The Federalisation of Financial Supervision in the US and the EU: A Historical-Comparative Perspective

Régis Bismuth

Abstract The federalisation processes of US and EU financial supervision have both originally been founded on similar—although not identical—legal bases: regulating interstate commerce in the US (US Const., Art. 1, Sect. 8, Cl. 3) and establishing or ensuring the functioning of the internal market in the EU (Art. 114 TFEU).

The complexity of the US system, comprised of a patchwork of state and federal authorities mainly established in the first part of the twentieth century, is the product of both major economic failures and a specific political culture. The progressive federalisation of financial supervision within the EU is the result of a well-thought-out project of integration of the internal market. The last financial crisis and the recognition of the overarching objective of financial stability have nonetheless led to significant evolutions, more particularly through the establishment of the three European supervisory authorities (ESAs). Moreover, and perhaps more importantly, the latest initiatives related to the establishment of an EU Banking Union have profoundly transformed the underpinnings of financial supervision in the EU since it is, from this point forward, partially linked with the Economic and Monetary Union (EMU) process.

Within this framework, the purpose of this contribution is to explore how political and legal differences between the EU and US systems have shaped and influenced the structures and institutional aspects of supervision on both parts of the Atlantic without necessarily leading to significant divergences as to the contents of financial regulation. More specifically, a comparative study of these two systems highlights significant differences as to the interplay between federal and State supervisors.

Keywords Federalism • Financial Supervision • United States • European Union • Commerce Clause • Internal Market • Banking Union • Economic and Monetary Union • Federal Agencies

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R. Bismuth is Professor of Public Law at University of Poitiers.

R. Bismuth (✉)
University of Poitiers, 86000 Poitiers, France
e-mail: regis.bismuth@univ-poitiers.fr

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1 Introduction

On October 9, 2013, the President of the European Central Bank (ECB), Mario Draghi, gave a speech at the Harvard Kennedy School of Government titled "Europe's pursuit of 'a more perfect Union'".[1] Surprisingly, he choose to depict EU financial supervision and EMU reforms through the lens of one of the objectives embedded in the US Constitution[2] instead of referring to the "process of creating an even closer union" mentioned in the Treaty on European Union (TEU, Article 1, § 2).[3] He explained that such closer union "creates anxiety" among EU citizens and suggests "to promise an inexorable movement towards a future super-state" for which "many Europeans [. . .] feel that they are not ready".[4] The relevance of these two concepts shall not be exaggerated. Be it "closer" or "more perfect", the "union" is just an overarching objective and not a basis of competence. These provisions do not, as such, empower the EU and the US to adopt legislative acts for the fulfilment of the Union.

When it comes to financial supervision and, of course, more broadly, to the regulation of economic activities, the competence of the US and EU legislative authorities is founded on similar—although not identical—legal bases[5]: regulating interstate commerce in the US (US Const., Art. 1, Section 8, Clause 3),[6] establishing or ensuring the functioning of the internal market in the EU (Art. 114 TFEU).[7] Besides, in the aforementioned speech, Mario Draghi also paralleled the US "commerce power" and the EU's internal market competence.[8]

The purpose of this chapter is neither to offer a comparative constitutional analysis of these two seemingly similar bases of federal competence[9] nor a comparative study of financial regulatory agencies and central banks in the EU and the

[1] Draghi (2013).

[2] The Preamble of the US Constitution provides, *inter alia*: "We the people of the United States, in order to form a more perfect union, [. . .], do ordain and establish this Constitution for the United States of America".

[3] See also, TEU, Preamble, para. 13.

[4] Draghi (2013).

[5] While all EU legislation must cite in its preamble its legal basis within the treaties, in the US, there is "no formal obligation to recite a 'basis' in the constitution for a given federal legislative measure" Bermann (1997, p. 32).

[6] "The Congress shall have power [. . .] [t]o regulate commerce with foreign nations, and among the several states [. . .]".

[7] "The European Parliament and the Council shall [. . .] adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market" (Art. 114.1 TFEU).

[8] Draghi (2013) (referring to "the political implications of a single market").

[9] For such an analysis, see Schütze (2014). See also Barnard and Peers (2014), pp. 315–317. For the US, see Williams (2008) and Kitch (1980).

US.[10] Rather, it is aimed to highlight how slight differences between these federal models have had significant consequences on how the institutional structures for financial supervision have been devised on both sides of the Atlantic. The term "Federation" (and, *per extensionem* "federal" and "federalism") is to be understood as a process of shared competences between two levels of government, thereby being multi-constitutional, multi-jurisdictional, multi-legislative from a legal standpoint, and regardless of the legal nature—domestic (constitution) or international (treaty)—of the constituent charter of the federal entity.[11] The federal phenomenon therefore includes both the model of the federal state (like the US) as well as the model of the international organization (like the EU) as long as they have the distinctive traits of a Federation.[12] Within this framework, the term "federalisation" can be defined as the process through which a competence (for instance financial supervision) is transferred from the State to the federal level.[13]

