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SUPERVISORY COLLEGES: THE GLOBAL FINANCIAL CRISIS AND IMPROVING INTERNATIONAL SUPERVISORY COORDINATION

Duncan Alford*

While the current financial crisis began in the United States, the crisis quickly spread globally, causing decreases in gross domestic product and employment levels around the world.¹ The crisis has revealed numerous weaknesses in the supervision and regulation of global banks and financial institutions generally.² National governments and international bodies also recognized these weaknesses in the supervisory system of global financial institutions and have begun to take steps to improve the system with the hope of avoiding, or at least mitigating, future financial crises.³ One such weakness has been the ineffective supervisory cooperation among national bank supervisors related to cross-border financial institutions.⁴ As a result, several international governmental organizations, national governments, and commentators⁵ have called for the use of colleges of supervisors to supervise

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¹ See Edward Hadas, *Is the Crisis Over?*, N.Y. TIMES, Apr. 22, 2009, at B2.

² See Ben Bernanke, Chairman, Fed. Reserve, Financial Regulation and Supervision After the Crisis: The Role of the Federal Reserve (Oct. 23, 2009), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20091023a.htm>.

³ *Id.*

⁴ See Tom de Swaan, *The Changing Role of Banking Supervision*, FRBNY ECON. POL'Y REV., Oct. 2000, at 75, 77–79.

⁵ In a recent report, the International Monetary Fund (“IMF”) encouraged the development of colleges of supervisors regulating internationally active banks and suggested that these colleges be more inclusive to avoid protectionist tendencies. Int’l Monetary Fund, Strategy, Policy & Review Dep’t, Initial Lessons of the Crisis for the Global Architecture and the IMF 10 (Feb. 18, 2009), available at <http://www.imf.org/external/np/pp/eng/2009/021809.pdf>. Ultimately, the IMF recommended a binding code of conduct for global banks but recognized that this code is a political solution beyond the capacities of regulators or supervisors alone to create. *Id.* The Financial Services Authority (“FSA”) of the United Kingdom recently reviewed the causes of the current financial crisis and made wide-ranging policy recommendations to improve financial regulation in the United Kingdom, the European Union (“EU”), and globally. FIN. SERVS. AUTH., TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS (2009), available at http://www.fsa.gov.uk/pubs/other/turner_review.pdf. In its March 2009 report, the FSA also recommended the use of colleges of regulators as an improvement to the current system but noted that their benefit may be limited. *Id.* at 97.

The Group of Thirty in its 2009 report, *Financial Reform: A Framework for Financial Stability*, stressed the need for national regulators to enhance existing mechanisms for international regulatory and supervisory coordination. The report also mentioned the need for more formal regional mechanisms such as in

global financial institutions, in particular, those systemically important financial institutions that have been the recipients of government financial support during the crisis.⁶ As French President Nicholas Sarkozy and British Prime Minister Gordon Brown noted recently, “[b]etter regulation and supervision are the means by which the risk to the taxpayer can be reduced for the longer term.”⁷

This Article explores one tool used to improve the international legal framework for financial supervision—the college of supervisors or supervisory colleges for systemically important financial institutions. These ad hoc groups are intended to improve the exchange of information among supervisors with the goal of ensuring safe and sound banking practices, reducing the possibility of governmental assistance to financial institutions, and building confidence generally in the international financial system.⁸ The hope is that these colleges, which meet on a regular basis to discuss the supervision of a particular financial institution, will identify issues or problems early and can then address them quickly and reduce the risk of a bail out or bank failure.⁹

The G-20 and the European Union (“EU”) have been particularly active in developing these colleges and codifying best practices for their operation. This Article explores their recent actions and suggests that the colleges are a step toward further global supervision of financial institutions with cross-border operations. However, colleges of supervisors are a limited, incomplete response to the inadequate coordination of supervision of global financial institutions. International supervisory coordination is necessarily hindered because each national supervisor will strive to minimize its use of taxpayer resources to cover any losses from bank failures. An international regime for the orderly winding up of insolvent banks is a necessary component of truly effective international supervisory coordination.

the EU. THE GROUP OF THIRTY, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY 11–12 (2009), available at <http://www.group30.org/pubs/recommendations.pdf>. In a 2008 report, *The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace*, the Group of Thirty noted that colleges of regulators “may indeed be good fora for more formalized information exchanges and cooperation between home and host supervisors.” THE GROUP OF THIRTY, THE STRUCTURE OF FINANCIAL SUPERVISION: APPROACHES AND CHALLENGES IN A GLOBAL MARKETPLACE 48 (2008).

⁶ FIN. SERVS. AUTH., *supra* note 5, at 98–99.

⁷ Gordon Brown & Nicolas Sarkozy, *For Global Finance, Global Regulation*, WALL ST. J., Dec. 10, 2009, at A25.

⁸ See FIN. SERVS. AUTH., *supra* note 5, at 98.

⁹ *Id.* at 99.

I. INAUSPICIOUS BEGINNINGS FOR COLLEGES OF SUPERVISORS—BANK OF CREDIT AND COMMERCE INTERNATIONAL

Supervisory colleges were not first created as a result of the current financial crisis. Financial supervisors have previously formed these groups to monitor financial institutions with cross-border operations.¹⁰ In the late 1980s, a college of supervisors, including supervisory authorities from the United Kingdom, Luxembourg, and other European nations, supervised the Bank of Credit and Commerce International (“BCCI”), a bank with operations in several dozen countries.¹¹ However, this college proved ineffective as the bank was ultimately liquidated because of internal fraudulent activities.¹²

In a coordinated action on July 5, 1991, regulators in eight nations closed all the BCCI branches located within their jurisdictions.¹³ At the time BCCI had total assets of approximately \$20 billion and was operating in sixty-nine countries, with the largest concentration of its deposits in the United Kingdom.¹⁴ Due to the absence of any international law governing the closure of an international bank, local regulators acted under separate national laws.¹⁵ By July 6, 1991, BCCI offices in eighteen countries either were closed or their operations were restricted.¹⁶ The closure of BCCI branches continued for several weeks, and by July 29, 1991, forty-four jurisdictions had closed BCCI offices located within their borders.¹⁷ The immediate reason for the closure of BCCI was the Bank of England’s receipt of a June 1991 report prepared by Price Waterhouse, the international accounting firm, which detailed massive fraud committed by BCCI’s senior managers.¹⁸

¹⁰ See *id.* at 97.

