligation[s]" by having the ECB inspect the amount banks owe to or are owed by any single entity.<sup>66</sup> Finally, by entrusting the ECB with oversight of liquid assets, the proposed regulations would guarantee that banks be

---

<sup>57</sup> Pietro Penza, PricewaterhouseCoopers, Workshop Presentation: *Examining How the Capital Buffer Standards Are Impacting the Use and Availability of Tier 1 Capital* (Feb. 18, 2011) at 4, 6, [http://www.pwc.com/en\\_GX/gx/banking-capital-markets/pdf/Pietro\\_Penza\\_Presentation.pdf](http://www.pwc.com/en_GX/gx/banking-capital-markets/pdf/Pietro_Penza_Presentation.pdf).

<sup>58</sup> BASEL COMM. ON BANKING SUPERVISION, *supra* note 50, at 2.

<sup>59</sup> *Id.*

<sup>60</sup> CARNELL, *supra* note 31, at 256–57.

<sup>61</sup> See Tahyar, *supra* note 44.

<sup>62</sup> ECB Proposal, *supra* note 4, at 12 ¶ 17.

<sup>63</sup> Miguel A. Segoviano & Manmohan Singh, *Counterparty Risk in the Over-the-Counter Derivatives Market 5* (Int'l Monetary Fund Working Paper No. 08/258, 2008), available at <http://www.imf.org/external/pubs/ft/wp/2008/wp08258.pdf>.

<sup>64</sup> *Id.*

<sup>65</sup> Edward Wyatt, *Fed Unveils Plan to Limit Chance of a Banking Crisis*, N.Y. TIMES, Dec. 21, 2011, at B1.

<sup>66</sup> See Segoviano & Singh, *supra* note 63.



prepared with sufficient easily-redeemed assets to remain solvent in any future crisis.<sup>67</sup>

**c. Acquisition and Disposal of Holdings**

In order to ensure that banks remain financially stable throughout their lives, the ECB will regulate key moments in their life cycle. First, the ECB will grant all new bank licenses and authorizations, certifying that all institutions begin life with adequate resources and management systems.<sup>68</sup> Second, the ECB would assess the strength of any potential owner before the “purchase or disposal of a significant stake” in a bank, so that a bank’s ownership does not undermine its stability.<sup>69</sup>

**d. Early Intervention and Stress Tests**

In order to provide better supervision, the ECB will have the authority to conduct its own stress tests.<sup>70</sup> Unlike the EBA, however, the ECB will hold full investigatory powers, including the power to compel the production of documents, examine an institution’s books or records, interview employees or institutional representatives, and even make unannounced on-site inspections.<sup>71</sup> If the ECB finds a bank out of compliance, the Proposal gives it the authority to intervene as soon as possible to prevent the need for a bailout.<sup>72</sup>

**e. Enforcement**

So that it can intervene as soon as possible, the Proposal grants the ECB the clout to impose punitive sanctions such as fines or periodic penalty payments on undertakings, either against individual banks or their holding companies.<sup>73</sup> In extreme cases, the

---

<sup>67</sup>See *BASEL III: Liquidity Rules* (Linklaters L.L.P.), Feb. 2011, at 2-3, available at [www.linklaters.com/pdfs/mkt/london/A13028760.pdf](http://www.linklaters.com/pdfs/mkt/london/A13028760.pdf).

<sup>68</sup> *ECB Proposal*, *supra* note 4, at 11 ¶ 14.

<sup>69</sup> *Id.* at 11–12 ¶ 16.

<sup>70</sup> *Id.* at 20 art. 4(1)(h).

<sup>71</sup> *Id.* at 23 arts. 9–12.

<sup>72</sup> See *id.* at 4 ¶ 4.2.1.

<sup>73</sup> *Id.* at 27 art. 15.

ECB would also have the authority to remove a member of an institution's management board or withdraw a bank's authorization completely.<sup>74</sup> However, the ECB will not be able to resolve a failed institution until the EU approves a full banking union.<sup>75</sup>

## 2. Broader Supervision

An equally important goal of the Commission is to end the regulatory mismatch between EU-wide banks and currency and provincial supervision.<sup>76</sup> Just as it would be inefficient for states to work together to supervise national banks in the U.S., the Commission hopes a single supervisor can more efficiently oversee cross-border banks.<sup>77</sup> As described *supra*, the ECB will serve as both home and host supervisor to euro-zone banks. Moreover, the proposed regulations would extend the scope of supervision to cover conglomerates, including consolidated institutions and holding companies, even of the mixed financial type.<sup>78</sup>

### E. Will the SSM Be Approved?

The Commission is currently in the process of drafting new versions of its Proposal to eliminate two impediments which could delay or even halt the SSM.<sup>79</sup> First, some legal advisors fear that Article 127(6) is insufficient legal basis<sup>80</sup> for the creation of an independent supervisory board within the ECB to avoid conflicts of interest with its monetary arm.<sup>81</sup> In order to grant the board full decision-making power, one solution would have the board create "draft" decisions to be ratified by the ECB Governing council.<sup>82</sup> Yet limiting the SSM's decision-making power could affect the

---

<sup>74</sup> *Id.* at 5 ¶ 4.3.1.

<sup>75</sup> Erik F. Nielsen, *Banking Union Is Critical for Survival of the Eurozone*, FIN. TIMES, Sept. 5 2012, at 20.