While a special focus is placed on EU and US systems, a short reference will be made to Canada. Its Supreme Court rendered in 2011 an interesting advisory opinion on the constitutionality of the Canadian Securities Act, more particularly on the issue of whether the Act was within the Parliament's authority under the "Trade and Commerce Clause" of the Constitution, which is an equivalent of the US Commerce clause.[14] This advisory opinion is all the more relevant that only a few judicial precedents provide guidance on institutional structures for financial supervision in a federal context.[15]

Before doing so, it is noteworthy to point out that the institutional structure of US financial regulation is more the result of several crises than the product of a duly planned legal integration like in the EU. Indeed, almost all existing monetary and financial regulatory authorities have been established between the Civil War and the New Deal.[16] The Office of the Comptroller of the Currency (OCC), the Federal Reserve, the Securities and Exchange Commission (SEC) and the Federal Deposit Insurance Corporation (FDIC) have been respectively established during the Civil

[10] For a comparative study of the ECB and the Federal Reserve, see, Jabko (2006). See also Lavelle (2014). For a comparative study including French, British, German and US models, see Bismuth (2011), p. 63 et seq.

[11] On this issue, see Beaud (2007), p. 91 et seq.

[12] Elazar (2001), p. 31 et seq. On the federal dimension of the EU, see Menon and Schain (2006), Burgess (2006), p. 226 et seq. and Levrat (2005), p. 285 et seq.

[13] Broschek (2013), p. 97 ("federalization basically can be conceived as a contingent outcome within the overarching process of political structuring that establishes institutionalized authority relationships between territorial power holders").

[14] Supreme Court of Canada, Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837.

[15] Besides, the Canadian Supreme Court mentioned in its opinion "a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another" (Id., para. 7). See also, paras. 54 et seq.

[16] Donahue and Pollack (2001), p. 85 (noting that "[t]he civil war and Reconstruction saw a marked shift of authority away from the States and toward the federal government. Prosecuting the war itself accelerated the growth of Washington's power").

War, following the Bank Panic of 1907, the 1929 financial crisis and the subsequent Great Depression.

While the initiatives taken following the 2008 financial debacle have transformed the institutional structure of EU financial regulation, it must be reminded that it is part of a wider project of legal and economic integration of the internal market which has been deepened since the 1999 Financial Services Action Plan that followed the recommendations of the Lamfalussy framework.[17]

However, since the 2010 sovereign debt crisis, the reform of financial regulation in the EU is no longer only confined to a deeper integration and liberalisation of the internal market. Indeed, financial stability has been promoted as an overarching objective of financial regulation, which has affected the process of legal integration in the EU.[18] Second, within the framework of the establishment of a Banking Union in the EU, financial regulation has reached the boundaries of the Economic and Monetary Union. Art. 114 TFEU is no longer the exclusive base of federal competence for financial regulation reform in this context. It is the case of the Single Supervisory Mechanism (SSM) established pursuant to Regulation 1024/2013[19] and based on Art. 127(6) TFEU. It is applicable to all euro area Member States and open to the participation of other EU Member States. By distinguishing between several categories of EU Member States, this has led to a system of multi-layered regulation likely to make the institutional structure for banking supervision in the EU even more complex than the US regulatory system.

After a first part analysing how federalisation of financial regulation can occur without the intervention of the federal legislature (Sect. 2), the second part provides a general overview of the federalisation of financial supervision in the EU and the US (Sect. 3). The last part aims to assess the broader federal challenges that the EU faces for the establishment of its Banking Union through the lens of the US system (Sect. 4).

2 Federalisation of Financial Regulation "Without Washington" (or Brussels)

Before analysing how institutional structures for financial supervision have been built at the federal level in the US and the EU, it should be recognized that such structures were originally established at state level. Interestingly, it is possible to identify some examples where state authorities have spontaneously cooperated without the intervention of federal authorities in order to promote an effective

[17] See below note 31 and accompanying text.

[18] Andenas and Chiu (2013), p. 335 et seq.

[19] Council Regulation 1024/2013 *conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions*, O.J. L 287/63 (2013).

regulation at the federal level: in the US in the field of insurance regulation, in Canada and, to a lesser extent, in the EU in the field of securities regulation.

In 1868, the US Supreme court ruled in *Paul v. Virginia* that insurance was not a transaction of commerce, thereby excluding this activity from the scope of application of the commerce clause.[20] While this holding was overturned by the Supreme Court in 1944,[21] the Congress adopted in 1945 the McCarran-Ferguson Act through which it chose to exempt insurance companies from most federal regulations (particularly antitrust laws) and not to preempt state regulations in this field.[22] As early as 1871, States' commissioners of insurance jointly constituted a private law association, the National Association of Insurance Commissioners (NAIC) in order to better coordinate their regulatory prerogatives. Interestingly, this entity, which resembles in many ways a US federal agency, was established by States right after the 1868 ruling for the preservation of their prerogatives through common policies and a harmonization of their regulations.[23] This is why the NAIC has been perceived as a form of "federalism without Washington".[24]

The Dodd-Franck Act reform of 2010 established a Federal Insurance Office (FIO) housed within the US Treasury. However, it does not act as a supervisory or regulatory authority over insurance companies since its main task is "to monitor [. . .] the insurance industry, including identifying issues or gaps in the regulation of insurers that could contribute to a systemic crisis in the insurance industry or the United States financial system".[25] Therefore, the FIO represents only limited progress at the federal level and has not called into question the *de facto* federal regulation that exists through the cooperation of States' authorities, even though the current system is often criticized for its complexity.[26]

At the European level, the Forum of European Securities Commissions (FESCO) is the only relevant, yet brief, experience of spontaneous cooperation between national financial regulatory authorities. FESCO was established in 1997 as an informal network by the 17 securities commissions of the Member States of the European Economic Area (EEA) without the direct intervention of European authorities.[27] One of its missions was "to develop common regulatory standards

[20] Paul v. Virginia, 75 U.S. 168 (1868).