¹¹ AUSTIN MITCHELL ET AL., THE BCCI COVER-UP 28 (2001), available at <http://visar.csustan.edu/aaba/BCCICOVERUP.pdf>.

¹² Duncan Alford, *Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI*, 26 GEO. WASH. J. INT’L. & ECON. 241, 259 (1992).

¹³ *Id.* at 258.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 258–59.

¹⁷ *Id.* at 259.

¹⁸ *Id.* Through the mid-1980s, the treasury operations of BCCI suffered huge losses. *Id.* Senior managers siphoned off deposits to cover these losses. If the depositors withdrew their money, then other deposits were diverted to cover the losses. *Id.* This practice resulted in an endless series of fraudulent transactions. *Id.* The report revealed that senior managers, board members, and representatives of major shareholders participated in the fraud by making fictitious loans, failing to record deposits, and dealing in their own shares in order to manufacture profits. *Id.* BCCI also used client names to trade on its own account. *Id.* BCCI managers hid the losses caused by bad trades, unpaid loans, and fraudulent practices by shuttling assets between subsidiaries. *Id.* In 1988 alone, BCCI subsidiaries paid each other \$152 million in fee income. *Id.* Price Waterhouse is the

Regulators in both the United States and England had been concerned about the safety and soundness of BCCI for years before the bank was finally closed.¹⁹ In February 1990, Price Waterhouse, BCCI's auditor, refused to sign off on the BCCI financial statements for 1989 and subsequently reported to the BCCI board and the Bank of England its concerns of fraud at BCCI.²⁰ In April 1990, the Bank of England permitted the government of Abu Dhabi to increase its investment in BCCI—in effect to bail out the bank.²¹ Six months later, in October 1990, Price Waterhouse delivered to the BCCI board a follow-up to its April report, detailing the bank's massive loan problems.²²

To compensate for the lack of supervisory resources over BCCI, bank regulators from the Cayman Islands, France, Hong Kong, Luxembourg, Spain, Switzerland, the United Arab Emirates, and the United Kingdom created a college of supervisors in 1987 to coordinate their regulatory efforts over BCCI.²³ In the end, this scheme was an unworkable solution and allowed supervisors to shift responsibility for any BCCI transgression among themselves.²⁴ No single supervisor had any incentive to supervise BCCI properly, and the supervisors did not cooperate adequately among themselves in sharing information on BCCI operations.²⁵ In a 2004 speech, Callum McCarthy, then head of the Financial Services Authority (“FSA”), concluded that “in some cases the resources [of a supervisor] are simply not up to the task of acting as a home regulator for a large group[,]” and in the case of BCCI, “the resources then available in Luxembourg[,]” the home regulator, were not sufficient.²⁶

predecessor accounting firm to the current Big Four accounting firm, PricewaterhouseCoopers. Press Release, Sec. & Exch. Comm'n, Donald Nicoliasen Named SEC Chief Accountant (Aug. 14, 2003), <http://www.sec.gov/news/press/2003-97.htm>.

¹⁹ Alford, *supra* note 12, at 259. BCCI pleaded guilty in 1988 to charges of money laundering in Tampa, Florida. *Id.* at 259–60. On June 12, 1989, the Federal Reserve Board (“FRB”) issued a cease and desist order requiring BCCI to strengthen its U.S. operations and to comply with currency reporting regulations. *Id.* at 260. The FRB issued a second cease and desist order against BCCI on March 4, 1991, ordering it to strengthen the funding of its U.S. agency offices. *Id.* at 259.

²⁰ *Id.* at 260.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 264.

²⁴ *Id.*

²⁵ *See id.* at 263–64.

²⁶ Callum McCarthy, Chairman, Fin. Serv. Auth., How Should International Financial Service Companies Be Regulated? ¶ 13 (Sept. 22, 2004), *available at* <http://www.fsa.gov.uk/Pages/Library/Communication/Speeches/2004/SP196.shtml>.

Following the failure of BCCI in 1991, European bank regulators recognized the need to improve cooperation among supervisors of global banks.²⁷ Ad hoc arrangements—colleges of supervisors—were created as the need arose to supervise banks with cross-border operations.²⁸ A college of supervisors was created to exchange information related to Citigroup, Deutsche Bank, and HSBC.²⁹ The Federal Reserve Bank of New York is the lead supervisor of Citigroup; the Federal Financial Supervisory Authority (“BaFin”) in Germany takes the lead on Deutsche Bank; and the FSA in the United Kingdom is the lead supervisor of HSBC.³⁰ Supervisory authorities from the United Kingdom, the United States, France, Canada, Hong Kong, and Switzerland meet regularly to share information on HSBC.³¹ Every six months, the Federal Reserve, the FSA, and the Swiss Banking Commission meet to discuss the operations of UBS and Credit Suisse.³²

II. THE EUROPEAN UNION AND COLLEGES OF SUPERVISORS

Even before the current crisis, supervisory authorities were utilizing colleges as a tool to share prudential information on financial institutions with cross-border operations.³³ The EU has been particularly active in utilizing colleges to supervise financial institutions operating in multiple member states.³⁴

The Committee of European Banking Supervisors (“CEBS”)³⁵ consists of the bank supervisory authorities of the EU member states and has the objective to “foster supervisory convergence across the Community.”³⁶ In furtherance of this objective, CEBS has been active in supporting the development of colleges of supervisors of cross-border banks within the EU.³⁷ In December 2007,

²⁷ See Alford, *supra* note 12, at 266.

