A SHIP WITHOUT A CAPTAIN AT THE HELM:

THE NEED FOR THE DEVELOPMENT AND IMPLEMENTATION OF A SUPRA-NATIONAL PRUDENTIAL SUPERVISOR TO OVERSEE THE EUROPEAN UNION FINANCIAL SECTOR

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> *"The current financial crisis has highlighted the weaknesses in the EU's supervisory framework, which remains fragmented along national lines despite the substantial progress achieved in financial market integration and the increased importance of cross border entities. If financial integration is to be efficient in terms of safeguarding systemic stability as well as in delivering lower costs and increased competition, it is essential to accelerate the ongoing reform of supervision."*[1]

I. INTRODUCTION

With the rapid growth of financial institutions in the European Union[2] (sometimes the "EU" or the "Union"), the subsequent development of cross-border transactions, and the establishment of financial subsidiaries spread

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1. Press Release, EUROPA, High Level Expert Group on EU Financial Supervision to Hold First Meeting on 12 November (Nov. 11, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1679&format=HTML&aged=0&language=EN&guiLanguage=en [hereinafter EUROPA Press Release]. EUROPA is the name of the website for the European Union that "provides up-to-date coverage of European Union affairs and essential information on European integration." EUROPA, About EUROPA, http://europa.eu/abouteuropa /index_en.htm (last visited Oct. 29, 2009).

2. The European Union is an "economic and political partnership between [twenty-seven] democratic European countries" with over 495 million citizens that has succeeded in creating a zone of free trade and travel, developed a uniform currency, the Euro, and advocates for a "fairer, safer world." EUROPA, The EU at a Glance, Panorama of the EU, http://europa.eu/abc/panorama/index_en.htm (last visited Oct. 29, 2009). Countries that are members of the EU are referred to as "Member States" in this Note.

throughout various countries within the EU over the past three decades,[3] the need has arisen for the development of an intra-EU supervisory body to oversee an integrated financial market.[4] Similar to the United States' Securities and Exchange Commission, which, *inter alia*, regulates and supervises domestic securities transactions,[5] each European Union Member State currently domestically self-polices their individual financial sector to verify "that their work will be performed in an objective fashion and that the rules in force will be applied fairly to all agents operating in the market for financial instruments, in banking and in insurance."[6] This system of Member State national self-supervision is the final line of review for financial institutions within the EU, as there does not exist an EU-wide supervisory body.[7]

With the increasing presence of financial institutions and subsidiaries located outside the Member States' territorial jurisdictions, individual Member States are no longer capable of adequately protecting the financial interests of their citizenry as their supervisory gaze is blinded by jurisdictional limitations.[8] Due to the "growing amount of cross-border activity and cross-border mergers of financial institutions," financial supervision at an exclusively national level is gradually, but increasingly, becoming an untenable condition.[9] Therefore, the need has surfaced for the development of an intra-EU regulatory body to supervise the financial institutions within the EU as a whole as a means to

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3. PIERPAOLO FRATANGELO, BANCA D'ITALIA, INTERNATIONAL AND EUROPEAN CO-OPERATION FOR PRUDENTIAL SUPERVISION 2 (2003), http://mpra.ub.uni-muenchen.de/5539/1/MPRA_ paper_5539.pdf ("The issue is not a new one since the first forms of cross-border co-operation are almost thirty years old.").

4. ECOFIN, Focus Paper, *Informal Meeting Of The Ministers In Charge of Economy And Finance* (2008), *available at* http://www.eu2008.fr/webdav/site/PFUE/shared/import/0912_ informelle_ecofin/Focus_paper_EN.pdf. As an arm of the Council of the European Union, the Economic and Financial Affairs Council, commonly referred to as ECOFIN, is composed of the Economics and Finance Ministers of the EU Member States, and "covers EU policy in a number of areas including: economic policy coordination, economic surveillance, monitoring of Member States' budgetary policy and public finances, the Euro (legal, practical and international aspects), financial markets and capital movements and economic relations with third countries." Council of the European Union, ECOFIN Council, http://consilium.europa.eu/cms3_fo/ showPage.asp?id=250&lang=en (last visited Oct. 29, 2009).

5. The United States Securities and Exchange Commission (the "SEC") acts as the "investor's advocate" and seeks "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." U.S. Securities and Exchange Commission, What We Do, http://www.sec.gov/about/whatwedo.shtml (last visited Oct. 29, 2009) [hereinafter SEC].

6. ECOFIN, *supra* note 4.

7. EUROPA Press Release, *supra* note 1.

8. Eurofi, *For Effective Supervision of Cross-Border Financial Groups* (2008), http://www.eurofi.net/pdf/2008/sept2008/Supervision_Crisis.pdf. "Eurofi, a European think tank dedicated to the integration and efficiency of EU Financial, Insurance and Banking Services markets, was created in 2000." Eurofi, Who are we?, http://www.eurofi.net/who.php (last visited Oct. 29, 2009).

9. Posting of Roel Beetsma & Sylvester Eijffinger to Europe EconoMonitor, *Credit Crisis is a Missed Opportunity to Restructure European Financial Supervision*, http://www.rgemonitor .com/euro-monitor/252721/credit_crisis_is_a_missed_opportunity_to_restructure_european _financial_supervision (June 2, 2008).

supplement the "solo" supervision currently conducted by each Member State.[10] This proposed entity would act not to wholly supplant national supervision, but to instead act as an overarching supervisor with the plenary authority to verify the veracity of financial institutions providing services across the European Union thereby vitiating the jurisdictional limitations currently inhibiting national-level supervisors.[11] The national supervisors will continue to supervise financial entities within their territorial boundaries; however, the supra-national EU supervisory body will verify the integrity of the financial sector throughout the EU.[12]

The Finance Ministers of the EU Member States have begun to recognize the weaknesses of solo supervision and are at the onset of taking necessary steps to make corrections.[13] Part I of this Note will discuss the meeting in Nice, France, where representatives of the EU Member States met in 2008 to discuss the current system of prudential omissions and possible avenues for change.[14] Part II will highlight the glaring gaps in the current system of national prudential supervision, describe past steps taken to shore up such supervisory holes, as well as discuss some emerging trends on the issue.[15] Part III advocates the creation of an intra-EU regulatory body with broad powers and no jurisdictional limitations within the EU with the mandate to supervise the European financial industry.[16] Additionally, Part III will affirm the interaction and effective cross-border cooperation necessary between national supervisors and the proposed supra-national entity for successful supervision of the EU financial sector.[17] Finally, Part IV will discuss some critiques of the creation of an intra-EU prudential supervisor and other theories that have been proposed to address the issue.[18]

II. THE NICE MEETING

In September 2008, all twenty-seven finance ministers of the EU Member States, the central bank governors, the European Commission, the European Central Bank, and the European Investment Bank met in Nice, France (hereinafter, the "Nice meeting"), to confer on the issue of, *inter alia*, supervision in an attempt to "fireproof Europe's financial system from the troubles that have brought U.S. lenders close to collapse" over the past two

10. ECOFIN, *supra* note 4. *See also*, Eurofi, *supra* note 8 ("[T]he financial crisis highlights the limits of 'solo' supervision."). As discussed in Part II A *infra*, "solo" supervision refers to Member States supervising their individual financial sectors domestically without review by any other entity or other national supervisor.

11. *See infra* Part III.

12. *See infra* Part III.

13. *See infra* Part I.

14. *See infra* Part I.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part III.

18. *See infra* Part IV.

years.[19] The concern of the respective EU Member States was the "potential collapse of a larger bank or insurer that does business in several EU countries" and the subsequent "prospect of clashing views between financial supervisors . . ." as to how to handle the entity's demise.[20] The ECOFIN Chair and French Economy Minister, Christine Lagarde, who organized the Nice meeting, noted that the discussions would be "devoted to analysing the current economic situation in Europe and how the Member States should collectively respond to this situation."[21]

At the conclusion of the Nice meeting the finance ministers "offered few details about how they will revamp EU's current system of fragmented, national-based supervision."[22] However, the ministers crafted some general guidelines to revamp the struggling system and initiated a dialogue regarding the possible creation of a multinational supervisory body.[23] In the financial sector, the ministers sought to "restore confidence through transparency and accountability of banks and other sectors."[24] Additionally, the "EU ministers and central bankers said they could agree on 'broad guidelines' on carving up responsibility for how national financial supervisors should work together to tackle problems at European financial institutions."[25]

This broad based plan "would see countries shar[ing] more key information on the risk profile of a company and figure out a crisis plan that would call on a parent company to ensure that its own funds 'are allocated equitably among each entity in the group if ever there should be a failure.'"[26] This supervisory body would essentially be "a pilot in [a] plane" to streamline supervision of multinational banks and insurers.[27]

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19. Aoife White, *EU Discusses Financial Supervision*, THE INDUSTRY STANDARD (Sept. 12, 2008), *available at* http://www.thestandard.com/news/2008/09/12/eu-discusses-financial-supervision.

20. *Id.*

21. Press Release, Presidency of the Council of the European Union, Informal Meeting of the Economy and Finance Ministers in Nice (Sept. 12, 2008), *available at* http://www.eu2008.fr/PFUE/lang/en/accueil/PFUE-09_2008/PFUE-12.09.2008/informelle_ministres_finances.