[21] United States v. South Eastern Underwriters Association, 322 U.S. 533 (1944); Polish National Alliance v. National Labor Relations Board (NLRB), 322 U.S. 643 (1944).

[22] For an overview, see Macey and Miller (1993).

[23] Randall (1999), p. 630.

[24] See Prybutok (1982). "Federalism without Washington" is defined as "the growing routinization of interstate relationships that are not routed through Washington and that acts as counterbalance to federal activity" Elazar (1972), p. 174.

[25] Dodd-Franck Act, Section 313(c)(1)(A).

[26] Brown (2013), p. 560 et seq. (pointing out that state insurance regulations lack uniformity, are sometimes duplicative, time consuming as well as expensive, and contain regulatory gaps allowing regulatory arbitrage).

[27] FESCO, The creation of the Forum of European Securities Commissions (FESCO), Press Release, FD1047, 9 Dec 1997. More generally, see Demarigny (2000).

[...] concerning aspects that are not harmonised by the existing European Directives".[28]

However, it also promoted a common interpretation for the implementation of EU legislation related to securities regulation[29] and, moreover, the European Commission attended its meetings.[30] Due to this nexus with the European legislative process, it cannot be paralleled with the precedent of NAIC in the US and cannot be regarded as a genuine form of "federalism without Brussels". Besides, it is not a surprise that, following the recommendations set forth in the Lamfalussy Report of 2001,[31] FESCO was replaced by the Committee of European Securities Regulators (CESR), an "independent advisory group" established under EU law.[32]

In Canada, several initiatives have been undertaken at the inter-provincial level in order to improve the cooperation between securities regulators without the intervention of federal authorities, notably within the Canadian Securities Administrators, a body consisting of all securities regulators from each province and territory. For instance, in 2004, securities regulators (except Ontario) signed a memorandum of understanding[33] under which they agree to harmonize some of their regulatory requirements and to implement a "passport system" based on mutual recognition of decisions by participating jurisdictions in the harmonized fields.[34]

As pointed out by the Attorney General of Canada in his factum filed with the Supreme Court within the framework of the advisory opinion on the constitutionality of the Canadian Securities Act, the aim of the passport system was "to achieve some of the benefits of a single national regulator without creating an actual national regulator".[35] It is important to note that, under the "Trade and Commerce Clause" of the Canadian Constitution,[36] the possibility of an effective and comprehensive concerted action by the provinces for the regulation of an economic activity

[28] Id. See, for instance, FESCO, Signature of an European Memorandum of Understanding on the surveillance of securities activities and creation of FESCOPOL, Press Release, 99-008, 1 Feb 1999.

[29] See for instance, FESCO, Implementation of Article 11 of the ISD: Categorisation of investors for the purpose of Conduct of Business Rules, 00-FESCO-A, 15 Mar 2000.

[30] Thieffry (2001), p. 219 note 33.

[31] Final report of the Committee of wise men on the regulation of European securities markets, 15 Feb 2001, http://ec.europa.eu/finance/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf. Accessed 8 Sep 2015.

[32] Art. 1 of Commission Decision 2001/527/EC *establishing the Committee of European Securities Regulators,* O.J. L 191/43 (2001).

[33] Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation, 2004, http://www.securitiescanada.org/2004_0930_mou_english.pdf. Accessed 8 Sep 2015.

[34] Ibid., Art. 5 ("Under mutual recognition, participating jurisdictions would recognize that a market participant who complies with, files documents under and/or receives approvals respecting market access requirements of the primary jurisdiction, is deemed to be in compliance with or exempt from the market access compliance, document filing and/or approval requirements of its host jurisdiction(s)").

[35] Supreme Court of Canada, Reference re Securities Act, Factum of the Attorney General of Canada, File No. 33718, para. 121.

[36] Art. 91(2) of the 1867 Constitution Act.

is a key indicator that adversely affects the federal power to regulate the said activity.[37] In that regard, the Supreme Court considered that "[t]he provinces, acting in concert, lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals such as management of systemic risk or Canada-wide data collection".[38] While this finding would have justified the establishment of a federal securities agency, the court concluded that the proposed legislation establishing a national regulator could not be sustained by the Trade and Commerce Clause since it also dealt substantially with matters (contracts, property) within the jurisdiction of provinces. The court's advisory opinion is nonetheless interesting to the extent that it highlights the possibility of a *de facto* federal regulator and a game of "musical chairs" between the federal and the provincial levels.