²⁸ Comm. of European Banking Supervisors, *Range of Practices on Supervisory Colleges and Home-Host Cooperation* ¶ I (Dec. 27, 2007), available at [http://www.c-ebs.org/getdoc/93f97617-da1f-4d96-8248-b214e231c28c/CEBS-2007-75-\(Range-of-practices\)-final-\(1\).aspx](http://www.c-ebs.org/getdoc/93f97617-da1f-4d96-8248-b214e231c28c/CEBS-2007-75-(Range-of-practices)-final-(1).aspx) [hereinafter CEBS, *Range of Practices*].

²⁹ See McCarthy, *supra* note 26, ¶ 5.

³⁰ *Id.* ¶ 8.

³¹ *Id.* ¶ 24.

³² *Id.*

³³ See generally CEBS, *Range of Practices*, *supra* note 28.

³⁴ See generally *id.*

³⁵ See generally Duncan E. Alford, *The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan-European Regulation?*, 25 ANN. REV. BANKING & FIN. L. 389, 405–06 (2006).

³⁶ Commission Decision 2009/78, Establishing the Committee of European Bank Supervisors, pmbl., ¶ 13, 2009 O.J. (L 25) 23, 23–24.

³⁷ See CEBS, *Range of Practices*, *supra* note 28, ¶ III.

CEBS issued two documents, *Range of Practices on Supervisory Colleges and Home-Host Cooperation*³⁸ and *Template for a Multilateral Cooperation Coordination Agreement on the Supervision of XY Group*,³⁹ that provided non-binding guidelines on the operation of colleges of supervisors.

The financial crisis has focused renewed attention on colleges of supervisors as one of several tools to reduce risk within the international financial system. CEBS updated both documents in January 2009 and provided more specific detail on the operation of the college of supervisors.⁴⁰ In its *Colleges of Supervisors—10 Common Principles*,⁴¹ CEBS provides that a college of supervisors shall supervise any cross-border insurance group, banking group, or financial conglomerate.⁴² The colleges—flexible, permanent fora for cooperation and coordination among financial supervisory authorities—shall have agreements in place describing the cooperation between the supervisors and the practical organization of the supervisory activities of the financial institution.⁴³ For banking groups, the consolidating supervisor, as defined in the amended Capital Requirements Directive (“CRD”), shall initiate the cooperation process.⁴⁴ The colleges shall also promote harmonization of supervisory approaches and coordinate all major supervisory decisions.⁴⁵ In addition, the colleges shall plan and coordinate

³⁸ *Id.*

³⁹ Comm. of European Banking Supervisors, *Template for a Multilateral Cooperation and Coordination Agreement on the Supervision of XY Group* (Dec. 27, 2007), available at [http://www.c-ebs.org/getdoc/0cb8e434-764d-4530-9b09-a23b5bd25f99/CEBS-2007-177-rev-2-template-for-written-agre-\(1\).aspx](http://www.c-ebs.org/getdoc/0cb8e434-764d-4530-9b09-a23b5bd25f99/CEBS-2007-177-rev-2-template-for-written-agre-(1).aspx) [hereinafter CEBS, 2007 *Template*]. The *Template* document was a form agreement, to be signed among supervisors, regarding the organization of the colleges and setting forth how the supervisors will interact with one another in supervising a particular bank. *Id.* ¶¶ 6–7. The agreement goes into detail about the exchange of information and communication within the group and sets forth responsibilities of each of the regulators who are a party to the agreement. *Id.*

⁴⁰ See generally Comm. of European Banking Supervisors, *Template for a Multilateral Cooperation and Coordination Agreement on the Supervision of XY Group* (Jan. 27, 2009), available at <http://www.c-ebs.org/getdoc/aaafdb97-f131-4af6-96b5-34720c1bd2ad/CEBS-2007-177-rev-4-template-for-written-agreement.aspx> [hereinafter CEBS, 2009 *Template*].

⁴¹ Comm. of European Banking Supervisors, Comm. of European Ins. and Occupational Pensions Supervisors & the Interim Working Committee on Fin. Conglomerates, *Colleges of Supervisors—10 Common Principles* ¶1 (Jan. 27, 2009), available at <http://www.c-ebs.org/getdoc/aecaf1a-81b5-476a-95dd-599c5e967697/Clean-V3-formatted-CEBS-2008-124-CEIOPS-SEC-08-54-.aspx-2008-124-CEIOPS-SEC-08-54-.aspx>.

⁴² *Id.* ¶ 2, princ. 1.

⁴³ *Id.* ¶ 2, princs. 2, 5.

⁴⁴ *Id.* ¶ 2, princ. 6.

⁴⁵ *Id.* ¶ 2, princ. 8.

supervisory, on-site inspections and share the findings from such visits with other members of the college.⁴⁶

While not significantly different from the 2007 version, the 2009 *Template for a Multilateral Cooperation Coordination Agreement* removes some discretion given to the supervisor under the earlier agreement and requires supervisors to cooperate more fully with their peers in the supervision of cross-border banks.⁴⁷ For instance, the new agreement adds a provision stating, “Should the authorities in a College not reach an agreement, as foreseen by the CRD the matter may be referred for mediation to the Committee of European Banking Supervisors”⁴⁸ In Section 7.2, which deals with information sharing, the 2009 agreement deleted language that defined expectations of timeliness.⁴⁹ This change could be interpreted as not requiring timely responses to requests for information.⁵⁰

In January 2009, the European Commission arrived at a decision that further strengthened CEBS’s supervisory cooperation role in reconstituting CEBS.⁵¹ The 2009 decision established that the Committee shall “mediate or facilitate mediation between supervisory authorities in cases specified in the relevant legislation or at the request of a supervisory authority.”⁵² Under this provision, CEBS is authorized to mediate between supervisors—authority it did not have under the 2004 decision originally creating CEBS.⁵³ Previously, colleges of supervisors made all decisions by consensus and had no mechanism to resolve conflicts other than by negotiation and mutual cooperation.⁵⁴ At least with respect to supervisory authorities within the EU, the 2009 decision allowed CEBS to mediate these disputes.⁵⁵ This decision also specifically required CEBS to “contribute to ensuring the efficient and consistent functioning of colleges of supervisors in particular through setting guidelines

⁴⁶ *Id.* ¶ 2, princ. 9.