22. *See generally* Adam Cohen, *EU Ministers Want Better Regulation*, WALL ST. J (Sept. 14, 2008), *available at* http://online.wsj.com/article/SB122130818990832183.html?mod=hpp_us_whats_news.

23. See *generally EU Finance Ministers Conclude Meeting with Measures to Tackle Slowdown*, CHINA VIEW (Sept. 14, 2008), *available at* http://news.xinhuanet.com/english/2008-09/14/ content_9981605.htm; Huw Jones, *EU Ministers Outline Bank Supervision Shake-Up*, THOMSON REUTERS (Sept. 13, 2008) *available at* http://www.reuters.com/article/rbssFinancialServicesAndRealEstateNews/idUSLD34647820080913 [hereinafter Jones, Supervision Shake-Up].

24. *EU Finance Ministers Conclude Meeting with Measures to Tackle Slowdown*, CHINA VIEW (Sept. 14, 2008), *available at* http://news.xinhuanet.com/english/2008-09/14/content_9981605.htm.

25. White, *supra* note 19.

26. *Id.*

27. Jones, *Supervision Shake-Up*, *supra* note 23.

Although the ministers were unable to develop a final detailed means for creating a unified supervisory entity at the Nice meeting, the stage was set for future fashioning of such a system.[28] Lagarde stated that the ministers "found the basis for unified supervision."[29] She continued by noting that a singular financial supervisory body "implies a sounder system, a more effective solution" and that following the Nice meeting, Europe had "moved towards a more integrated Europe."[30] Additionally, the meeting brought about greater transparency among the Finance Ministers and it was agreed that concerted solutions were necessary to address the growing problem.[31] Lagarde similarly stated that a lead supervisor was necessary for supervision of the EU to be effective.[32]

The financial downturn, arguably initiated by the American sub-prime mortgage debacle, exemplifies the current inability of Member States to regulate the cross-border financial institutions and their myriad of intra-Member State securities' transactions.[33] Eurofi, a European think tank that monitors financial integration, comments,

> Since cross-border financial players are characterized by highly integrated and centralized operations from a strategic and commercial perspective, as well as for their risk and cash management, it is at the group's head office that growth strategies are mapped out, future sources of profit are planned, choices are decided on in terms of innovations, and the various corresponding risks are identified.[34]

It is because of these cross-border interactions that Member States' self-policing, or "solo supervision," is untenable.[35] Member States' supervisory bodies can no longer guarantee quality supervision or effectively protect their depositors because subsidiaries can be located outside their territorial boundaries and, thus, outside their reviewable jurisdiction.[36] In order to provide for the future security and stability of the European Union, Member States should continue the dialogue begun at Nice so as to create a unified intra-EU supervisory body, which will oversee the integrity of the continent's

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28. *HIGHLIGHTS—EU Finance Ministers' Meeting in Nice*, THOMSON REUTERS (Sept. 13, 2008), *available at* http://www.reuters.com/article/companyNews/idUKLC 66164120080913?symbol= LEH.N.

29. *Id.*

30. Jones, *Supervision Shake-Up*, *supra* note 23.

31. Christine Lagarde, ECOFIN Chair and French Economy Minister, Remarks following the Nice Meeting (Sept. 13, 2008) (transcript available at http://uk.reuters.com/article/UK_ SMALLCAPSRPT/idUKLC66164120080913).

32. *Id.*

33. Eurofi, *supra* note 8.

34. *Id.*

35. *Id.*

36. *Id.*

financial system.

III. CURRENT SYSTEM OF EUROPEAN FINANCIAL SUPERVISION

Debates regarding the cooperation of European nations in the financial sector typically focus on crisis management.[37] This is a natural reaction as it is these crises that bring the spotlight on inadequacies in a financial system. However, in order to properly address the way in which a system manages a crisis, it is necessary to analyze the manner in which it operates under ordinary conditions so as to ascertain the existing deficiencies.[38] This Note focuses not on the present financial crises, but instead on the deficiencies in supervision that have not yet been rectified. The financial damage could have been mitigated had these failures been previously addressed. Accordingly, attention should shift from the immediate emergency to future prevention and adaptation by focusing on cooperation of all EU Member States toward the end of creating an intra-EU supervisor.[39]

At present, prudential supervision in the EU exists exclusively at a national level,[40] meaning that there is no EU financial supervisor with the authority to verify that financial institutions are in accord with the standards[41] set forth by EU regulations or domestic laws.[42] EUROPA has noted that "[t]he current national-based organisation of EU supervisions lacks a framework for delivering supervisory convergence and limits the scope for effective macro-prudential oversight based on a comprehensive view of developments in financial markets and institutions."[43] If protecting against systematic instability and further negative developments in the EU financial sector is going to occur, integration of an EU supervisor must be accelerated.[44]

A. *Supervision Versus Regulation*

The difference between the creation of regulation—a legislative function—and supervision, traditionally under the purview of an executive, has been blurred.[45] Although the terms regulation and supervision are often

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37. Tommaso Padoa-Schioppa, *Better Supervision is Key to Stability*, THE BANKER (Apr. 7, 2008), *available at* http://www.thebanker.com/news/fullstory.php/aid/5666/Better_supervision_is_key_to_stability.html. Mr. Padoa-Schioppa was the Minister of Economy and Finance of Italy from 2006-2008 and is a former board member of the European Central Bank (the "ECB"). *Id.*

38. *Id.*

39. *Id.*

40. EUROPA Press Release, *supra* note 1.

41. See *infra* Part II D for a discussion of supervisory standards that have been proposed to further effective cross-border communication and information sharing by national supervisors.

42. *See* EUROPA Press Release, *supra* note 1.

43. *Id.*

44. *Id.*

45. Padoa-Schioppa, *supra* note 37.

mistakenly used interchangeably, "[s]upervision refers to the oversight of financial firms' behaviour (in particular, risk monitoring)."[46] In contrast, "[r]egulation refers to rule-making."[47] The goal of economic regulation is to "correct market imperfections and unfair distribution of resources, while simultaneously pursuing three general objectives: stability, equitable resource distribution, and efficiency."[48]

A supervisor is a regulatory body that seeks to competently and objectively guarantee that rules pertaining to the market for financial institutions in banking and insurance are applied fairly to all agents in such fields.[49] "Solo" supervision refers to the overseeing of a financial market by a singular Member States' supervisor without external review.[50] For example, in France the supervisory bodies are the Autorité des Marchés Financiers, which is in charge of the financial instrument market, the Banking Commission, which oversees credit institutions and investment banks, and the Autorité de Contrôle des Assurances et des Mutuelles, which covers the insurance industry.[51] These agencies review their respective markets *sans* outside interference.[52]

As discussed below, national supervisors have voluntarily adopted quasi-uniform standards whereby each national supervisor attempts to coordinate with other national supervisors.[53] However, there currently is no EU body acting on a supra-national level to coordinate supervision. Prudential supervision is "[a] term sometimes used to describe the supervision/regulation of institutions such as banks . . . where the supervising authority seeks to ensure that the depositors are protected by the institution in question being financially sound."[54] By leaving supervision of international banks under the purview of national supervisors exclusively, supervisory review is inadequate, and exposes the financial sector to systemic failure.

B. Overview of National Supervision and Its Inherent Flaws

The traditional notion, or "institutional" model, of national supervision is predicated on specialization of each single segment of the financial industry by separate supervisors.[55] Under this model, all supervisory responsibilities of

46. Rosa M. Lastra, *The Governance Structure for Financial Regulation and Supervision in Europe*, 10 COLUM. J. EUR. L. 49, 49 (2003).

47. *Id.*

48. Giorgio Di Giorgio & Carmine Di Noia, *Financial Market Regulation and Supervision: How Many Peaks for the Euro Area?*, 28 BROOK. J. INT'L L. 463, 469 (2003).

49. ECOFIN, *supra* note 4.

50. *Id.*

51. *See id.*

52. *Id.*

53. See *infra* Part II D for a discussion of the Basel Committee's series of standards proposed to nations around the world in an attempt to encourage cross-border communication and uniformity in applying supervisory norms.

54. prudential%20supervision/1188/ (last visited Oct. 29, 2009).

55. Di Giorgio, *supra* note 48, at 466.

each segment are assigned to a distinct agency.[56] The three traditional supervisory authorities are guardians over banks, financial mutual funds, and insurance companies.[57] These supervisory agencies control "entry selection processes (*e.g.*, authorizations and enrolling procedures in special registers), constant monitoring of business activities (controls, inspections, sanctions) and decisions about exit from the market (suspensions or removal)."[58]

The institutional model has been effective in the past as financial entities were able to efficiently interact with a single specialized supervisor (*i.e.*, a distinct national agency tasked with a particularized and individual financial sector) thereby reducing supervision costs.[59] However, with the development and growth of massive financial institutions servicing multiple arms of the financial industry, duplication and redundancy have become the norms of the traditional model of national supervision.[60] For example, financial entities performing multiple sector activities are being burdened by conflicting rules imposed by various distinct supervisory agencies due to differing classifications and overlap in their legal statuses.[61] Additionally, global banks "which operate in [ten] or more countries find it impossible to organize compliance with rules from their group headquarters in a structured way because rules and requirements are completely different across countries."[62] In a global financial economy "where the boundaries separating the various institutions are progressively being erased, it is no longer possible to definitively determine whether particular entities are banks, non-banking intermediaries, or insurance companies."[63]

The growth of conglomerates with international offices and subsidiaries makes national level regulation and supervision unable to adequately protect the public.[64] The current "financial architecture" of the supervision of Europe is defined by three principles: (1) decentralization, (2) cooperation, and (3) segmentation "by specialist financial institutions conducting distinct financial activities: banking, securities and insurance."[65] However, the current institutional design is being altered by the "trend towards unification of supervisory authorities at the level of the Member States and the possible centralization of supervisory functions at the EU level."[66] The blurring of services provided by international financial entities has created the trend toward

56. *Id.* See *supra* Part II A for an analogous discussion of the French model of supervisory segmentation by particularized financial sectors.