3 The Structure(s) for Financial Supervision in a Federal Context

The issue is now to determine whether differences can be observed between institutional structures for financial supervision in the US and the EU. In this respect, an important distinction must be drawn between "federal financial regulation" and "federal financial supervision". The former refers to the sole adoption of substantive rules at the federal level (that will not be considered here) while the latter indicates the existence of a federal agency having the power to monitor financial institutions and/or having a role to play in the process of adoption or implementation of federal regulation.

In a comparative perspective, it can be shown that US and EU financial supervision models present significant differences stemming from both distinct visions of federalism and differences between the dynamics of the "commerce clause" and of the "internal market".

3.1 The International Outreach of Federal Financial Supervision

It must be noted beforehand that other matters of federal competence can also justify the establishment of a federal agency, among them the issue of the representation of the federal State at the international level, requiring that the state must speak with "one voice" in its foreign relations.[39]

[37] Supreme Court of Canada, above note 14, para. 80.

[38] Id., para. 121.

[39] However, it must be noted that the "one voice" doctrine is still highly debated. See Moore (2014).

For instance, the Dodd-Franck Act established the Federal Insurance Office (FIO) which has a rather modest role in monitoring—and not supervising or regulating—the insurance industry.[40] It has nonetheless the authority "to coordinate Federal efforts and develop federal policy on prudential aspects of international insurance matters, including representing the United States, as appropriate, in the International Association of Insurance Supervisors".[41] The FIO is therefore in the position to take over the US foreign policy for the insurance sector.

The argument concerning the uniform representation of the federal State at the international level was also introduced in the debate over the constitutionality of the Canadian Securities Act. The Attorney General of Canada pointed out in his factum filed with the Supreme Court that "[a] province cannot represent Canada's interests or speak for Canada at the international level".[42] He also noted that the "regrettable absence of a voice that can speak for all of Canada at [IOSCO] [...] diminishes Canada's capacity to cooperate with other countries in the design and enforcement of its securities laws, creating serious issues of effectiveness and accountability".[43] The court did not rule on this issue insofar as it considered that the bill trampled over provincial jurisdiction. However, it noted in a historical account of previous legislative initiatives that "the idea of a single Canadian securities regulator has been percolating for more than 50 years"[44] and that the issue of the uniform representation of Canadian interests in the international arena was frequently put forward as a justification for federal intervention.[45]

The EU offers a different system since the establishment of an EU body does not generally have the effect of neutralizing the international activities of national financial regulators.[46] For instance, Article 33 of Regulation 1095/2010 establishing the European Securities and Markets Authority (ESMA) provides that "the Authority may develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries"[47] but it must be done "[w]ithout prejudice to the respective competences of the Member States and the Union institutions".[48] As to international cooperation among standard-setting bodies, ESMA became an associate member of IOSCO which is equivalent to the status of an active observer without

[40] See above notes 25 and 26 and accompanying text.

[41] Dodd-Franck Act, Sect. 313(c)(1)(E).

[42] Factum of the Attorney General of Canada, above note 35, para. 118.

[43] *Ibid*.

[44] Supreme Court of Canada, above note 14, para. 95.

[45] Id., paras. 13, 18.

[46] On this issue, see Castellarin (2014), p. 197 et seq.

[47] Regulation 1095/2010 *establishing a European Supervisory Authority (European Securities and Markets Authority)*, O.J. L 331/84 (2010).

[48] Id.

voting rights,[49] thus not overlapping with domestic regulators that are still ordinary members of IOSCO.

3.2 *Financial Supervision as an Integral Part of Financial Regulation in the US*

As to the distinction between the "commerce clause" and the "internal market" as bases of competence, it is noteworthy to mention that they imply two significantly different processes of market integration at the federal level.

Under the commerce clause of the US or Canadian constitution, it is the determination of the existence of an interstate commerce that empowers the federal State. To some extent, the federal competence stems from a factual determination regarding the integration of the market. It is particularly clear in the Supreme Court of Canada's advisory opinion. The argument concerning the federal integration of financial markets was first put forward by the Attorney General who, on the basis of statistics and an impressive set of data, considered that "it is impossible today to maintain credibly that the dominant characteristic of capital markets is anything other than national and international. [...] The markets do not respect provincial borders".[50] While the Supreme Court affirmed the unconstitutionality of the bill, noting that the proposed Act "descends into the detailed regulation of all aspects of trading in securities, a matter that has long been viewed as provincial",[51] it nonetheless pointed out that it was beyond doubt that "much of Canada's capital market is interprovincial and indeed international".[52] The court also appeared to be receptive to the arguments concerning the preservation of the integrity and financial stability of Canada's financial markets.[53] Should the project of a Canadian financial regulator be limited to such national issues, it would probably fall within the scope of the Trade and Commerce Clause of the Canadian Constitution.

In the EU context, the functioning and the establishment of the internal market is an objective of the EU for which the Union shall adopt "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States" (Article 114 TFEU). Therefore, unlike the commerce clause in the US and Canada, the movement towards a deeper integration of the market stems from federal legislative interventions. Arguably, there is a significant asymmetry between these two approaches regarding market integration and this will have an impact on how financial supervision is devised at the federal level.