⁴⁷ Compare CEBS, 2007 *Template*, *supra* note 39, ¶¶ 6, 6.1, with CEBS, 2009 *Template*, *supra* note 40, ¶¶ 6, 6.1.

⁴⁸ CEBS, 2009 *Template*, *supra* note 40, ¶ 6.1(26).

⁴⁹ Compare CEBS, 2007 *Template*, *supra* note 39, ¶ 7.2(56), with CEBS, 2009 *Template*, *supra* note 40, ¶ 7.2.

⁵⁰ Cf. CEBS, 2009 *Template*, *supra* note 40, ¶ 7.2 (omitting any reference to timeliness).

⁵¹ See generally Commission Decision 2009/78, *supra* note 36. This 2009 decision repealed the 2004 decision initially establishing the Committee of European Banks Supervisors (“CEBS”). *Id.* at 25.

⁵² *Id.* art. 4(1).

⁵³ Compare *id.*, with Commission Decision 2004/10, Establishing the Committee of European Banking Supervisors, 2004 O.J. (L 3) 28 (EC).

⁵⁴ See CEBS, 2007 *Template*, *supra* note 39, ¶ 4.

⁵⁵ Commission Decision 2009/78, *supra* note 36, art. 4(1)(a).

for the operational functioning of colleges, monitoring the coherence of the practices of different colleges and sharing best practices.”⁵⁶ Now, CEBS is authorized to ensure that colleges of supervisors apply EU law, implement measures consistently across financial institutions, and ensure that cross-border banks are supervised consistently by colleges of supervisors with varying membership.⁵⁷

The EU has taken additional steps to buttress colleges as a supervisory tool.⁵⁸ In several EU directives, the EU institutionalized greater cooperation among supervisors monitoring cross-border banks.⁵⁹ With the adoption of the Basel II directive dealing with capital requirements of credit institutions,⁶⁰ the EU specifically created rules dealing with cooperation among supervisors of cross-border banks operating in the EU.⁶¹ In its proposal for Basel II,⁶² the European Commission noted that the establishment of colleges of supervisors would “facilitate the tasks of the consolidating supervisor and the host supervisors.”⁶³ Chapter 4 (Articles 124 through 144) of this directive provides rules to determine which supervisor, also known as the lead supervisor, exercises consolidated supervision over the cross-border bank.⁶⁴ Within Chapter 4, Articles 125 and 126 set forth detailed rules identifying the lead supervisor, depending on the structure of the credit institution and its relationship to any parent financial holding company.⁶⁵ The membership of the college includes supervisors from all EU member states where the credit institution has a subsidiary.⁶⁶ Article 126(3)–(4) provides that supervisors may waive these rules, appoint a lead supervisor selected among themselves to

⁵⁶ *Id.* art. 4(1)(c).

⁵⁷ CEBS, *2007 Template*, *supra* note 39, ¶¶ 5(21), 7.3(58). On December 17, 2009, CEBS issued a consultation paper on guidelines for the operational functioning of colleges of supervisors. *See* CEBS, Consultation Paper on CEBS’s Guidelines for the Operational Functioning of Colleges (Dec. 17, 2009), available at <http://www.c-ebs.org/documents/Publications/Consultation-papers/2009/CP34/CP34.aspx> [hereinafter CEBS Consultation Paper].

⁵⁸ *See, e.g.*, Council Directive 2006/48, 2006 O.J. (L 177) 1 (EC).

⁵⁹ *See id.*; Council Directive 2006/49, 2006 O.J. (L 177) 201 (EC).

⁶⁰ BASEL COMMITTEE ON BANKING SUPERVISORS, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT: CAPITAL STANDARDS: A REVISED FRAMEWORK 12–14 (2004) [hereinafter BASEL II].

⁶¹ *Id.* at 168–69.

⁶² Proposal for a Directive of the European Parliament and of the Council Amending Directives 2006/48/EC and 2006/49/EC as Regards Banks Affiliated to Central Institutions, Certain Own Funds Items, Large Exposures, Supervisory Arrangements, and Crisis Management, at 3, COM (2008) 602, available at http://ec.europa.eu/internal_market/bank/docs/regcapital/crd_proposal_en.pdf.

⁶³ *Id.* at 9.

⁶⁴ Council Directive 2006/48, *supra* note 58, arts. 124–44.

⁶⁵ *Id.* arts. 125–26.

⁶⁶ *Id.* art. 131.

supervise the credit institution, and notify the Commission of such appointment.⁶⁷ In addition, Article 131 of the Third Capital Requirements Directive requires that supervisors “shall have written coordination, cooperation agreements in place.”⁶⁸ Within the EU, these colleges carry out the tasks set forth in the CRD and are generally limited to regulating capital requirements of financial institutions.⁶⁹ In practice, colleges of supervisors may expand their purview to include other supervisory matters.⁷⁰

One weakness of the college of supervisors, under these directives, is the lack of a mandatory mediation process if the supervisors cannot agree on an action with respect to the supervision of the financial institution.⁷¹ As seen in the current financial crisis, this lack of mediation allowed supervisors to act on their own and not in coordination with their peers.⁷² For example, in the fall 2008 rescue of Fortis, the financial group with investors in Belgium, the Netherlands, and Luxembourg,⁷³ the national supervisors struggled to coordinate their actions.⁷⁴ At first, the Benelux governments purchased 49% of the common equity of Fortis.⁷⁵ A few days later, the Dutch government seized the Dutch operations of Fortis, and the Belgian and Luxembourgian operations were sold to BNP Paribas, a private bank.⁷⁶ These events illustrate a lack of effective supervisory cooperation, particularly during times of crisis. Recognizing the weaknesses in the supervisory system highlighted by the

⁶⁷ *Id.* art. 126(3)–(4).

