***Notes on the seminar ôReflections on the design and implementation of the European Banking Unionô, organised by the European Banking Institute (EBI) at the Bologna Business School, Villa Guastavillani, Bologna (I), 17 September 2016***

Outline of the programme

Speakers from academia, practitioners from supervisory authorities and central banks, as well as practicing lawyers together gave some twenty presentations on the banking unionôs policy design and market perspectives, the institutional dimension (including mandates and fundamental rights), on administrative review and judicial protection, and on recovery and resolution of banks. In-depth sharing of experiences, e.g. by the three review panels (EBA/ESMA/EIOPA; ECB (ABoR); SRB), and critical analysis of the architecture and early experiences were on the agenda, while future developments like Capital Market Union (CMU) were explored. Some 70 people attended in all. The below impressions seek to render the highlights and inform about the points that I learned.

Points learned - remarkable themes

Beyond familiar issues such as the Treaty limitations on the architecture of financial supervision in Europe (the limitations on delegating authority deriving from the *Meroni* Case [9-56]; the Treatyôs determination of the ECBôs decision-making bodies; the European Court of Justice (CJEU)ôs case law on proportionality) interventions highlighted the following themes:

- **Diego Valiente**, FISMA, European Commission; author of the recent major study on CMU
Figures show there is still, eight years after the crisis began, insufficient risk sharing among States. Risk absorption comes from three sources of which fiscal transfers even in the USA amount only to 20% of the total, the other sources being income (savings) and international credit and capital markets (a negative [!] source of risk absorption for the EU). The speaker differentiated between *structural* barriers to integration (such as language) and *artificial* barriers which harmonisation or unification under the CMU project could address, provided sufficient enforcement powers would be attributed. In this respect, the governance of the European Supervisory Authorities (ESAs), to be reviewed in 2017, was characterised as deficient, notably the absence of voting rights for ESMAôs Management in its Board.

- **Reiner Masera**, member of the DeLarosière Group, *Università G. Marconi*, Rome
The link between monetary policy and prudential supervision, now bother undertaken by the ECB, was found by this speaker to hinder the effectiveness of the former. Without going into the strong legal reasons for this (that I would argue for, RS), the speaker rightly pleaded for a central Lender of Last Resort (LOLR, or ELA) function for the ECB, rather than for the National Central Banks (NCBs).

- **Giovanni Ferri**, LUMSA University, Rome
The speaker questioned whether regulation is appropriate for the diverse banks in Europe, and whether regulatory standards have been adopted with the template of a profit seeking stock-exchange quoted bank company in mind. We were reminded that, while the EU had decided ï decades ago ï to apply Basel standards to all banks, in the US, these apply to internationally operating banks only. Are cooperatives and, as bankô counterparties, family-based businesses not put at a disadvantage this way? The one-size-fits-all approach to banking regulation was alleged to disproportionately favour for-profit banks. The relationship-based model of banking is said not to be acknowledged in EU banking regulation. There is a ósingle company modelô behind this regulation, according to the speaker. A lack of proportionality in the supervisory response on this side of the Atlantic (too much focus on swift

recapitalisation) was alleged to lead to a permanent credit crunch for Small and Medium-sized Enterprises (SMEs) in Europe. In Europe, there is ósilo thinkingô on bank regulation. As there was no time for discussion, it was not possible to draw the speakerôs attention to the acknowledgment in recital 17 of the SSM Regulation of diversity in the banking industry[1].

- **Elena Louri Dendrinou**, Single Resolution Board (SRB) Appeal Panel
This speaker presented highly instructive figures about the rapid deterioration of the situation at the Greek and Cypriot banks since 2009, undermining their erstwhile resilience. The authors of the paper - including M. Mavridou of the Central Bank of Greece - argue that the conditionality imposed made the situation far worse: a óperfect stormô with, in Greece, a 50% loss of deposits in six years, loss of access to wholesale markets and the crisis affecting collateral necessary for liquidity assistance (reductions in value; higher haircuts applied by the ESCB). While, in Greece, public debt was the primary source of the crisis, in Cyprus, it was bank debt that triggered the crisis. Greek banks needed simultaneously to increase the interest paid to depositors to reduce withdrawals and to offer higher returns to attract investors, leading to a margin squeeze. The speaker, while acknowledging that reinforced regulation (CRD IV; CRR) had strengthened banks in ordinary times, expressed severe doubts whether the ñincomplete Eurozone architectureò was and will be fit to face systemic failure.

- **David Ramos Muñoz**, University of Madrid Carlos III and *Università degli Studi di Bologna*
This speaker made the case for appropriate protection of property rights under EU case law and the principle of proportionality.