[49] IOSCO By-Laws, Art. 30 (stipulating that "Associate members may attend and speak at meetings of the Presidents Committee").

[50] Factum of the Attorney General of Canada, above note 35, para. 98.

[51] Supreme Court of Canada, above note 14, para. 114.

[52] Id., para. 115.

[53] Id., paras. 114, 117.

In the US, as soon as an activity is regarded as "interstate commerce", the federal legislature has the choice not to preempt State law (which is still the case for insurance)[54] or to exercise its commerce power. In the latter case, the history of financial regulation in the US has proven that, through a "ratchet effect", the aforementioned power will be fully exercised at the federal level, from both institutional and normative standpoints, and without any delegation of authority to state level.

This is true for the Securities and Exchange Commission (SEC) established pursuant to the Securities Exchange Act of 1934 "in order to protect interstate commerce".[55] The same applies for the Commodity and Futures Trade Commission created in 1974.[56]

This clear separation of authority between the state and the federal levels is less obvious yet significant in the banking sector. The US "dual banking system" consists of two levels of governance under which commercial banks may be either federally or state chartered. In this respect, they are respectively designated "national banks" or "state banks".[57] National banks are subject to the supervision and control of federal banking agencies (Federal Reserve, FDIC and OCC). State banks can choose to become a member of the Federal Reserve System and are then regulated by the Federal Reserve and the FDIC. For state banks that do not join the Federal Reserve System, the FDIC acts a primary federal regulator. While state banks can be controlled at both the state and the federal levels, it must be stressed that state bank supervisors are not considered as agents responsible for implementing federal regulation.

As a result, in the US system, the implementation of federal financial regulation remains under the authority of federal agencies, which constitutes a significant difference from the EU system.

[54] See, above notes 20–22 (and accompanying text).

[55] Securities Exchange Act, Title I, Sect. 2. More precisely, the Act refers to transactions in securities that "(a) [. . .] are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce" (Securities Exchange Act of 1934, Title I, Sect. 2(1)).

[56] Commodity Exchange Act, Sect. 2(a)(1)(A).

[57] For an overview of the dual banking system, see Butler and Macey (1988) and Redford (1966).

3.3 The "Institutional Turn" of EU Financial Regulation

At the EU level, the approximation of laws is, pursuant to Article 114 TFEU, a means of achieving the establishment and the functioning of the internal market.[58] Therefore, all measures adopted under the aforementioned provision must be linked to this objective and, to this extent, Article 114 TFEU has a more substantive, rather than institutional, outreach. It does not prevent the establishment of an EU body, but such decision is subject to some conditions and limitations.[59] In its judgment concerning the establishment of the European Network and Information Security Agency, the CJEU declared that "the tasks conferred on such a body must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States"[60] and that it is the case "where the [EU] body thus established provides services to national authorities and/or operators which affect the homogenous implementation of harmonising instruments and which are likely to facilitate their application".[61] It is noteworthy to mention that, despite these stringent safeguards developed in the case law of the CJEU, some Member States have been reluctant to admit the institutional outreach of Article 114 TFEU. This is particularly the case of the United Kingdom, which argued in the aforementioned case that "[t]he power conferred on the [EU] legislature by Article [114 TFEU] is the power to harmonise national laws and not one which is aimed at setting up [EU] bodies and conferring tasks upon such bodies".[62]

It is within this framework that, following the Lamfalussy Report,[63] the EU established in 2001 the European Securities Committee whose role was, pursuant to Art. 2 of Commission Decision 2001/528/EC, "to advise the Commission on policy issues as well as on draft legislative proposals the Commission might adopt in the field of securities".[64] This procedure was later extended with the establishment of new committees in the fields of banking[65] as well as insurance and pensions.[66] It

[58] It is noteworthy to mention that the process of approximation of laws is not fully transposable in US law under the commerce clause system since "federal commerce legislation cannot require state legislatures to adopt 'harmonized' state laws" (Schütze 2014, p. 232) (referring to *New York v. United States*, 505 U.S. 144 (1992)).

[59] On this issue, see Van Cleynenbreugel (2014), p. 104 et seq.

[60] CJEU, 2 May 2006, United Kingdom v Parliament and Council, C-217/04, I-3789, para. 45.

[61] Id.

[62] Id., para 11. See also, CJEU, 6 Dec 2005, United Kingdom v Parliament and Council, C-66/04, I-10553, para. 18.

[63] Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, above note 31.

[64] Commission Decision 2001/528/EC *establishing the European Securities Committee*, O.J. L 191/45 (2001).

[65] Commission Decision 2004/10/EC *establishing the European Banking Committee*, O.J. L 3/36 (2004).

[66] Commission Decision 2004/9/EC *establishing the European Insurance and Occupational Pensions Committee*, O.J. L 3/34 (2004).

must also be noted that, even established under EU law, those bodies were only composed of national regulators and their role was limited to assisting in the preparation and implementation of EU legislation.