⁶⁸ *Id.* art. 131.

⁶⁹ *Id.* arts. 124–44.

⁷⁰ See CEBS Consultation Paper, *supra* note 57, at 3. The proposed guidelines describe activities of colleges that go beyond the regulation of capital and include analyzing macroprudential risks to the financial institution and developing a coordinated supervisory response in the event of an emergency. *Id.* at 6, 49–54.

⁷¹ See Council Directive 2006/48, *supra* note 58, arts. 124–44; Council Directive 2006/49, *supra* note 59.

⁷² See Nikki Tait & Jennifer Hughes, *Trichet Calls for Supervision of All Institutions*, FIN. TIMES, Feb. 24, 2009, at 7; Ulrich Volz, *Europe Needs a United Approach to the Credit Crunch*, WALL ST. J., Oct. 7, 2008, at A27.

⁷³ Press Release, Fortis, Governments of Belgium, Luxembourg, and the Netherlands Invest EUR 11.2 Billion in Fortis (Sept. 29, 2008), available at http://www.holding.fortis.com/Documents/UK_PR_Fortis_29092008.pdf.

⁷⁴ Tait & Hughes, *supra* note 72, at 7; Press Release, Fortis, Governments of Belgium, Luxembourg, and the Netherlands Invest EUR 11.2 Billion in Fortis, *supra* note 73.

⁷⁵ Press Release, Fortis, Governments of Belgium, Luxembourg, and the Netherlands Invest EUR 11.2 Billion in Fortis, *supra* note 73.

⁷⁶ Volz, *supra* note 72, at A27.

financial crises, the EU responded with legislative proposals to reform the system within the EU.⁷⁷

III. THE EUROPEAN UNION'S REFORM OF FINANCIAL SUPERVISION⁷⁸

On February 23, 2009, the High-Level Group of advisors, chaired by Jacques de Larosière, former Governor of the Banque de France, issued its report on the reform of the EU system of financial supervision, also known as the Larosière Report.⁷⁹ Appointed by José Manuel Barroso, the President of the European Commission, in the fall of 2008, the High-Level Group was charged with a broad mandate: “to make proposals to strengthen European supervisory arrangements covering all financial sectors, with the objective to establish a more efficient, integrated and sustainable European system of supervision.”⁸⁰ A complete analysis of this Report is beyond the scope of this Article, which will focus on the Report's recommendations related to supervisory cooperation within the EU. The Larosière Report recommended that the colleges of supervisors, introduced by the amended CRD and the then-proposed Solvency II Directive, should take the lead in supervising cross-border institutions.⁸¹ The Report went on to suggest that colleges of supervisors should be strengthened by “participation of representatives of the secretariat of the Level 3 committees as well as of [the European Central Bank and European System of Central Bank] observers.”⁸² The Larosière Report, in Recommendation 18, advised that “colleges of supervisors would be set up for all major cross-border institutions.”⁸³

⁷⁷ JACQUES DE LAROSIÈRE ET AL., THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU 15–27 (2009), available at http://ec.europa.eu/economy_finance/focuson/crisis/documents/de_larosiere_report_en.pdf [hereinafter LAROSIÈRE REPORT].

⁷⁸ A timeline of the current effort to reform the EU legal framework for financial supervision is attached as Annex A.

⁷⁹ LAROSIÈRE REPORT, *supra* note 77. This group held eleven public meetings and consulted widely to develop its thirty-one recommendations to improve financial services regulation within the EU. *Id.* at 19–68, 70.

⁸⁰ Press Release, 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>.

⁸¹ LAROSIÈRE REPORT, *supra* note 77, at 47. The Solvency II Directive was enacted later. Council Directive 2009/138, 2009 O.J. (L 335) 1 (EC).

⁸² LAROSIÈRE REPORT, *supra* note 77, at 47. The Level 3 committees refer to the CEBS, the Committee of European Securities Regulators (“CESR”), and the Committee of European Insurance and Occupational Pension Supervisors (“CEIOPS”). *Id.* at 70. These committees were set up under the Lamfalussy process to advise the Commission and its committees on implementing measures needed to effectuate financial regulation. See generally Alford, *supra* note 35, 397–406.

⁸³ LAROSIÈRE REPORT, *supra* note 77, at 48.

The Report also stated the “relatively restrictive use of supervisory colleges should be expanded immediately.”⁸⁴ The Report suggested that by the end of 2009, supervisory colleges should be established for all major cross-border firms within the EU,⁸⁵ estimated to be at least fifty financial institutions.⁸⁶ The Level 3 committees⁸⁷ would participate in this process by defining the final supervisory practices and arrangements for the functioning of the colleges of supervisors.⁸⁸ The clear intent of the Report is to expand the mandate of CEBS—to be more inclusive of the supervisory players and to broaden the tasks of colleges beyond those stated in the CRD. This recommendation is a logical precursor to the Report’s medium-term goal of creating a European System of Financial Supervisors (“ESFS”).⁸⁹ The ESFS would transform the Level 3 committees into three supervisory authorities, one for each financial sector: banking, securities, and insurance.⁹⁰ The authorities are tasked to ensure “consistency of prudential supervision”⁹¹ and to define “common supervisory practices and arrangements for the functioning of the colleges of supervisors.”⁹²

The European Council of the EU⁹³ took up the Larosière Report at its March 2009 meeting.⁹⁴ The European Council “agreed on the need to improve the regulation and supervision of financial institutions in the EU and that the Report from the High-Level Group on financial supervision chaired by Jacques de Larosière is the basis for action.”⁹⁵

⁸⁴ *Id.* at 51.

⁸⁵ *Id.*

⁸⁶ *Id.* at 51 n.13. See Annex B attached for a list of systemically important financial institutions that the Financial Stability Board purportedly compiled in November 2009.

⁸⁷ See *supra* note 82 and accompanying text.