- **Christos Hadjiemmanuil**, EBI and University of Piraeus, Athens
Again, proportionality was dissected in its various applications, with the speaker arguing, as well, against subjecting all banks to a single regulatory system, mentioning two modes of differentiation: simplification (of the rules) and use of discretion versus differentiation (in the rules themselves). On the vexed issue of the use of state aid in bank recovery and resolution, the speaker advocated a more flexible approach than accepted thus far.

- **Rafaele D'Ambrosio**, *Banca d'Italia*
The difference between the SSM and the SRM in the protection of fundamental rights was highlighted. SRB decisions need to be implemented by national (resolution) authorities (NRAs), unlike ECB decisions which may be effective without recourse to National Competent Authorities (NCAs). The SRB may only apply special resolution tools if NRAs do not comply with SRB decisions. The speaker referred to Article 22 SSM Regulation (*Due process for adopting supervisory decisions*) which sets a general rule on due process, whereas the SRM Regulation (806/2014) contains no such general rule, mentioning due process in Articles 40 and 90(4) only. Article 29 SRM Regulation refers to the Bank Recovery and Resolution Directive (BRRD) safeguards which largely protect third parties only. Article 18(1) SRM Regulation, Article 41 (*Right to good administration*) of the Charter of Fundamental Rights of the European Union (Charter), recital 121 of the preamble to the SRM Regulation and recital 88 to the BRRD were all cited in the speakerôs very critical assessment of the protection of fundamental rights in the SRM.

[1] Recital 17 of the preamble to Regulation 1024/2013 reads: ñWhen carrying out the tasks conferred on it, and without prejudice to the objective to ensure the safety and soundness of credit institutions, the ECB should have full regard to the diversity of credit institutions and their size and business models, as well as the systemic benefits of diversity in the banking industry of the Union.ò

- **Salvatore Providential**, CONSOB
This in-depth discussion of the protection against double jeopardy (*ne bis in idem*) in the application of criminal and administrative sanctions cannot be easily be summarised. The speaker referred to Article 4 of Protocol 7 to the ECHR, Article 50 of the Charter (*Right not to be tried or punished twice in criminal proceedings for the same criminal offense*) and found *ne bis in idem* difficult to reconcile in the two areas of sanctions (criminal and administrative).

- **Sylvia Allegrezza**, EBI and *Université de Luxembourg*
Again on criminal and administrative law application in banking union, the speaker argued for full inclusion of criminal law and offered a blueprint for this that seemed to overlook that the SSM is not responsible for conduct of business oversight. The issues of *locus commissi delicti* and concurrent intervening jurisdictions were highlighted with a reference to the Serious Fraud Office (SFO) in London issuing arrest warrants for *Deutsche Bank* staff members in March whilst the German Prosecutor's Office found no criminal offense.

- **Daniel Sarmiento**, *Universidad Complutense*, Madrid and Uría Menéndez law firm
The judicial dimension of banking union with the remedial side of EU law being ñrevolutionisedò was the subject of this presentation which systemically discussed the issues, including the following: an EU institution applying national law (with the author surmising that the NCBsô involvement in the SSM helps the ECB to apply national law appropriately but with preliminary proceedings for a ruling on the interpretation of *State* law missing); the question whether national law would be treated as *law* or as *fact* in appeal cases, citing Case C-263/09P [*Edwin*]); the possibility of shared liability in case of damages actions; the stated impossibility for the ECB to use Article 271(d) TFEU (and Article 35.6 ESCB Statute, RS) against a non-compliant NCB (ñobviously notò, according to the speaker, as the provision relates to monetary policy only ï I am not so sure). According to the speaker, the direct effect of directives which, according to the *Portgás* Case (C-425/12) may be invoked by a State organ against another State organ, cannot be invoked by the ECB vis-à-vis banks if there is no national implementing law or if such law is clearly deficient (I am not so sure either, at least *de lege ferenda*, RS).

- **Matteo Gargantini**, of the CONSOB and the Max Plank Institute (MPI), Luxembourg
The speaker gave an extensive overview of the research project on quasi-judicial review and boards of appeal and the provisional results of the MPIôs cross-sector inquiry in 2016.