The establishment of the European System of Financial Supervision (ESFS) after the 2008 financial crisis and following the recommendations of the De Larosière Report[67] undoubtedly constitutes an important step towards the institutionalization of financial supervision in the EU.[68] It is particularly the case of the three European Supervisory Authorities (ESAs) responsible for micro-prudential supervision: the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA), all established on the basis of Article 114 TFEU.[69] In their founding regulations, the main tasks of the ESAs focus mainly on the establishment of common regulatory standards, the consistent application of EU law, the conduct of peer-review analyses of Member States authorities, the monitoring of market developments and the monitoring of systemic risk.[70] Such tasks encompass both market integration and financial stability.[71] Their powers are broader than those vested in the Lamfalussy committees, but they cannot be regarded as genuine and fully-fledged EU financial regulators. While they can "take individual decisions addressed to competent authorities" in some circumstances (Art. 8(2)(e) of Regulations 1093/2010, 1094/2010 and 1095/2010),[72] they do not have direct supervisory authority over financial institutions like US financial regulators. It is only after a procedure establishing a failure to act on the part of a national authority, that the ESAs may "adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice" (Art. 17(6) of Regulations 1093/2010, 1094/2010 and 1095/2010).[73] The strict conditions under which the ESAs may exercise supervisory powers could explain why the issue of the appropriateness of Article 114 TFEU as the legal basis for their establishment has not been highly debated.[74]

However, recent developments indicate that Article 114 TFEU could constitute an adequate legal basis for further federal market supervision. For instance, Regulation 513/2011 has conferred to ESMA exclusive responsibility for the

[67] Report of the High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosière, Brussels, 25 Feb 2009, p. 42 et seq., http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf. Accessed 8 Sep 2015.

[68] Andenas and Chiu (2013), p. 339 et seq.

[69] See, Regulations 1093/2010, 1094/2010 and 1095/2010 of 24 November 2010 [establishing a European Banking Authority, a European Insurance and Occupational Pensions Authority and a European Securities and Markets Authority], O.J. L 331/12, L 331/48 and L 331/84 (2010).

[70] Tasks listed in Art. 8 of Regulations 1093/2010, 1094/2010 and 1095/2010 (above note 69).

[71] Andenas and Chiu (2013), p. 339.

[72] See above note 69.

[73] See above note 69.

[74] See, Opinion of Advocate General Jääskinen of 12 September 2013 in Case C-270/12, United Kingdom v Parliament and Council, paras. 27–34.

registration and supervision of credit rating agencies in the Union,[75] suggesting that, step by step, supervisory competences could be transferred from the national to the federal level. The CJEU has also recently considered that, for the purpose of preserving the "orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union",[76] the EU legislature can empower ESMA to adopt, in the case of emergency, decisions directed at certain participants in the financial markets "where there may be cross-border implications and competent national authorities have not taken sufficient measures to address the threat".[77] The court therefore acknowledges that the overarching objective of financial stability stretches the limits of Article 114 TFEU and enables a form of "authorification"[78] in the field of financial supervision and regulation.

As a result, it is still true that national supervisory authorities are an important and necessary component of the implementation and enforcement of EU legislation, but recent developments suggest that new prerogatives will be gradually transferred to the ESAs, thereby meaning that more supervision will be exercised at the federal level. Though this constitutes a point of convergence with the US system, there are still significant differences between the structures of financial supervision in the EU and the US. Moreover, it must be kept in mind that national regulators sit on the Board of Supervisors of the ESAs (Art. 40(1)(b) of Regulations 1093/2010, 1094/2010 and 1095/2010)[79] while, by contrast, state regulators in the US do not participate in the governance of US federal agencies.[80] This specific feature of "hybridisation of federal supervision" in the EU also exists in the newly established Banking Union.

4 Beyond the Internal Market: The Federal Challenges Faced by the EU Banking Union Through the Lens of US Federalism

The establishment of the ESFS has its origins in the 2008 financial crisis, but the financial crisis later turned into a sovereign debt crisis for some euro area Member States, significantly impacting the economy as a whole. Within this framework, several initiatives have been undertaken to strengthen the economic governance of the Eurozone and improve its credibility[81]: a European Stability Mechanism (ESM)

[75] Regulation 513/2011 of 11 May 2011 *Amending Regulation 1060/2009 on Credit Rating Agencies*, O.J. L 145/30 (2011).

[76] CJEU, 22 January 2014, United Kingdom v Parliament and Council, C-270/12, para. 115.

[77] Id. See also, paras. 97–119.

[78] Lo Schiavo (2013), p. 300.

[79] See above note 69.

[80] See Bismuth (2011), pp. 152–153.