⁸⁸ LAROSIÈRE REPORT, *supra* note 77, at 52. The Larosière Report envisioned that the Level 3 committees under the Lamfalussy process would eventually become European authorities or regulatory agencies—the European Banking Authority, the European Insurance Authority, and the European Securities Authority. *Id.* at 53, 55. See *supra* notes 35–46 and accompanying text for a discussion of the best practice documents issued by CEBS on the operation of colleges of supervisors.

⁸⁹ LAROSIÈRE REPORT, *supra* note 77, at 52–55.

⁹⁰ *Id.* at 55.

⁹¹ *Id.* at 53.

⁹² *Id.*

⁹³ The European Council, consisting of the heads of state of the member states of the EU, meets quarterly. The Institutions of the Union: The European Council, *available at* http://europa.eu/scadplus/constitution/european_council_en.htm (last visited Apr. 15, 2010).

⁹⁴ For a timeline of events, see Annex A.

⁹⁵ Presidency Conclusions, Brussels European Council (Mar. 20, 2009), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/106809.pdf.

In May 2009, the European Commission issued a communication describing its planned actions based on the Larosière Report,⁹⁶ calling for comments from interested parties during a consultation period, and setting forth a revision of the European supervisory structure based on two pillars: (1) the creation of a European Systemic Risk Council (“ESRC”) to deal with macroprudential supervision and (2) the creation of the ESFS to deal with microprudential supervision, that is, supervision of individual financial institutions.⁹⁷ The ESFS is charged with developing a “harmonized core set of standards”⁹⁸ and “a common supervisory culture.”⁹⁹ The Commission’s legislative proposals go beyond the framework developed at the G-20 summits discussed below and create an integrated financial supervisory structure within the EU.¹⁰⁰

The Commission stated that the current Level 3 committees must move beyond being advisory bodies and should become European supervisory authorities with legal personalities and additional powers and responsibilities.¹⁰¹ As part of the ESFS, the Commission proposed creating three new supervisory authorities—the European Banking Authority (“EBA”), the European Securities Authority (“ESA”), and the European Insurance and Occupational Pensions Authority (“EIOPA”).¹⁰² This Article focuses on the EBA. The additional powers given to the EBA include “develop[ing] binding technical standards,”¹⁰³ drafting “interpretative guidelines,”¹⁰⁴ settling “[d]isagreement[s] between national supervisors”¹⁰⁵ (including within colleges of supervisors), issuing recommendations to national supervisors on prudential matters, issuing decisions directly to financial institutions in the event that a national supervisor does not comply,¹⁰⁶ “[e]nsur[ing] a common supervisory culture,”¹⁰⁷ “[e]nsur[ing] a coordinated response”¹⁰⁸ by supervisors in the event

⁹⁶ *Communication from the Commission: European Financial Supervision*, COM (2009) 252 final (May 27, 2009).

⁹⁷ *Id.* at 3.

⁹⁸ *Id.* at 4.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 8–9.

¹⁰² *Id.* at 8.

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 11.

¹⁰⁸ *Id.*

of a crisis, and “[c]ollect[ing] microprudential information” on financial institutions.¹⁰⁹

The May communication relies heavily on colleges of supervisors as “the lynchpin of the supervisory system”¹¹⁰ as they will “ensur[e] a balanced flow of information between home and host authorities.”¹¹¹ The EBA will participate in the colleges as an observer,¹¹² will ensure that colleges use consistent practices in supervising financial institutions,¹¹³ and will facilitate the distribution of microprudential information to all national supervisors in a particular college.¹¹⁴ The expectation is that the college will take an institution-wide view regarding prudential supervision, rather than just a national view.¹¹⁵ The European Commission highlights that the participation of the EBA in colleges is not a “‘Europeanisation’ of all financial supervision.”¹¹⁶

Subsequently, in June 2009, the Council of Economic and Finance Ministers (“ECOFIN Council”) approved the May communication and the creation of both the ESRC and the ESFS.¹¹⁷ However, the ECOFIN Council stressed that any action by the new European supervisory authorities “should not impinge on the fiscal responsibilities of the Member States.”¹¹⁸ The ECOFIN Council stated that “a common supervisory culture” will be developed because of the EBA’s participation in the colleges of supervisors.¹¹⁹ The EBA would collect microprudential information and create a central database of this information available to the relevant supervisors of a particular financial institution.¹²⁰ The ECOFIN Council acknowledged the role of the

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 9.

¹¹¹ *Id.*

¹¹² Press Release, European Union, Fin. Supervision—Frequently Asked Questions 6 (May 27, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/251&format=HTML&aged=0&language=EN&guiLanguage=en> (follow “PDF: EN” hyperlink).

¹¹³ *Id.* at 3.

¹¹⁴ *Communication from the Commission: European Financial Supervision*, *supra* note 96, at 11.

¹¹⁵ See *id.* at 9 (“[T]he ESFS will combine the advantages of an overarching European framework for financial supervision with the expertise of local supervisory bodies.”).

¹¹⁶ Press Release, European Union, Fin. Supervision—Frequently Asked Questions, *supra* note 112, at 4.

¹¹⁷ See Press Release, Council of the European Union, Econ. & Fin. Affairs 8–11 (June 9, 2009), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/108392.pdf (describing proposed roles for the ESRC and ESFS).

¹¹⁸ Press Release, Council of the European Union, Council Conclusions on Strengthening EU Fin. Supervision 4 (June 9, 2009), available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/108389.pdf.