57. Di Giorgio, *supra* note 48, at 466.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 466-67.

62. Padoa-Schioppa, *supra* note 37.

63. Di Giorgio, *supra* note 48, at 467.

64. *See id.* at 463.

65. Lastra, *supra* note 46, at 50.

66. *Id.*

the consolidation of national supervision into a single domestic supervisory entity (*i.e.*, moving away from the institutional model of supervision for each specialized financial sector).[67]

C. The Trend for Consolidation of Member State Supervision into a Singular National Supervisor

Member States with a multitude of specialized agencies are trending towards consolidation into a singular national supervisor to streamline supervision.[68] The drive for consolidation of national supervisory authorities within Member States via legislative reform "is a regulatory response to the rise in financial conglomerates and complex financial groups."[69] The impetus for these legislative reforms within certain Member States (*e.g.*, the United Kingdom[70] and Germany[71]) is that "the structure of the regulatory system needs to reflect the structure of the markets that are regulated."[72] Other Member States, such as Ireland, Sweden and Britain "have [also] moved to a single supervisor who oversees not just banks but other segments of the financial services industry, like insurance and securities."[73] This trend for individual Member States to consolidate supervisory responsibilities has significant broader implications, "as it could pave the way for the creation of a single [European Union supervisor], in particular if all or most Member States were to adopt such a model in their respective jurisdictions."[74]

Although analogous to the United States' system of supervision, the European trend to consolidate to a single national supervisor is not wholly equivalent. As noted in the introduction of this Note, the SEC is a regulator and supervisor of the United States' financial sector.[75] But, it is not the sole supervisor.[76] The United States "model of financial regulation and supervision

67. Di Giorgio, *supra* note 48, at 466-67.

68. Lastra, *supra* note 46, at 50.

69. *Id.*

70. *Id.* at 51. The Bank of England Act of 1998, which came into effect on June 1, 1998, transferred responsibility for banking supervision from the Bank of England to the Financial Services Authority (commonly referred to as the "FSA"). *Id.*

71. *Id.* at 50. The Federal Financial Supervisory Authority of Germany, the Bundesanstalt für Finanzdienstleistungsaufsicht or "BaFin," was established on May 1, 2002, and "consists of three supervisory directorates for banking supervision, insurance supervision and securities supervision/asset management, and three cross-sectoral departments dealing with cross-sectoral issues." *Id.*

72. *Id.* (quoting Richard K. Abrams & Michael W. Taylor, *Issues in the Unification of Financial Sector Supervision* 3 (International Monetary Fund, Working Paper No. 00/213, 2000)).

73. Matthew Saltmarsh, *Jumble of Rules Would Hobble Any EU Bailout Warnings, Anger and Doubts*, INTERNATIONAL HERALD TRIBUNE, Sept. 24, 2008, at 1, *available at* 2008 WLNR 18121608.

74. Lastra, *supra* note 46, at 52.

75. *See generally* SEC, *supra* note 5.

76. Lastra, *supra* note 46, at 53.

is characterized by its complexity, the multiplicity of regulators, and the demands of federalism."[77] Additionally,

> Banking in the U.S. is subject both to federal law and to state law. There are several supervisory authorities at the federal level: the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (in addition to the federal regulators for thrifts, such as the OTS, Office of Thrift Supervision). There are also supervisory authorities at the state level.[78]

Although a comparison of the United States' system of supervision seems rational, due to the breadth of complexity in the United States' tiered supervision, comparing the United States' system to the progression of European development towards singular Member State supervision is not wholly analogous. Accordingly, the subsequent analysis and recommendation in this Note will omit further comparison to the United States' system of prudential supervision. The emerging trend in EU Member States to consolidate their individual supervisory system within the domestic financial sector displays an openness for change as well as greater regulatory uniformity, which would make the potential for the creation of an intra-EU supervisory body more plausible as it simplifies coordination from a multitude of national agencies to a singular entity for each nation.[79]

D. EU Framework of Minimum Standards

While supervision has been effectuated on an exclusively national level in the EU, this is not to say that there does not exist communication and cooperation among Member States' domestic supervisors. Steps have been taken to encourage cross-border operations so as to maintain, as best as feasible, supervision of international banks and institutions by national supervisors.[80] As discussed below, the intrinsic failure of attempting to coordinate national supervisors is that abiding by agreements and supervisory standards are optional, and lack any legally binding force.[81]

Contrary to other industries, such as steel production or automotive manufacturing, "finance is called a system – a set of connected things."[82] That is to say, the financial sector is a global assortment of giant international financial institutions, such as "JPMorgan [Chase], Deutsche Bank, UniCredit, and perhaps two dozen other global financial institutions [that] form a system

77. *Id.*
78. *Id.*
79. *Id.* at 51.
80. *See generally* Padoa-Schioppa, *supra* note 37.
81. *Id.*
82. *Id.*

among themselves, with the plethora of minor institutions operating in their respective home countries."[83] Although advancements have been taken in the past to make regulation of these institutions international, whether it be in the creation of capital requirements, bank licensing criteria, or deposit insurance, there has been very limited steps taken to mandate financial supervision on an international scale or at even a European level.[84]

In the European Union, the responsibility for Euro monetary policy has been centralized in the European Central Bank (the "ECB").[85] However, banking and financial supervision has remained at the national level with the respective domestic agencies.[86] This divergence is unique to the European Union.[87] National supervisors within the EU are tasked with the obligation to create both regulations, including harmonization with EU directives, and effectuate such regulation through financial supervision of domestic institutions.[88]

At the EU level, common standards have been proposed to financial intermediaries, banks, securities regulations, and accounting rules to ensure universal banking and to maintain an open market throughout the Union.[89] An example of internationally proposed supervisory standards is the Minimum Standards for the Supervision of International Banking Groups and Their Standards (the "Minimum Standards"), which were enacted in 1992.[90] Under internationally proposed standards such as these, each Member State may voluntarily adopt the Minimum Standards, but they are not mandatory.[91]

The Minimum Standards were a product of the Basel Committee, which was created in 1975 as a response to various bank failures in Europe.[92] The Basel Committee, which is still in existence, is composed of banking regulators from France, Germany, the Netherlands, Belgium, Luxembourg, Sweden, Switzerland, Italy, Spain, Japan, the United Kingdom, Canada, and the United

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83. *Id.*

84. *Id.*

85. Di Giorgio, *supra* note 4848, at 463.

86. *Id.*

87. *Id.* at 463-64.

88. *Id.* at 463.

89. Rolf H. Weber & Douglas W. Arner, *Toward a New Design for International Financial Regulation*, 29 U. PA. J. INT'L L. 391, 440 (2007).

90. Duncan E. Alford, *Core Principles for Effective Banking Supervision: An Enforceable International Financial Standard?*, 28 B.C. INT'L & COMP. L. REV. 237, 243 (2005).

91. *Id.*

92. *Id.* at 242. "The Basel Committee was established as the Committee on Banking Regulations and Supervisory Practices by the central-bank Governors of the Group of Ten countries at the end of 1974 in the aftermath of serious disturbances in international currency and banking markets (notably the failure of Bankhaus Herstatt in West Germany). The first meeting took place in February 1975 and meetings have been held regularly three or four times a year since." BASEL COMMITTEE ON BANKING SUPERVISION, HISTORY OF THE BASEL COMMITTEE AND ITS MEMBERSHIP 1 (2004), *available at* http://www.aon.com/nl/nl/risicomanagement/arc/credit_risk_management/History_of_Basel_committee_Oktober_2004.pdf.

States.[93]

The purpose of the Basel Committee is to "provide[ ] a forum for regular cooperation on banking supervisory matters . . . to enhance understanding of key supervisory issues and improve the quality of banking supervision worldwide."[94] It is worth noting, however, that the Basel Committee "has no legal enforcement power itself, but encourages member nations to abide by these regulatory guidelines and to use whatever authority they possess to enact and enforce them."[95] In order to promulgate its determinations as effectively as possible, the Basel Committee typically presents its determinations at a biennial meeting of the International Conference of Banking Supervisors.[96] These principles are subsequently endorsed by the Conference.[97] In addition to the Minimum Standards from 1992, the Basel Committee has issued other guidelines on international banking supervision: the Concordat of 1975; the Revised Concordat; the Capital Adequacy Standards, commonly referred to as "Basel I"; the Core Principles; and in 2004, the International Convergence of Capital Measurement and Capital Standards: A Revised Framework, commonly referred to as "Basel II." Some of these guidelines will be discussed below.[98]

Improved cross-border communication, a principle espoused by the Basel Committee, assists national supervisors in effectively conducting their jobs by increasing information, and evidences the point that a supra-national EU supervisor can work among multiple nationalities. Such cooperation was seen as desperately needed following bank failures in the mid-1970s "and the subsequent confusion over the settlement of the bank's liabilities."[99] The Basel Committee sought to address these deficiencies by delineating the proper roles of home country supervisory agencies over their domestically located international financial institutions.[100] To these ends, the Basel Committee issued the Concordat of 1975.[101] The proclamation was entitled a Concordat because it was not a binding legal treaty, but an enumeration of supervision guidelines that EU Member States were encouraged to adopt.[102] Duncan Alford

93. Alford, *supra* note 90, at 242. *See generally* Bank for International Settlements, About the Basel Committee, http://www.bis.org/bcbs/ (last visited Oct. 29, 2009); Peter Cooke, *The Basel "Concordat" on Supervision of Banks' Foreign Establishments*, 39 AUSSENWIRTSCHAFT 151 (1984).