[81] Tuori and Tuori (2014), p. 85 *et seq*.

providing financial assistance to ESM Member States experiencing financing problems,[82] a "Fiscal Compact" aimed at strengthening fiscal discipline within the euro area[83] (both established under two distinct treaties), as well as a Banking Union with the objective to restore financial stability in the euro area and "to break the vicious circle between banks and sovereigns".[84]

This vicious circle stems from the fact that the bailout of the banking sector transfers private debt to sovereign debt, thereby weakening national finances and the fiscal position of governments and thus depreciating the value of sovereign debt held by banks.[85] Furthermore, a Banking Union is all the more necessary in the EU where bank financing of the real economy is prevalent (about two-thirds of firms' external financing while it represents one third in the US)[86] and where the fragmentation of the banking system impair a smooth transmission of monetary policy.[87]

4.1 A Banking Union Sitting Astride Between the Internal Market and the EMU

The Banking Union is mainly composed of two mechanisms: a Single Supervisory Mechanism (SSM) transferring a substantial part of banking supervision from national supervisors to the ECB, and a Single Resolution Mechanism (SRM) aimed at establishing an orderly resolution of failing banks. Both mechanisms are mandatory for all euro area Member States and are only applicable to other Member States on a voluntary basis.[88] It is clear that the euro area forms the hard core of the Banking Union which, according to the "Four Presidents' report", has been devised in order to complete the EMU.[89]

[82] Treaty establishing the European Stability Mechanism, 2 Feb 2012.

[83] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012.

[84] Euro Area Summit Statement, D/12/7, Brussels, 29 Jun 2012.

[85] For a brilliant overview of the economic and political underpinnings of the Banking Union, see Geeroms and Karbownik (2014).

[86] Draghi (2013). See also Geeroms and Karbownik (2014), p. 219 et seq.

[87] Elliot (2012), p. 6 et seq. and Brescia Morra (2014), p. 2.

[88] Art. 2(1) of Regulation 1024/2013 (above note 19), Art. 4(1) of Regulation 806/2014 *establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund*, O.J. L 225/1 (2014).

[89] Van Rompuy H, Towards a genuine economic and monetary union (in close collaboration with Barroso J M, Juncker J-C, Draghi M) 5 Dec 2012, http://www.consilium.europa.eu/en/workarea/downloadAsset.aspx?id=17415. Accessed 8 Sep 2015. See also Draghi (2013) (pointing out that the Banking Union "is a consequence of the monetary union").

The SSM and the SRM are founded on two different legal bases: Article 127 (6) TFEU for the SSM (power to confer supervisory functions to the ECB) and Article 114 TFEU for the SRM (establishment and functioning of the internal market).[90] This might give the impression that the Banking Union is disunited in its own legal foundations since its inception. It is also important to notice that a framework dedicated to the better integration of the EMU overlaps with the broader issue of the internal market. Indeed, the European Commission adopted a rather contrasted view regarding the interplay between the Banking Union and the internal market. While claiming that "[t]he single market and the Banking Union are thus mutually reinforcing processes",[91] it added that "[t]he creation of the Banking Union must not compromise the unity and integrity of the single market which remains one of the greatest achievements of European integration".[92]

4.2 The Potential Disruptive Effects of the Banking Union on the Functioning of the Internal Market

The establishment of the Banking Union has prompted critical reactions from some Member States. In particular, the United Kingdom has opted to remain outside the supervisory mechanism of the Banking Union pursuant to the rules applicable to non-euro area Member States. Sweden, Denmark and the Czech Republic have also chosen not to participate in the SSM.

The UK expressed concern about the potential collateral damage caused by a greater integration of the euro area. According to the British government, the Banking Union is likely to lead to a "marginalisation of non-euro area interests"[93] and results in measures that fail to respect their rights and interests. To this extent, the Banking Union could have "the effect of creating a single market within the Single Market".[94] This is why non-participating Member States have called for—

[90] Art. 127(6) TFEU provides: "[t]he Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings". For Art. 114.1 TFEU, see above note 7.

[91] European Commission, A Roadmap Towards the Banking Union. Communication from the Commission to the European Parliament and the Council. COM(2012)510, 12 Sep 2010, p. 4.

[92] Id.

[93] HM Government, Review of the Balance of Competences between the United Kingdom and the European Union—Economic and Monetary Policy, Summer 2014, p. 108.

[94] Id., p. 109.

and have secured—the adoption of measures of protection "against the risk that the members of the Banking Union ignore the interests of the Single Market".[95]

The issue raised by the UK highlights a distinctive feature of the EU compared to the US. In the US system, the monetary area coincides with the economic zone of the common market. In the EU, the economic space of the internal market includes, but does not coincide with, the euro monetary area and the area of the Banking Union. Within this framework, regulations adopted under the auspices of the Banking Union affecting the provision of banking services among participating Member States are likely to interfere with the unity and the integrity of the internal market. To this extent, a deeper economic and monetary union might eventually conflict with the integration of the internal market. It is for this reason that Regulation 1024/2013 establishing the SSM explicitly provides that the supervisory function of the ECB shall be exercised "with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage" (Article 1 § 1). Furthermore, the same regulation establishes a review mechanism stating that the European Commission shall publish a report "with a special emphasis on monitoring the potential impact on the smooth functioning of the internal market" (Article 32).

Another question might also be asked as to whether the optional character of the Banking Union for non-euro area Member States affects the validity of the legal basis of Regulation 806/2014 establishing the SRM (Article 114 TFEU). As long as this mechanism is not binding on all EU Member States, is it still possible to argue that it contributes to the completion of the internal market? A similar question had been raised before the Supreme Court of Canada when it examined the constitutionality of the Canadian Securities Act. The proposed legislation intended to establish a federal regime of securities regulation the provinces were free to join. While discussing the appropriateness of this voluntary mechanism under the Trade and Commerce Clause, the court identified an apparent contradiction between the optional nature of the federal regime and its truly national objectives (particularly the integrity and financial stability of Canada's financial markets) insofar as the achievement of these objectives could be jeopardized by the non-participation of one or more provinces.[96] An analogy can easily be drawn with the apparent inconsistency between the voluntary basis of the Banking Union allowing for the non-participation of non-euro area Member States and the objective of the proper functioning of the internal market.