¹¹⁹ *Id.*

¹²⁰ *Id.*

European supervisory authorities as mediators in disputes between national supervisors over prudential matters but stated that this “power[] should not impinge in any way on Member States’ fiscal responsibilities.”¹²¹ The members of the ECOFIN Council, particularly the United Kingdom, were concerned that these new European agencies could require a member state to bail out a bank or other financial institution against its will.¹²²

In parallel to the legislation based on the Larosière Report, the EU considered and enacted changes to the Third Capital Requirements Directive¹²³ with respect to the formation of colleges of supervisors to supervise financial institutions operating across borders in the EU. The amended CRD requires consolidating supervisors to create colleges of supervisors.¹²⁴ Under the CRD, colleges can exchange information about financial institutions, voluntarily delegate supervisory tasks and responsibilities among themselves, and develop a “supervisory examination programme[]” for the financial institution for which they are responsible.¹²⁵ Members of the college are supervisors from a member state where a subsidiary is located or which contains significant branches of the financial institution.¹²⁶ Previously, member states where significant branches were located did not have the right to participate in colleges of supervisors.¹²⁷ The consolidating supervisor chairs the college, selects the participating supervisors, and notifies CEBS (or the EBA once it is created) of the college’s activities, subject to any confidentiality agreements.¹²⁸

In September 2009, the European Commission proposed three regulations creating the European supervisory authorities discussed in its May 2009 communication and originally proposed by the Larosière Report.¹²⁹ Member states reviewed the proposal,¹³⁰ and negotiations began among the member

¹²¹ *Id.* at 5.

¹²² *EU Finance Chiefs Tackle Latvia*, BBC News, June 9, 2009, <http://news.bbc.co.uk/2/hi/8090824.stm>. U.K. City Minister Lord Myners was quoted as saying that “[n]ational supervision must be pre-eminent when the cost of failure of an institution lies with the taxpayer.” *Id.*

¹²³ Council Directive 2009/111, 2009 O.J. (L 302) 97 (EC).

¹²⁴ *Id.* pmbl., ¶ 33.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See Council Directive 2006/48, *supra* note 58, arts. 42–43.

¹²⁸ Council Directive 2009/111, *supra* note 123, pmbl., ¶ 33.

¹²⁹ *Commission Proposal for a Regulation of the European Parliament and the Council Establishing a European Banking Authority*, at 2–11, 13–14, 21, COM (2009) 501 final (Sept. 23, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0501:FIN:EN:PDF> [hereinafter *Proposed Regulation*].

¹³⁰ See HOUSE OF COMMONS TREASURY COMMITTEE, 16TH REPORT OF SESSION 2008–2009, COMMITTEE’S OPINION ON PROPOSALS FOR EUROPEAN FINANCIAL SUPERVISION, 2008–2009, H.C. 1088, at 10–16.

states about the proposed legislation. There was particular concern about the powers of the European supervisory authorities to issue binding decisions that may require member states to bail out a financial institution or to issue a decision directly to a financial institution and, in effect, bypass the national supervisor.¹³¹

At its December 2009 meeting, the ECOFIN Council did approve the three regulations creating the European supervisory authorities but with significant changes to the European supervisory authorities' powers.¹³² In this Article, I focus on the changes in the regulation creating the EBA.¹³³ The ECOFIN Council's compromise significantly weakened the decision-making powers of the European supervisory authorities. Again, some member states, particularly the United Kingdom, were concerned about the possibility of an EU institution requiring the member state to use taxpayer money to bail out a financial institution against its will.¹³⁴ Given London is the largest financial center in Europe, the United Kingdom was particularly concerned about this possibility.¹³⁵ With these amendments, the ECOFIN Council authorized the European Presidency to negotiate with the European Parliament to enact legislation on first reading that would allow the European supervisory authorities to become operational sometime in 2010.¹³⁶

This legislation does improve, to a limited extent, the financial supervisory system in the EU. The EBA can issue binding technical standards, subject to review by the European Commission.¹³⁷ However, according to the amended regulation, the standards shall not include public policy choices,¹³⁸ an

[hereinafter HOUSE OF COMMONS TREASURY COMMITTEE]; HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE, 32D REPORT, ANNEX: EUROPEAN FINANCIAL SUPERVISION—DELEGATING POWER TO COMMUNITY AGENCIES AND LEGAL BASES FOR DOING SO, 2008–2009, H.C. 19-xxx, at 15.

¹³¹ Stephen Castle, *E.U. Solves Financial Rule Deadlock*, INT'L HERALD TRIB., Dec. 3, 2009, at 16; see HOUSE OF COMMONS TREASURY COMMITTEE, *supra* note 130, at 23–27, 29–34.

¹³² *Compare Proposal for a Regulation of the European Parliament and of the Council Establishing a European Banking Authority*, COM (2009) 501 final (Sept. 23, 2009) [hereinafter *EBA Regulations*], with *Proposed Regulation*, *supra* note 129.

¹³³ See generally *EBA Regulations*, *supra* note 132.

¹³⁴ See Castle, *supra* note 131, at 16.

¹³⁵ *Id.*

¹³⁶ Council Conclusions EUCO 6/09 of 11 Dec. 2009, at 5, available at http://ec.europa.eu/internal_market/finances/docs/committees/supervision/20090923/com2009_501_en.pdf.

¹³⁷ See *EBA Regulations*, *supra* note 132, ¶ 14, at 15 (indicating the need to create technical standards that the Commission should endorse); *Proposed Regulation*, *supra* note 129, arts. 6(1)(a), 6(2)(a), 7 (indicating the need for technical standards, that the European supervisory authorities should have the power to propose them, and that they will be binding upon approval by the Commission).

¹³⁸ *EBA Regulations*, *supra* note 132, art. 7(1), at 24.

ambiguous phrase that limits EBA discretion. The EBA Board of Supervisors must approve any standards by qualified majority voting.¹³⁹ The revised regulation continues the EBA's role in a college of supervisors¹⁴⁰ and encourages the development of a common reporting format of prudential information.¹⁴¹ The EBA is an observer in all colleges of supervisors and is obligated to create a central system for the collection of prudential information on financial institutions.¹⁴² The EBA can settle disputes among supervisors.¹⁴³ To ensure its independence, the EBA has a separate budget, financed by the EU's general budget and member states.¹⁴⁴