<sup>76</sup> See Towards a Banking Union, *supra* note 23, at 1.1 .

<sup>77</sup> *ECB Proposal*, *supra* note 42, at 3 ¶ 3.

<sup>78</sup> *ECB Proposal*, *supra* note 4, at 12 ¶ 20.

<sup>79</sup> Laurence Norman & Gabriele Steinhauser, *The EU's Supervisory Riddle*, WALL ST. J. BLOG (Oct. 23, 2012, 2:03 PM), <http://blogs.wsj.com/brussels/2012/10/23/the-eu-supervisory-riddle/>

<sup>80</sup> Alex Barker, *Europe Banking Supervisor Plan 'Illegal'*, FIN. TIMES, Oct. 17, 2012, at 3 [hereinafter *Plan Illegal*].

<sup>81</sup> *ECB Proposal*, *supra* note 4, at 7 ¶ 4.5.2.

<sup>82</sup> *Id.*

Proposal's popularity if the Council of Ministers does not view this solution as a convenient legal fiction.<sup>83</sup> One fix could be to make ECB supervision temporary, and later create an independent supervisor via treaty amendment.<sup>84</sup>

Second, under the current Proposal, non-euro countries with close ties to euro-zone banks<sup>85</sup> can opt in to ECB supervision on a voluntary basis,<sup>86</sup> but would not be actual members with full voting rights.<sup>87</sup> This is a major concern for Sweden and Poland.<sup>88</sup> The "draft decision" solution could also resolve this issue by giving non-euro members full voting rights so long as the ECB Governing Council ratifies their votes.<sup>89</sup>

For countries who do not want to join, like Britain, a major concern is the potential dilution of their voting power in the EBA.<sup>90</sup> As stated above, the Commission has created a separate proposal on EBA reform to address the concern that the seventeen euro supervisors in the EBA would consistently outvote the ten non-euro supervisors.<sup>91</sup> This proposal on EBA reform suggests strengthening the EBA's mediation power to resolve conflicts impacting all twenty-seven countries.<sup>92</sup> However, the medicine may be worse than the disease, because Britain could find itself unable to gather support to overturn a contrary vote.<sup>93</sup>

The above questions are mostly practical. With the exception of Britain, most reactions to the Proposal have been positive. For example, the European Banking Federation, composed of every national banking association in Europe (including the British Bankers' Association) fully supports the creation of a SSM and a January 2013 start date.<sup>94</sup>

---

<sup>83</sup> *Id.*

<sup>84</sup> Véron, *supra* note 7, at 7.

<sup>85</sup> Norman & Steinhauser, *supra* note 79.

<sup>86</sup> *ECB Proposal*, *supra* note 4, at 6 ¶ 4.4.

<sup>87</sup> Véron, *supra* note 7, at 5.

<sup>88</sup> *Plan Illegal*, *supra* note 64.

<sup>89</sup> *Id.*

<sup>90</sup> Alex Barker, *UK Faces Clashes With Brussels On City*, FIN. TIMES, Sept. 11, 2012, at 4 [hereinafter *UK Clashes*].

<sup>91</sup> Véron, *supra* note 7 at 8.

<sup>92</sup> *UK Clashes*, *supra* note 90; see Véron, *supra* note 7, at 8.

<sup>93</sup> *UK Clashes*, *supra* note 90.

<sup>94</sup> Kirwin, *supra* note 6.

However, even if the Commission succeeds in creating a proposal that solves the above problem, it has not resolved the issue of timing. The Commission's original proposal, backed by France and Spain, called for supervision of the weakest banks beginning in January 2013.<sup>95</sup> However, in order to obtain German approval, the Commission has agreed to slow its timetable.<sup>96</sup> Instead of full supervision, only the "legislative framework" need be in place by January 2013.<sup>97</sup> The ECB will not take over supervision until later in 2013.<sup>98</sup>

#### F. What Will the Future Hold?

The creation of a unitary supervisor is only the first step toward a banking union. The next two steps would be a shared bank deposit guarantee and a shared bank resolution mechanism—essentially a Federal Deposit Insurance Corporation for the EU.<sup>99</sup> A fiscal union would follow.<sup>100</sup> Each of these steps is increasingly unlikely because of the political integration required.<sup>101</sup> Even to take the second step and create a shared bank deposit guarantee would require persuading all euro-zone residents to agree to guarantee other countries' deposits.<sup>102</sup> Whether or not the EU will ever have the necessary political cohesion remains to be seen.

For now, Commission President José Manuel Durão Barroso says that the Commission aims just to "break the vicious link between sovereigns and their banks," so that "in the future, bankers' losses should no longer become the people's debt, putting into doubt the financial stability of whole countries."<sup>103</sup>

Andrea Jennings<sup>104</sup>

---

<sup>95</sup> Tony Czuczka & Helene Fouquet, *Merkel, Hollande EU Unity Pledge Fails to Stretch to Bank Union*, BLOOMBERG, (Sept. 22, 2012), <http://www.bloomberg.com/news/print/2012-09-22/hollande-warns-against-selfishness-populism-in-debt-crisis.html>.

<sup>96</sup> *EU Summit: Compromise Deal on Eurozone Bank Supervisor*, *supra* note 2.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Nielsen, *supra* note 75.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Véron, *supra* note 7, at 3–4.

<sup>103</sup> Kirwin, *supra* note 6.

<sup>104</sup> Student, Boston University School of Law (J.D. 2014).