94. Bank for International Settlements, About the Basel Committee, http://www.bis.org/bcbs/ (last visited Oct. 29, 2009).

95. Alford, *supra* note 90, at 243.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 244.

100. *Id.*

101. *Id.* See Committee on Banking Regulations and Supervisory Practices, Report to the Governors on the Supervision of Banks' Foreign Establishment (1975), http://www.bis.org/publ/bcbs00a.pdf?noframes=1 (last visited Oct. 29, 2009), for the original text of the Concordat of 1975. The original name of the Basel Committee was Committee on Banking Regulations and Supervisory Practices. *Id.*

102. Alford, *supra* note 90, at 244.

comments on the Concordat:

> The objectives of the Concordat were to ensure the adequate regulation of foreign banks and the prevention of foreign banks from escaping supervision. A central tenet of the Concordat was joint responsibility between home and host countries in regulating international banks.
>
> The Concordat dealt primarily with the liquidity, solvency, and foreign exchange operations of foreign banks. The host supervisory authority was responsible for regulating liquidity, regardless of the type of banking entity established in the host nation.[103]

The Concordat sought to clarify confusion between supervisors as to which supervisor, domestic or host country, was responsible for overseeing international corporations based on what type of foreign banking entity was involved.[104] It was proclaimed by the Concordat that "subsidiaries and joint ventures were the responsibility of the host regulator, while branches were the responsibility of the home regulator."[105]

Although the Concordat was effective in shoring up some of the confusion regarding which supervisor was tasked with overseeing a particular entity, it did have some weaknesses.[106] For example, the Concordat left open the question of which supervisor should act to oversee a major bank failure.[107] Additionally,

> designation of the host supervisor as the primary regulator of foreign bank subsidiaries ran contrary to the system of consolidated supervision used in most industrialized nations. The allocations of responsibility in the Concordat presented a risk that host regulators, following consolidated supervision, would look to parent supervisors to regulate a bank subsidiary's solvency, while parent regulator, relying upon language in the Concordat, would look to the host supervisor to perform this task.[108]

There was also a mistaken belief that lender of last resort responsibilities came along with supervisory obligations; this was never intended, nor stated in

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103. *Id.* at 244-45 (internal citations omitted).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 245-46 (internal citations omitted).

the Concordat.[109] Member State supervisors were interpreting the Concordat inconsistently, leading to incongruous determinations.[110] In the end, it was the lack of specificity that relegated the Concordat to failure and necessitated amendment.[111]

The 1982 implosion of the Luxembourg subsidiary of Banco Ambrosiano, which at one point was the largest Italian bank, evidenced the insufficiencies of the original Concordat.[112] The Luxembourg subsidiary had made $1.4 billion worth of loans to Latin American countries, which proved to be ill-considered.[113] The subsidiary also owed $450 million to a myriad of creditors, which the bank was unable to pay leading to a total financial collapse.[114] Both the Italian and the Luxembourg supervisors claimed not to have supervisory or lender of last resort obligations.[115] Italian regulators opined that since local regulators had rebuffed their attempts to examine Banco Ambrosiano's South American offices, they accordingly had no legal authority to regulate the bank's foreign subsidiaries.[116] The Italian government's argument was that Italian regulators could not take responsibility for a bank failure that they were not permitted to supervise.[117] Contrastingly, Luxembourg regulators believed that the responsibility rested solely with Italian regulators because the subsidiary was operating under the same name as the parent.[118] Banco Ambrosiano's collapse in Luxembourg and the subsequent tangle over responsibility accentuated the failures in the Concordat and led to the creation and implementation of the Revised Concordat of 1983.[119]

The Revised Concordat of 1983 was not a new agreement, but rather an amendment to the original Concordat.[120] Similar to the original, the Revised Concordat is a non-binding agreement that was promulgated by the Basel Committee as a proclamation of "recommended guidelines of best practices."[121] The revisions sought to close the gaps in European financial supervision that had been present under the original Concordat and directly addressed foreign bank regulation and supervision.[122] As with the original, the Revised Concordat instituted the principle of consolidated supervision whereby, "firstly, no foreign banking establishment should escape supervision; and secondly, that

109. *Id.* at 246.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 247.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

the supervision should be adequate."[123] Although these principles may seem clear in modern finance, "[T]hey express an 'essential truth' that constitutes the basis of international co-operation: without them current structures wouldn't exist."[124]

A pivotal amendment included in the Revised Concordat was the principle of "Dual Key" supervision.[125] Under such a system, both home and host supervisory entities assess the quality of the other's supervision for international banks.[126] This gives both supervisors—home and host—the authority to make sure that the manner in which the other is supervising meets their minimum degree of quality.[127] Duncan Alford comments that under the Revised Concordat:

> The host jurisdiction had to be satisfied with the supervision over the parent bank within its home jurisdiction; likewise, the parent bank's home jurisdiction had to be satisfied that the foreign operations of its domestic banks were supervised adequately by the host regulators.
>
> If the host regulator considered the parent regulator's supervision insufficient, the host regulator had the right to discourage or prohibit the foreign bank from operating within its jurisdiction or to set stringent conditions for the bank's continued operation therein. Likewise, the parent regulator could attempt to extend its jurisdictional reach if it did not believe that the host regulator was providing adequate supervision.[128]

The goal of the revisions was to prevent a "race to the bottom" mentality where jurisdictions would relax their regulations and supervision with the hopes of attracting foreign investment.[129]

In the context of the Banco Ambrosiano failure, if the Revised Concordat had been in effect at that time instead of the Concordat, Luxembourg would have had the responsibility for supervising the Italian bank's subsidiary in Luxembourg.[130] However, if Italian supervisory authorities had not been satisfied with the quality of supervision by Luxembourg, Italian supervisors

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123. Fratangelo, *supra* note 3, at 3. *See also* Weber & Arner, *supra* note 89, at 391.
124. Fratangelo, *supra* note 3, at 3.
125. Alford, *supra* note 90, at 248.
126. *Id.*
127. *Id.*
128. *Id.* at 248-49.
129. *Id.* at 249.
130. *Id.*

would have been able to step in and provide supervision.[131] This is a prime example of the benefits of Dual Key supervision. As it stood, no regulator interceded and took responsibility for supervisory duties.[132]

In addition to Dual Key supervision, the Revised Concordat also implemented the theory of Consolidated Supervision whereby "the parent supervisor monitored a parent bank's risk exposure and capital adequacy based on all operations of the bank, wherever conducted."[133] It was noted by the Basel Committee that this principle might extend the commonly understood jurisdictional bounds of supervisory responsibilities.[134] Although the Revised Concordat took great steps in filling the gaps in supervision, there still remained flaws.[135] Most glaringly, the Revised Concordat still lacked provisions pertaining to lender of last resort responsibilities.[136] Additionally, "[t]he Revised Concordat purposely blurred host and parent regulatory responsibilities in order to avoid the type of finger-pointing that occurred among regulators after the Banco Ambrosiano failure."[137] By doing this, the Basel Committee created new issues of overlapping supervisory authority between home and host agencies where one regulator might have responsibility as the primary supervisor, but another regulator has an interest in maintaining supervision over a foreign institution.[138]

Addressing critiques of the Revised Concordat, the Basel Committee put forth the Minimum Standards in 1992.[139] The Minimum Standards were intended by the Basel Committee to tighten international bank supervision and strengthen the principles espoused in the Concordat and the Revised Concordat.[140] The Minimum Standards required that:

> (1) all international banks and banking groups should be supervised by home country regulators; (2) international banks should obtain permission from both the host and home country regulators before opening branches or other banking establishments in foreign nations; (3) banking regulators should have the right to gather information form international banks; (4) host regulators can impose restrictive measures against the international banks if the Minimum Standards are not met; and (5) encouragement of information exchanges

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131. *Id.*
132. *Id.*
133. *Id.* at 250.
134. *Id.*
135. *Id.* at 251.
136. *Id.*
137. *Id.* at 252.
138. *Id.*
139. *Id.* at 255.
140. *Id.*

between regulators in different nations should continue.[141]

The Minimum Standards affirmed to the world that no internationally operating European bank can function outside the eye of a supervisor and that "consolidated supervision is a fundamental regulatory principle adopted by the international bank supervisory community."[142]