- instead of **Bill Blair**, Chair of the Board of Appeal of the European System of Financial Supervisors (ESFS), who was unable to attend, **René Smits**, Professor of EMU law in Amsterdam and an Alternate Member of the Administrative Board of Review of the ECB, gave Mr. Justice Blairôs prepared presentation on the Board of Appeal. This presentation highlighted the useful role that such specialist boards may perform in the relationship between supervisor and supervised which more often than not is a continuous one in which litigation has been rare. The substitute speaker referred approvingly to the introductory words to this session of the workshop by its chair, Advocate General **Paolo Mengozzi**, who had intimated that the CJEU is considering to facilitate review by simplifying procedures of judicial oversight of independent and permanent ó*mécanismes parajudiciaires*ô of specialised agencies in the EU. The speaker briefly spoke on the on-going US case pitting MetLife against the Financial Stability Oversight Council (FSOC, the US equivalent of the European Systemic Risk Board [ESRB]) and the judicial considerations on the need to balance costs of regulation of a non-bank Systemically Important Financial Institution (SIFI) against the benefits of ó enhanced supervisionô after a SIFI determination. Bill Blairôs closing remarks were on the right approach to European law as not fragmented but as a unity where contributions from each jurisdiction are respected and serve to make up the whole.

- **Concetta Brescia Morra**, Vice Chair of the Administrative Board of Review, European Central Bank
An overview of ABoRôs composition, mandate, approach, caseload and issues dealt with was given. ABoRôs opinions are not binding on the Supervisory Board (SB) or the Governing Council (GC), which the former needs to ñtake into accountò. ABoR assesses substantive and procedural conformity with the SSM Regulation and EU law principles which this legal act refers, while respecting the ECBôs wide margin of discretion in complex cases of economic assessment. The status of ABoR as an ECB organ was posited.

- **Hélène van Dort**, Chair Appeal Panel, Single Resolution Board
Just as the previous speaker, an overview of the composition, mandate, approach and caseload was given, with ABoR and SRB Appeal Panel said to be comparable. Differences relate to the SRB being bound by a panel decision, to the need in many instances to pass through the panel before accessing the CJEU, and to the publication of extracts of the panelôs decisions. The status of the Appeal Panel(ôs members) as falling under the Protocol on Privileges and Immunities (PPI) was posited, important for their immunity from liability, both professional and personal, external and internal. Possibly, the Appeal Panel is bound by the supervisory secrecy provisions of the Belgian Penal Code (section 458)[2], as it is based in Brussels.

- **Ana Gardella**, *Università Cattolica* (Milan) and European Banking Authority
This presentation was about the enforcement of state aid rules in bank stabilisation and resolution. It included references to the recent judgment in Case C-526/14 (*Tadej Kotnik and Others v Državni zbor Republike Slovenije*) on the validity of the European Commissionôs 2013 Banking Communication[3] which makes burden-sharing by shareholders and subordinated creditors a prerequisite for the Commissionôs authorisation of state aid to banks.

- **Stefano Capiello**, Single Resolution Board
His presentation contained a fervent call for the abandonment of the strictness of the ñoverratedò *Meroni* doctrine in defining the limits of the regulatory function of the ESAs. The current phrase that ESAs in proposing Regulatory and Implementing Technical Standards (RTS and ITS), of which he described the iterative process of adoption as a framework of legitimacy, ñshall not apply strategic decisions or policy choicesò neither reflects practice nor is possible in reality. A remarkable quote: ñThe single market performs a social functionò.

- **Lorenzo Stranghellini**, University of Florence
The speaker highlighted the ñhidden trapsò in the application of the BRRD whose ôno creditor worse offô principle implies that a counterfactual analysis must be made of the outcome of insolvency proceedings whereas national company and insolvency law to which reference is made lack uniformity and are not even harmonised.

- **Luís Morais**, *Universidade de Lisboa* and Appeal Panel of the Single Resolution Board
Without revealing any confidential information on the case of the resolution measures applied to the *Banco Espírito Santo* (BES), the speaker sketched the history of the downfall of the bank formerly owned by the family *do Espírito Santo e Silva* and split into a bad bank and *Novo Banco* in 2014. He

[2] Here quoted in the French version: ñ*Les médecins, chirurgiens, officiers de santé, pharmaciens, sages-femmes et toutes autres personnes dépositaires, par état ou par profession, des secrets qu'on leur confie, qui, hors le cas où ils sont appelés à rendre témoignage en justice (ou devant une commission d'enquête parlementaire) et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis d'un emprisonnement de huit jours à six mois et d'une amende de cent [euros] à cinq cents [euros]*.ò

[3] Communication from the Commission 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 (ôBanking Communicationô), Official Journal of the European Union C 216/1, 30 July 2013.

held an impassioned speech on the many issues of proportionality that will be adjudicated in several on-going court cases in Portugal and elsewhere, during which he also made reference to the ECHR case on Northern Rock (Application no. 34940/10, *Dennis Grainger and others vs. UK*, 10 July 2012). Extensive judicial review of this Portuguese bankôs resolution will result in more precision on the balancing of property rights and resolution measures relevant across Europe.

René Smits, 18 September 2016 (adapted 25 October 2016)