[95] HM Government, Review of the Balance of Competences between the United Kingdom and the European Union—Economic and Monetary Policy, December 2014, p. 47 (pointing out the following measures of protection that have been adopted: prohibition of discrimination by the ECB; requirement by the ECB to enter into a memorandum of understanding with supervisory authorities of non-participating Member States; voting safeguards in the EBA to address the risk that Banking Union members vote as a bloc; and a requirement for EBA members to strive for consensus).

[96] Supreme Court of Canada, above note 14, para. 123.

4.3 Towards a Complex "Triple Banking System" in the EU?

The Banking Union also poses certain problems as to its complexity. First, under the SSM, a distinction exists between "significant" and "less significant" banks (Regulation 1024/2013, Article 6), the former being directly supervised by the ECB and the latter by the national competent authority.[97] This structure resembles the "dual banking system" in the US where commercial banks can be chartered at the state level (state banks) or the federal one (national banks),[98] a system that has already been criticized by the International Monetary Fund (IMF) for its overall complex institutional structure gathering together 50 State banking authorities coexisting and sometimes competing with federal agencies.[99]

Second, it must be noted that, beyond the distinction between "significant" and "less significant" banks within the Banking Union, there is a third category: the bank (significant or not) already supervised by a national regulator of an EU Member State having chosen to remain outside the Banking Union. The national regulator is therefore in the position to apply EU regulations also applied by the ECB, a situation that might lead to inconsistencies and adversely affect the uniform application of EU law. In the US dual banking system, the State banking authority does not have the responsibility of applying federal regulations, thereby ensuring the consistent application of federal banking regulations by federal agencies.[100] Consequently, the EU Banking Union could eventually lead to a "triple banking system" even more complex, entangled and multi-layered than the system currently in place in the US.

[97] See, generally, ECB, Guide to Banking Supervision, November 2014, https://www.ecb.europa.eu/pub/pdf/other/ssmguidebankingsupervision201411.en.pdf. Accessed 8 Sep 2015.

[98] See above note 57 and accompanying text.

[99] IMF, United States—Publication of Financial Sector Assessment Program Documentation—Financial System Stability Assessment, IMF Country Report No. 10/247, July 2010 (noting that "[th]e complexity of the US supervisory system and the diffusion of powers across agencies undermined its efficiency, effectiveness, transparency, and accountability" (p. 7, para. 9) and that "the complex web of multiple federal and state authorities as having contributed to regulatory gaps and overlaps, as well as weaknesses in supervisory accountability" (p. 33, para. 54)). IMF, United States—Financial Sector Assessment Program—Detailed Assessment of Observance of the Basel Core Principles for Effective Banking Supervision, IMF Country Report No. 15/89 ("pointing out that "[t]he dual banking structure does pose a challenge for international cooperation, and state banking agencies with Foreign Banking Organization (FBO) presence do not always inform or coordinate enforcement actions with home supervisors" (p. 6, para. 7)). See also Felsenfeld and Glass (2011), p. 45 et seq. and Singh (2007), p. 32 et seq.

[100] It must be reminded that in the US banking system, State banks are subject to the supervision of a state supervisor and at least one federal authority (the Federal Reserve and/or the FDIC) (See above note 57 and accompanying text).

5 Conclusion

A comparative study of the federalisation of institutional structures for financial supervision in the US and EU highlights significant differences between the two federal systems that are originally based on two rather similar constitutional bases of federal competence: regulating interstate commerce in the US, establishing or ensuring the functioning of the internal market in the EU. In the US system, the application of federal legislation remains under the authority of federal agencies and is not delegated to state level. To this extent, there is an alignment between the normative and the institutional perspectives. In the EU, the application of EU legislation in the field of financial regulation has primarily rested with national authorities. It is only after the global financial crisis of 2008 that the EU legislature has more recently transferred supervisory powers to the ESAs, thereby highlighting a process of "authorification" of the internal market.

An important leap has been achieved with the establishment of the Banking Union and more particularly with the SSM transferring significant supervisory powers to the ECB. However, the Banking Union, while mandatory for euro area Member States, remains optional for other EU countries. This architecture is likely to make financial supervision in the EU even more complex and multi-layered, but may also cause interference with the functioning of the internal market.

In the exordium of his aforementioned speech at Harvard University, Mario Draghi described recent EMU and EU financial reforms as a process of creating a "more perfect union" (Preamble of the US Constitution) instead of referring to the "process of creating an even closer union" (TEU, Article 1(2)). However, he declared in his peroration that these accomplishments show "the commitment of European nations to closer integration".[101] In light of recent EMU and EU financial reforms, it is certainly, indeed, a closer integration for the EMU, but probably not a "more perfect union" for the EU.

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