The Minimum Standards, like the Revised Concordat, accentuated the notion of consolidated supervision whereby all international banks would be, at a minimum, supervised by their home country supervisors and obligated to conduct business in accordance with their domestic regulations.[143] Under this theory of supervision, home country supervisors would have verifiable information on the international operations of banks within their home jurisdiction that are operating on a supra-national scale.[144] Home country supervisors would then assess the financial practices based on the information gathered for "safety and soundness of international banks."[145] Additionally, home country supervisors could block the creation of corporate subsidiaries that they deemed to be in discord with the theory of consolidated supervision or prevented adequate supervision.[146]

The responsibility for ensuring that home country supervisors were able to meet the Minimum Standards rested solely with the home country supervisors themselves.[147] The Minimum Standards also required banks desiring to operate on an international scale to obtain permission from both the home country and host country supervisors before commencing such operations.[148] This was not always readily obtained as such approval was conditioned on a multilateral accord between supervisors with often-divergent opinions.[149] In the absence of such agreement, the "Minimum Standards allocated supervisory responsibilities between home and host country regulators in a similar manner as the Revised Concordat."[150] The Minimum Standards, like other Basel Committee plans, are not without flaws necessitating redress.[151]

Unlike the Minimum Standards and other Basel Committee standards that are adopted solely on an optional basis, principles relating to financial institutions that each Member State was obligated to interpose into its national laws were delineated with the 1986 Single European Act.[152] This act

141. *Id.* at 255-56.
142. *Id.* at 257.
143. *Id.* at 256.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *See* Europa, The Single European Act, http://europa.eu/scadplus/treaties/singleact_en.htm (last visited Oct. 29, 2009), for the text of the statute, which "revises the

"implemented the common internal market on the basis of mutual recognition that is based on common minimum standards applicable in all Member States through European Directives and implemented through domestic legislation."[153] Weber and Arner note that under the Single European Act

> all Member States agree to recognize the validity of one another's laws, regulations, and standards, thereby facilitating free trade in goods and services without the need for prior harmonization, while limiting the scope for competition among rules by mandating Member State conformity with a "floor" of essential, minimum European requirements. As such, financial services regulation in the European Union seeks to avoid the problem of competitive deregulation and regulatory arbitrage that may undermine the legitimacy and efficiency of financial markets.[154]

Through the combination of promoting the Minimum Standards for financial regulation and respecting the free flow of capital throughout the EU via the Single European Act, businesses have been encouraged to conduct commerce outside their "home state" and enter the "host states" throughout the EU.[155] The notion of a "single" passport permits an EU firm to conduct business throughout the Union as if there were no territorial boundary restrictions.[156]

Free movement of capital and commerce within the EU is possible, in part, due to the Minimum Standards directed to all national regulators and supervisors. By creating a system of common Minimum Standards, financial institutions are on notice as to at least the "floor" of essential requirements.[157] A drawback of this legal framework is that despite making institutions aware of the minimum burdens prescribed, the EU is still lacking a supra-national supervisor with the authority to oversee compliance by financial entities. Instead, national supervisors are the sole watchdogs to ensure the veracity of the financial entities. Relying exclusively on national supervisory entities exposes consumers both inside and outside the EU to fiscal harm.

Like the Revised Concordat, the Minimum Standards had gaps that banks attempted to utilize to gain advantages and avoid regulations.[158] Host country

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Treaties of Rome in order to add new momentum to European integration and to complete the internal market. It amends the rules governing the operation of the European institutions and expands Community powers, notably in the field of research and development, the environment and common foreign policy." *Id.* *See generally* Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1.

153. Weber & Arner, *supra* note 89, at 440-41.
154. *Id.* at 441.
155. *Id.*
156. *Id.*
157. *Id.*
158. Alford, *supra* note 90, at 258.

supervisors were able to choose to allow foreign banks to operate within their jurisdiction even if the banks' domestic supervisors did not act in accordance with the Minimum Standards.[159] To do this, host country supervisors needed only to issue restrictions upon the foreign bank that it held to be "necessary and appropriate."[160] Furthermore, questions of retroactivity were left untouched by the Minimum Standards.[161] Although new branches were covered by the conditions of the Minimum Standards, pre-existing branches were not explicitly addressed, leaving lingering questions of whether the new provisions were to be retroactively applied to the older financial establishments.[162]

The premise behind the Minimum Standards was to "promote cooperation between home and host countries and encourage the flow of information among bank regulators."[163] To achieve this end, the drafters of the Minimum Standards intentionally left the provisions therein vague.[164] By doing this, it was believed that ambiguity would facilitate flexibility to analyze each issue for what it was on a case-by-case basis.[165] Similar to the Concordat and the Revised Concordat, the Minimum Standards are not legally binding.[166] Therefore, enforcement of the mandates in the Minimum Standards rested solely on the shoulders of national supervisors.[167] Furthering confusion, domestic supervisors interpreted the Minimum Standards as they saw fit, creating murky standards at best and illogical discrepancies at worst.[168] Conceived in 1992, the Minimum Standards were supplemented, due to many of these failing, by the Core Principles for Banking Supervision, commonly referred to as the "Core Principles," in 1997.[169]

In order to move past mere coordination of national supervisors, the Basel Committee proffered the Core Principles to develop a more substantive notion of banking regulation and supervision.[170] This move was seen to be a reaction to many prominent bank failures after 1992 and the insufficiencies of the

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 258-59.
164. *Id.* at 259.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 260. The Core Principles were created by the Basel Committee "slightly over one year after the G-7's request." *Id.* at 261. The G-7 had asked for "more comprehensive and detailed financial standards." *Id.* In their communiqué, the G-7 "encourag[ed] the adoption of strong prudential standards in emerging economies and increase[ed] cooperation with their supervisory authorities; international financial institutions and bodies should increase their efforts to promote effective supervisory structures in these economies." *Id.* (quoting *Strengthening Economic and Monetary Cooperation*, Making a Success of Globalization for the Benefit of All: Economic Communiqué, G-7 Lyon Summit (June 28, 1996), *available at* http://www.g8.utoronto.ca/ summit/1996lyon/communique.html).
170. *Id.* at 260.

Minimum Standards to meet those challenges.[171] These bank failures occurred not only in the EU, but also in the United States.[172] The Core Principles are expansive and addressed the best practices for supervision in the banking industry.[173] Spread across twenty-five guidelines, the Core Principles cover "supervising entire national banking systems from the licensing of banks to their closure due to insolvency."[174] Merely three of the principles discuss "cross-border banking, which previously had been the focus of the Basel Committee's standard- setting work."[175] Supervision of banks conducting operations across borders as well as exclusively domestic services is enumerated in the remainder of the Core Principles.[176] The Core Principles were seen by the financial industry as "a major expansion of the Basel Committee's work on bank supervision."[177]

The Core Principles are far more detailed than previous Basel Committee standards and are enumerated in seven categories: (1) preconditions for effective banking supervision; (2) licensing and structure; (3) prudential regulations and requirements; (4) methods of ongoing banking supervision; (5) information requirements; (6) formal powers of supervision; and (7) cross-border banking.[178] Although a detailed explanation of these guidelines is not essential to this analysis, the preconditions set forth in Principle 1 are worth noting. The Core Principles' preconditions mandate

> that there are certain economic conditions necessary for an effective bank supervisory system. A nation must have sound macroeconomic policies, effective market discipline, a well-developed legal system, sound accounting principles, an orderly method for closing insolvent banks, and policies that promote financial system stability such as lender of last resort responsibility and depositor protection. Although bank supervisors generally do not create or implement these policies, sound macroeconomic conditions are vital to their

171. *Id.* The Bearings Bank of London "failed after a trader in the Singapore operation . . . had lost over 927 million British pounds . . . in the futures market." *Id.* The Bank of England refused to rescue the bank, and it was sold to ING. *Id.* Many attributed the failure of the bank to botched supervision because the individual trader in question hid the losses for some years. *Id.*

172. *Id.* In 1995, "the Federal Reserve Board revoked the charter of the New York branch of the Daiwa Bank . . . because of its concealment of over US $ 1 billion in unrecorded trading losses incurred in the bond market." *Id.* This failure to disclose did not rest solely with the Daiwa Bank because the Japanese Ministry of Finance was knowledgeable of the loss, but had failed to notify the Federal Reserve in a timely manner. *Id.*

173. *Id.* at 261.

174. *Id.* at 261-62.

175. *Id.* at 262.

176. *Id.*

177. *Id.*

178. *Id.*

ability to regulate banks effectively.[179]

The theme most espoused by the Core Principles is the need for supervisory independence.[180] To maintain such independence, supervisors must be provided adequate resources with respect to funding as well as staffing.[181] Effective supervisors will have delineated parameters and objectives for their respective agency.[182] Additionally, the Core Principles posit best practices in fairly broad terms.[183] For example, the Core Principles recommend that supervisors should attempt to "limit[] or restrict bank exposures to single borrowers" or "groups of related borrowers."[184] Such broad language was most likely the effect of compromise among the drafters of the Core Principles who varied in their desired language for the guidelines.[185] Although the Basel Committee was the original drafter of the Core Principles, supervisory entities from non-G-10[186] nations endorsed the Core Principles as well.[187] For example, "[r]epresentatives from Chile, the People's Republic of China, the Czech Republic, Hong Kong, Mexico, Russia, and Thailand participated in the drafting process, while officials from Argentina, Brazil, Hungary, India, Indonesia, the Republic of Korea, Malaysia, Poland, and Singapore participated closely in the Core Principles' development."[188] Additionally, at the International Monetary Fund's annual meeting in 1997 and the World Bank's annual meeting, representatives of the attending nations endorsed the Core Principles.[189]

Despite the drastic steps taken by the Basel Committee to express as much guidance as possible, the Core Principles nonetheless lacked in some areas.[190] The Core Principles failed to satisfactorily address "whether a country should have a deposit insurance scheme."[191] Although they mention a "systemic safety net as a precondition to effective supervision," the Core Principles do not delineate specific requirements such as amounts or percentages as to deposit insurance.[192] Additionally, the Basel Committee did

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 263.
184. *Id.*
185. *Id.*
186. At the time of the Core Principles' promulgation, the "informal forum that promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability" was known as the "G-10." Currently there are twenty members of the group now known as the "G-20." G-20, About G-20, http://www.g20.org/about_what_ is_g20.aspx (last visited Oct. 4, 2009).
187. Alford, *supra* note 90, at 263.
188. *Id.* at 263-64.
189. *Id.* at 264.
190. *Id.* at 265.
191. *Id.*
192. *Id.*

not specify the most appropriate structure for supervisory agencies. However, this flaw is *de minimis* as many commentators have provided guidance on this topic *ad nauseam*.[193] Furthermore, the Core Principles failed to agree on a common bank accounting system.[194] Principle 21 asserted that accounting systems should be fair and consistent; however, more is needed than a vague suggestion such as this.[195] It is essential and should have been recommended by the Basel Committee that a common system of accounting standards be developed across the continent for commonality to effectuate consolidated supervision.[196] Duncan Alford notes that "[i]t appears that more substantive harmonization of bank accounting standards will be left for a future revision of the Core Principles."[197] Although the enumeration of the Core Principles is the most profound step taken by the Basel Committee to clarify the best practices to supervise financial institutions,[198] proposals by a non-government entity without the force of law can only go so far in advancing effective supervision of the European Union financial sector.

The ambiguities of Basel Committee proposals are often criticized, as they are in this Note; however, there are some advantages to non-treaty agreements.[199] "Soft law" is beneficial in that it is fairly easy to gain wide acceptance of the agreement without having to deal with the haggling and compromise of "hard law."[200] Additionally, "[t]his type of law is flexible and allows the parties to consider specific national conditions or attributes in implementing the standards. For instance, the Core Principles are sensitive to the fact that bank regulatory structures differ greatly among nations."[201] By not being bound to the explicit provisions of non-binding agreements, nations tend to be easily persuaded to accept the substantive principles expressed in the document without fear of facing repercussions in failing to abide by the entirety.[202] This is particularly true in industries where standards are rapidly evolving, such as finance.[203] In the scope of this Note, "soft law" has been an effective means for the Basel Committee to gain acceptance of uniform supervisory standards with which individual nations are familiar. By building comprehension among national supervisors of these standards, the creation of an intra-EU supervisor will be eased, as there will be little substantive change in the supervisory standards.

The advancements taken over the past forty years to shore up deficiencies

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193. *Id.*
194. *Id.* at 266.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 269.
199. *Id.* at 284-85.
200. *Id.* at 285. "Soft law" is defined as being a non-enforceable agreement. *Id.* at 284.
201. *Id.* at 285.
202. *Id.*
203. *Id.*

in European financial supervision and prudential cooperation have been profound; however, the goal of effective supervision has not been satisfied. Further developments are needed to address the supervisory flaws currently still in existence. The financial emissaries that met in Nice in 2008 sought to solve such problems, but by the beginning of 2009, their objectives still remained unattained. Angel Gurría, the Secretary General for the Organisation for Economic Cooperation and Development, proclaimed in January 2009 that a single centralized EU-wide supervisor is absolutely necessary to work in conjunction with national supervisors.[204] With no end in sight to the current economic turmoil, European Union leaders now see that a drastic shift in the supervision of financial entities is no longer a debate, but instead a necessity.[205] National supervision coordination alone is an insufficient means to quell fears of instability and authenticate the veracity of the financial sector. The creation of an intra-EU supervisory entity alone is adequate to effectively supervise the Union's financial industry.

IV. CREATION OF AN INTRA-EU PRUDENTIAL SUPERVISOR

A. *Overview*

Whether phrased as the "lead supervisor,"[206] the proposed European Financial Services Authority, commonly referred to as the "EFSA",[207] a pan-European supervisor,[208] or, as it is in this Note, an intra-EU supervisor or supra-national supervisor, the notion remains the same: the creation of a prudential supervisory entity tasked with the mandate to oversee the financial industry within the entire EU. This entity would directly supervise all "internationally operating companies or companies that operate only at the national level but that are so big that they pose a potential systemic risk."[209] The supra-national

204. Press Release, Organisation for Economic Co-operation and Development, Euro Area Needs More Integrated Financial Market Supervision, says OECD's Gurría (Oct. 29, 2009), *available at* http://www.oecd.org/document/49/0,3343,en_2649_34569_41985521_1_1_1_1,00.html.

205. Huw Jones, *EU Executive, Watchdogs Spar in Supervision Debate*, THOMSON FINANCIAL NEWS, Oct. 29, 2009, http://www.forbes.com/feeds/afx/2009/01/27/afx5969284.html [hereinafter Jones, *Watchdogs Spar*]. EU Economic and Monetary Affairs Commissioner, Joaquin Almunia, posited that "[t]here is now a real necessity to have a single supervisory agency at EU level." *Id.*

206. *See generally* European Financial Services Round Table, On the Lead Supervisor Model and the Future of Financial Supervision in the EU (2005), *available at* http://www.efr.be/members/upload/news/22676EFRlsvfinal-June2005.pdf [hereinafter European Financial Services Round Table].

207. Beetsma & Eijffinger, *supra* note 9.

208. *See generally* Duncan Alford, *The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan-European Regulation?*, 25 Ann. Rev. Banking & Fin. L. 389 (2006) [hereinafter Alford, *The Lamfalussy Process*].

209. Beetsma & Eijffinger, *supra* note 9.

prudential supervisor would be a lead contact for all issues of prudential supervision, create a system of reporting, and to the extent necessary, harmonize conflicting national regulations.[210]

This European supervisory body will have the ability to dictate standardized rules on supervision at the national level. Moreover, the national supervisors will exist under the umbrella of the European supervisor.[211] A system of uniform rules will create equality across borders and prevent national supervisors from initiating advantages for local companies through loose supervision.[212] However, "[s]upervision of smaller, national financial enterprises can be delegated to national supervisory agencies."[213] Thus, "these agencies will not disappear, because they are in close contact with national financial firms and as such they have the necessary information for adequate supervision."[214]

B. Factors Encouraging Integration of a Supra-National Supervisor

The European Union has the ability to move ahead on the path to an intra-EU financial market and a single prudential supervisor.[215] In addition to individual Member States moving to consolidate their domestic supervisors into a sole entity,[216] "[f]inancial operators enjoy complete freedom of movement across Member States while the introduction of the single currency offered new opportunity of business all over the Continent."[217] However, there still remains a great many barriers to the integration of an intra-EU prudential supervisor.[218]

The legal, cultural, and tax code differences amongst twenty-seven different Member States has a very real impact on the ability for cross-border collaboration and coordination.[219] Additionally, "with the accession of new Member States from Eastern Europe, these differences will be even more evident considering the specific history of these countries."[220] Accordingly, further development of cross-national relations will continue to be a prerequisite for the viability of an intra-EU prudential supervisor.[221]

The manner in which individual Member States self-regulate their respective financial industries is affected by their historical development of regulation as well as the character of their financial institutions.[222] The public

210. European Financial Services Round Table, *supra* note 206, at 23.
211. *See generally id.*
212. *See generally id.*
213. Beetsma & Eijffinger, *supra* note 9.
214. *Id.*
215. Fratangelo, *supra* note 3, at 2.
216. *See supra* Part II C.
217. Fratangelo, *supra* note 3, at 2.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. Iain Begg & David Green, *Should the European Tier Play a Role in Prudential*

predominantly owns some Member States' financial institutions; whereas, other "countries have centralised financial systems in which major financial groups play a leading role, while in others, the system is fragmented either regionally or by type of service."[223] The differences in each country's "legal, political and institutional arrangements are compounded by contrasting market structures in financial services."[224] These varying prudential supervision lineages are as much of the result of historical context as they are rationalized choices premised in sound economic principles.[225]

Laws regarding insolvent financial institutions differ markedly from one Member State to another within the EU with some leaning towards creditor's favor and others to debtors.[226] European finance ministers noted in April 2008 that speed is of the essence following a financial implosion of a mega-institution.[227] The ministers signed a "memorandum of understanding binding national authorities to favor private-sector rescues where possible, and urging them to decide in advance who would foot the bill for banks that operate in more than one country if state bailouts are required."[228] Unlike a unified federal nation where the citizenry shares a common understanding, Europeans will likely not have an affinity for sending their tax dollars out of the country to foot the bill on a failed bank in a neighboring country.[229] Although Member States recognize the importance of cross-border interaction in sidestepping complete collapse of financial institutions, in the absence of an intra-EU authority with broad powers to coordinate a potential bailout, the likelihood of success for such a bailout is minimal.

C. The ECB Willing to Assume Supervisory Responsibilities

One of the initial questions pertaining to any conversation regarding the creation of an EU-wide supervisor is: who will assume supervisory responsibilities yet maintain independence? The most capable entity to perform supervisory duties is the ECB. The President of the ECB, Jean-Claude Triche, has made clear that the Bank is willing to take control of the new intra-EU supervisor.[230] The ECB's willingness to accept such responsibility is significant as the ECB is widely recognized as being an independent agency.[231] This is due, in part, to the fact that the ECB's independence is enshrined in the

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Supervision of Banks? (2001) (unpublished manuscript, on file with the Archive of European Integration, available at http://aei.pitt.edu/6899/01/begg_iain.pdf).

223. *Id.*

224. *Id.*

225. *Id.*

226. Saltmarsh, *supra* note 73, at 2.

227. *Id.*

228. *Id.*

229. *Id.* at 3.

230. *Calls for Single EU Financial Supervisor Resurface*, EURACTIV, Oct. 29, 2009, http://www.euractiv.com/en/financial-services/calls-single-eu-financial-supervisor-resurface/article-178514 [hereinafter EURACTIV].

231. Jones, *Watchdogs Spar*, *supra* note 205.

European Union's founding treaty.[232] Some members of the ECB have commented that the Bank "could play a central role in [E]uro zone banking supervision without needing to change the treaty, which would be a difficult task."[233]

However, an assumption of supervisory duties by the ECB would not be without some hindrances. A major

> obstacle lies in wait regarding a possible extension of the ECB's powers. The bank only has a mandate to act on behalf of the [sixteen E]urozone countries, thus excluding the [United Kingdom], Sweden, Denmark, Poland and the majority of the Eastern EU member states, which have not adopted the single currency.[234]

Thus, creating an entire new agency seems more likely than expanding the ECB scope to non-Eurozone countries.[235]

The European Financial Services Round Table[236] has articulated the creation of a "lead supervisor" since June 2004.[237] It notes "the lead supervisor should be responsible for the prudential supervision not only of branches in other EU [M]ember [S]tates, but also of fully owned (fully controlled) subsidiaries in other EU [M]ember [S]tates."[238] Additionally, "[i]n order to be considered optimal and conducive towards reaching its goals, any supervisory structure must meet—and must be assessed against—objective criteria."[239] Such criteria include: (1) the creation of financial stability while implementing a framework for a competitive financial industry; (2) a cost efficient supervisory system; (3) transparency; (4) an effective crisis management system; (5) adaptable to market evolvement; and (6) political accountability.[240]

Proponents of creating a supra-national supervisory body in Europe point to the increased cooperation amongst Member States as evidence that the proposed entity is becoming more feasible.[241] With EU regulators meeting regularly, such as the Nice meeting, the European Union leaders, specifically the European Commission, are duly advised as to how to amend or draft new rules to most effectively combat issues hindering the financial markets.[242] To

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232. *Id.*

233. *Id.*

234. EURACTIV, *supra* note 230.

235. *Id.*

236. "The purpose of the [European Financial Services Round Table] is to provide a strong industry voice on European policy issues relating to financial services." European Financial Services Round Table, www.efr.be (last visited Nov. 27, 2009).

237. EUROPEAN FINANCIAL SERVICES ROUND TABLE, *supra* note 206, at 7.

238. *Id.*

239. *Id.* at 10.

240. *Id.*

241. Saltmarsh, *supra* note 73.

242. *Id.*

accentuate their point, critics point to the $700 billion plus financial "bailout"[243] in the United States in 2008[244] as the type of assistance which would be difficult to formulate under a system without an intra-EU prudential supervisor.[245] The blurred rules in Europe "concerning the insolvency of a financial institution that operates in different countries in particular is causing unease."[246] These differences amongst Member States would make any multi-State coordinated assistance package difficult unless there was a captain at the helm, such as a supra-national supervisor. In order to address these and other noted concerns, EU leaders must act to implement a single intra-EU supervisor with relative haste.

V. CRITICS OF INTRA-EU SUPERVISION & OTHER OPTIONS

With the escalation of financial institutions' struggles throughout 2008, 2009, and foreseeably into 2010, some nations and groups have called for greater (or lesser) steps than what this Note has recommended.[247] Below are some alternative proposals that have been advocated for during the financial struggle.

A. A Pseudo Supra-National Supervisor: An Early Warning System

In early 2009, a combination of a multitude of plans emerged as the leading blueprint for creating a pseudo supra-national supervisor.[248] This proposed entity is a watered-downed version of the supervisor advocated for in this Note.[249] At an emergency summit in Brussels on the financial crises, EU leaders backed a proposal that "recommended setting up two new broad supervisory bodies in the EU—one chaired by the ECB to monitor system-wide risks, the other to combine the efforts of national supervisors."[250] This plan

243. The Author acknowledges that the purported "bailout" is not technically a bailout, but is merely referring to its colloquially used designation.

244. *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

245. Saltmarsh, *supra* note 73.

246. *Id.*

247. *See generally* David Rothnie, *EU Called for Worldwide Banking Watchdog*, EVENING STANDARD, Oct. 16, 2008, at 26. *See also* Charlie McCreevy, European Comm'r for Internal Markets and Services, Address at the Lead Conference—Euro Finance Week: Prudential Supervision in an Integrated Market (Nov. 17, 2008) (transcript *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/623&format=DOC&aged=0&language=EN&guiLanguage=en).

248. Huw Jones, *UPDATE 1-EU Leaders Back Financial Supervision Blueprint*, THOMSON REUTERS, Mar. 1, 2009, http://uk.reuters.com/article/idUKL165744420090301 [hereinafter Jones, *Blueprint*].

249. *EU Considers New, Stronger Financial Supervision*, ASSOCIATED PRESS (Feb. 25, 2009), *available at* http://www.iht.com/articles/ap/2009/02/25/business/EU-EU-Banking-Oversight. php.

250. Jones, *Blueprint*, *supra* note 248.

calls for the creation of "a new EU-wide supervisor to oversee risks and give early warnings, but that individual banks should continue to be looked after by strengthened national regulators."[251] With this, national supervisors would maintain their status as the effective supervisor of their domestic institutions while the two EU-wide supervisors would serve as gatherers of information to facilitate cross-nation supervisor communications and to serve as an early warning system for pending failures of financial entities.[252]

Previously viewed as a potential hindrance to any step towards a supra-national supervisory entity, German Chancellor Angela Merkel noted that she "encourage[d] the European Commission to rapidly implement the [proposal]."[253] Additionally, French President Nicolas Sarkozy and Britain's Prime Minister, Gordon Brown, advocated on behalf of the adoption of this blueprint.[254] The inclusion of these leaders amongst those supporting any measure advocating the creation of a supra-national supervisor is not insignificant.

Although this proposal is leading down the road towards an intra-EU supervisor, it falls "short of advocating a single European superregulator, opting instead for a more pragmatic and incremental approach toward strengthening supervision."[255] As this Note recommends, the creation of a supra-national supervisor would "run the risk of a veto from Britain, which is worried about transferring responsibility for the management of the City of London, the British financial center, to a European level."[256] Stephen Castle notes that this proposal's "authors said they thought the scale of the financial crisis might persuade national governments to cede some supervisory authority, and, under their plans, the City of London would, to some extent, be supervised by a pan-European watchdog."[257] However, this plan is but an intermediate step that falls short of the recommendation made in this Note.

The proposal's author, Jacques de Larosiere, explained the rationale as to why the drafters did not push for the creation of an EU-wide supervisor with broad powers.[258] He noted "it would have been 'unrealistic' for one EU-wide supervisor to police banks, saying it 'would not necessarily prove effective' and would not be accountable to taxpayers."[259] Additionally, Larosiere mentioned that recommending the creation of the supra-national supervisor had "little

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251. *EU Considers New, Stronger Financial Supervision*, *supra* note 249.
252. *Id.*
253. Jones, *Blueprint*, *supra* note 248.
254. *Id.*
255. Stephen Castle, *European Panel Seeks Closer Supervision of Banks*, THE NEW YORK TIMES, Feb. 25, 2009, http://www.nytimes.com/2009/02/26/business/worldbusiness/26euro.html?_r=1&ref=europe.
256. *Id.*
257. *Id.*
258. *EU Considers New, Stronger Financial Supervision*, *supra* note 249.
259. *Id.*

prospect of being accepted" due to Britain's purported veto on the issue.[260]

Notwithstanding many EU Member States' leaders' support, this proposed plan is not without its dissenters.[261] Peter Praet, who chairs the Banking Supervision Committee of EU Central Banks, noted that although the proposal is "a very good step in the right direction and some of the problems we have seen could have been mitigated under such a system," it is "certainly not sufficient in the absence of a strong crisis management and resolution framework for the European Union as a whole."[262] Praet noted the conceptual and practical insufficiencies of the plan in relation to the exchanges of "monetary policy, financial stability, and micro supervision."[263] Although this proposal takes an affirmative step towards the creation of a supra-national supervisor, it is too little, too late. Greater steps are necessary at this pivotal juncture. The creation of a supra-national entity is mandated by this economic climate. Any step short of that action is insufficient.

B. Proposed International Supervisor

Some leaders from around the globe have now recognized that there is indeed an international market warranting increased steps to streamline regulations across the globe, instead of merely the EU.[264] The meeting of the leaders from twenty heads of state, commonly known as the "G20," in November 2008 culminated in a shared understanding "towards a more appropriate financial architecture at the global level."[265] Additionally, the leaders put forth their notion of the cause of the financial turmoil:

> Not least among these was the fact that regulators and supervisors did not fully understand the risks building up in the financial markets. They did not keep pace with financial innovation or give due attention to cross-sectoral propagation of risk. There was a lack of transparency and inadequate oversight of market players, particularly with respect to complex financial instruments. The G20 leaders also noted that the segmented nature of regulation contributed to inconsistencies, both domestically and internationally. These regulatory deficiencies contributed to the excesses in the market and ultimately resulted in severe market disruption.[266]

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260. *Id.*

261. *Top EU Supervisor Says Reform Plan Good but Insufficient*, THOMSON FINANCIAL NEWS, Feb. 25, 2009, http://www.forbes.com/feeds/afx/2009/02/25/afx6094879.html.

262. *Id.*

263. *Id.*

264. McCreevy, *supra* note 247.

265. *Id.*

266. *Id.*

The G20 meeting came on the heels of an announcement by EU leaders in October 2008 calling for the creation of an international board to oversee, at a minimum, the world's thirty largest financial institutions.[267] This proclamation was at the behest of United Kingdom Prime Minister Gordon Brown.[268] In order for such a plan to come to fruition, the significant hurdles of gaining Chinese and American approval remain.[269] Furthermore, there appears to be disagreement amongst some Member States regarding the exact details of the supervisory body.[270] Specifically, the United Kingdom is unlikely to sign off on French requests to extend financial supervision to hedge funds or to remove financial offshore offices in the Channel Islands or the Isle of Man.[271] Whether the relevant parties will be able to reach a compromise as to the exact specifics of an international supervisory body is yet to be seen and is, in fact, unlikely. In the interim, the EU should proceed on the road to create its own intra-EU supervisory body to fully and efficiently protect the citizenry of the EU Member States.

C. Common Regulation Without a Common Supervisor

Other financial theorists have opined that although a common system of rules would be advantageous to the EU, the creation of a single supervisor is unnecessary and could be in fact counterproductive to the stated goals.[272] Rosa Lastra notes that a system of common regulation could be adopted through a treaty or a directive that would require harmonization of national regulations similar to that of other EU directives without the need of a supra-national supervisor.[273] The advantage of such a proposal is that supervision would be left in the hands of national supervisors and that international financial institutions would not be burdened with conflicting and confusing regulations differing from nation to nation. Such a system of common regulations would be an increase over the current framework of minimum standards previously discussed as this system would be mandatory throughout the EU.[274] Lastra additionally points out that some Member States have begun to consolidate their individual supervisory agencies into a single national supervisor.[275] This

267. Rothnie, *supra* note 247.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. Lastra, *supra* note 46, at 59.
273. *Id. See, e.g.*, Council Directive 85/374, On the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 20 (commonly referred to as "The EU Products Liability Directive," mandating harmonization of national statutes with the directive).
274. See *supra* Part II D for a discussion on the minimum obligations encouraged for all financial institutions within the EU.
275. See *supra* Part II C for a discussion of the trend towards having a singular national supervisor exclusively.

trend would make communication, coordination, and harmonization more streamlined should the EU decide to adopt a model system of regulations instead of following the recommendation of this Note and create a single supra-national supervisor.[276]

Member States who are hesitant to relinquish autonomy of their national supervisory agencies could potentially be the greatest inhibitor of creating a uniform and mandatory system of EU-wide standards (even without an intra-EU supervisor). This debate is not unknown to scholars of the creation of the United States' system of government. The proposed system of common regulations throughout the EU mandating increased and uniform supervision by national supervisory entities is analogous to the United States' notion of Federalism in that nations are apprehensive of subjecting themselves to the regulations of a higher authority.[277] With the advent of the American theory of government evolved the duopoly of the power of the federal system compared to that of the independence of states.[278] Advocates for the rights of individual states were threatened by the supremacy[279] of federal laws and sought to ensure that the recent Revolution would not be for naught with the creation of a new monarchy in federal form imposing potentially restrictive laws upon the states. This debate is analogous to the present Note in that individual EU Member States and their respective supervisory agencies, whether singular or specialized by sector, wish to ensure the veracity of financial institutions throughout the EU without subjecting the businesses within their territories to overly burdensome regulations or restrictive provisions imposed by an EU-wide directive mandating common supervisory standards.

By creating a common system of regulations for national supervisors to follow uniformly throughout the EU, transaction costs for financial entities to act in compliance with a multitude of, at times, conflicting rules would be minimized. Although the creation of a system of uniform standards, whether implemented through a directive or otherwise, would be advantageous for uniformity throughout the EU, without an intra-EU supervisor to mandate compliance, national supervisors alone would be ineffective in verifying conformity therewith.

D. EU Member Opposition to the Creation of an Intra-EU Supervisor

As previously noted, some Member States vehemently oppose the

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276. Lastra, *supra* note 46, at 66. See *supra* Part II C for a discussion of the trend towards the merging of specialized national supervisory agencies into a single national supervisor.

277. See STATES' RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY (Frederick D. Drake & Lynn R. Nelson eds., 1999), for a general commentary on the debate between Federalism and states' rights advocates during the inception and ratification of the United States of America and its Constitution from 1787-1789.

278. *Id.*

279. *See* U.S. CONST. art. VI cl. 2.

creation of a singular intra-EU supervisor for a multitude of reasons.[280] EU heavyweights Germany and the United Kingdom have previously opposed any sort of new supervisory body or extending the reach of the ECB because both nations prefer domestic control of the financial institutions.[281] Additionally, "both countries prefer the concept of collegial supervision, which would effectively allow them to control branches located in other EU countries."[282] Even some smaller Member States, especially in Eastern Europe, oppose enlarging supervision "as they want to retain control of their own banking sectors."[283] Finally, as discussed above, "France and Italy, which are keen to promote more centralised European supervision . . . would prefer to address the issue at global level. Italy was among the first to push for the idea, while French President Nicolas Sarkozy backed the concept at a hearing in the European Parliament " in September 2008.[284]

The opposition of even a single Member State could derail the entire process.[285] At the 1998 European Council meeting in Vienna, the integration of the financial services sector was advocated.[286] Following that conference,

> the European Commission proposed a Financial Services Action that outlined the steps (including forty-two legislative measures) to complete the creation of an internal market for financial services. As of June 2004, nearly all the required legislation at the EU level had been enacted. Nevertheless, [Member States] have yet to enact legislation at the national level to implement the various EU directives.[287]

Furthermore, advocates for the transfer of supervisory responsibilities to the ECB should note that pursuant to the Treaty on European Union, "the ECB can only aid in the smooth operation of prudential supervision of banks" because the ECB does not "have direct responsibility for the supervision of banks within the EU."[288] The Treaty on European Union does have a provision whereby supervisory duties can be transferred to the ECB; however, the passage of such responsibilities requires a unanimous approval from Member States that would be exceptionally difficult to achieve.[289] Nonetheless, the current economic climate has shifted notions of traditional expectations making an unanimous approval, something normally outside the realm of possibility,

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280. EURACTIV, *supra* note 230.
281. *See generally id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. Alford, *supra* note 90, at 269-71.
286. *Id.* at 269.
287. *Id.* at 269-70.
288. *Id.* at 270.
289. *Id.*

into a real prospect.

The aforementioned alternative proposals certainly have merit and are well thought out approaches to previous financial supervision deficiencies; however, incremental steps are insufficient at present. The implementation of an intra-EU supervisor with broad supervisory reach alone is satisfactory to provide adequate supervision of cross-border entities within the European Union.

VI. CONCLUSION

Dissenters to the creation of a supra-national EU-wide supervisor with plenary supervisory authority point to the numerous difficulties in such creation as the grounds for implementing some watered-down supervisory scheme.[290] Concededly, there are indeed substantial hindrances to achieving this end. However, merely because the implementation of the entity is fraught with political challenges does not warrant the implementation of a lesser plan that is incremental in nature. The past half-century of European financial supervision development has seen the increasing growth of cross-border communication and a merging of the standards of best supervisory practices.[291] Whether promulgated by the Basel Committee or other advisory bodies,[292] the theories encompassing effective supervision have evolved to the degree where the next logical and proper step is the creation of an intra-EU supervisor without jurisdictional limitations.

The leaders of the EU Member States have delineated a blueprint for supervision that would leave supervision to their own national supervisors and have EU supervisors serve as conduits of information and as an early warning system.[293] This proposal is insignificant when viewed under the eye of the current economic climate. Such a blueprint is insufficient. The citizenry and investors of the EU financial system deserve greater protection that what this plan offers. Accordingly, leaders of the EU should move with relative haste to develop and implement the supra-national EU supervisor with broad power to adequately protect the European financial sector.

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290. See *supra* Part IV A for a discussion of the proposal to create two new supervisory bodies at the EU-level while leaving effective supervision to national supervisors. The EU-wide supervisors would "oversee risks and give early warnings, but that individual banks should to be looked after by strengthened regulators." *EU Considers New, Stronger Financial Supervision*, *supra* note 249.

291. See *supra* Part II D for a discussion of the developments of cross-border communication of national supervisors and the Basel Committee's non-binding "soft laws" to encourage greater supervision standards.

292. *See supra* Part II D.

293. *See supra* Part IV A.