As a result of the political compromise, the regulation has significant weaknesses and falls short of the goals set forth in the May communication and the Larosière Report. In particular, the compromise weakened the independence of the EBA. The EBA cannot issue a binding decision directly to a financial institution,¹⁴⁵ a power the European Commission proposed and that is typical of national supervisory authorities.¹⁴⁶ A declaration of a financial emergency by the ECOFIN Council triggers additional powers of the EBA.¹⁴⁷ Under the Commission proposal, the European Commission could declare such an emergency.¹⁴⁸ The directive includes a safeguard provision that weakens the EBA's power vis-à-vis member states and repeats the June 2009 statement by the ECOFIN Council that the EBA decisions should not impinge on the fiscal responsibilities of a member state in any way.¹⁴⁹ A member state can appeal any decision of the EBA to the ECOFIN Council.¹⁵⁰ During the appeal, the EBA decision is not implemented.¹⁵¹ The ECOFIN Council must maintain the decision (e.g. take an affirmative action to approve it), or the decision is

¹³⁹ *Id.* art. 29, at 36. Qualified majority voting is the method of voting used for approval of most EU legislation by the Council of Ministers. See generally Council of the European Union, <http://www.consilium.europa.eu/showPage.aspx?id=242&lang=en> (last visited Mar. 25, 2010).

¹⁴⁰ *EBA Regulations*, *supra* note 132, ¶ 23, at 17.

¹⁴¹ *Id.* ¶ 31, at 18.

¹⁴² *Id.* art. 12(3), at 28.

¹⁴³ *Id.* art. 11, at 27.

¹⁴⁴ *Id.* ¶ 50, at 21.

¹⁴⁵ *Id.* arts. 6(2)(c), 9(3), 10(2), at 24–26 (stating that the European supervisory authorities may issue recommendations to competent authorities or the Commission but cannot issue decisions directly to a financial institution).

¹⁴⁶ See *Proposed Regulation*, *supra* note 129, arts. 10(3), 11(4). Articles 10(3) and 11(4) from the Proposed Regulation were both deleted by the Council. *Id.*

¹⁴⁷ See *EBA Regulations*, *supra* note 132, art. 10, at 26–27.

¹⁴⁸ *Proposed Regulation*, *supra* note 129, art. 10(1).

¹⁴⁹ *Id.* art. 23(1).

¹⁵⁰ *Id.* art. 23(2).

¹⁵¹ *Id.*

terminated.¹⁵² During an emergency declared by the ECOFIN Council, a member state may appeal an EBA decision to the ECOFIN Council and the decision is suspended.¹⁵³ If the ECOFIN Council does not revoke the decision, the suspension of the decision is terminated.¹⁵⁴ Even then, a member state has the right to request the ECOFIN Council to re-examine its decision.¹⁵⁵ Through the appeals process, the ECOFIN Council can overrule any decision by the EBA for any reason.¹⁵⁶ While any EBA decision would generally be subject to judicial review by the European Court of Justice, this review by the ECOFIN Council significantly undermines the independence of the EBA.

This regulation has not yet been finally enacted. Because the legal basis for the regulation is Article 95 of the Treaty of Lisbon,¹⁵⁷ dealing with the internal market,¹⁵⁸ it is subject to the co-decision procedure and must go before the European Parliament for approval.¹⁵⁹ Promptly after the ECOFIN Council meeting in December 2009, four political parties that represent a vast majority of the members of the European Parliament issued a press release stating that they will not approve a “water[ing] down” of the financial supervision legislation.¹⁶⁰ The European Parliament will likely propose some amendments to this compromise. In its first reading of the European Commission’s May 2009 communication, the Parliamentary report commented that this legislation, and particularly the use of supervisory colleges, was “a phase in a development towards further regulatory convergence and supervisory integration.”¹⁶¹

¹⁵² *Id.*

¹⁵³ *Id.* art. 23(3).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* art. 23.

¹⁵⁶ *Id.*

¹⁵⁷ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

¹⁵⁸ *Proposed Regulation*, *supra* note 129, pmbl., ¶ 10.

¹⁵⁹ *Id.* pmbl.

¹⁶⁰ Press Release, The Greens/Eur. Free Alliance, Fin. Supervision: European Parliament Will Not Agree to Water Down the New European Authorities (Dec. 2, 2009), *available at* http://www.greens-efa.org/cms/pressreleases/dok/317/317452.financial_supervision@en.htm. While this Article is based on research completed through December 2009, the European Parliament on February 10, 2010, issued a draft report that amends significantly the regulation creating the EBA and the other supervisory authorities. See European Parliament, Committee on Economic and Monetary Affairs, *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing a European Banking Authority*, 2009/0142(COD) (Feb. 10, 2010), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-438.408+01+DOC+PDF+V0//EN&language=EN>.

¹⁶¹ Position of the European Parliament Adopted at First Reading on 6 May 2009, EUR. PARL. DOC. EP-PE_TC1-COD (2008) (0191) 7 (2009).

IV. G-20 SUMMITS

Like the EU, the G-20¹⁶² has also recommended the expanded use of colleges of supervisors to supervise systemically important financial institutions. To address the financial crisis, the leaders of the G-20 nations met in Washington, D.C. in November 2008. The G-20 in its communiqué at the end of this summit on financial markets and the world economy noted the importance of the use of colleges of supervisors to enhance supervisory cooperation related to global banks. This joint communiqué stated that by March 31, 2009,

[s]upervisors should collaborate to establish supervisory colleges for all major cross-border financial institutions, as part of efforts to strengthen the surveillance of cross-border firms. Major global banks should meet regularly with their supervisory college for comprehensive discussions of the firm's activities and assessment of the risks it faces.¹⁶³

The countries at the Washington Summit in 2008 agreed to meet again in London by April 30, 2009, to review the implementation of these principles and decisions.¹⁶⁴

In preparation for the London Summit, finance ministers and central bank governors of the G-20 met in the United Kingdom in March 2009.¹⁶⁵ During their meeting they reiterated the importance of supervisory coordination stating: "Given the interconnectedness of the global financial system, international cooperation is important to maximise the effectiveness of these measures and reject financial protectionism."¹⁶⁶ This same group in their communiqué stated that the Financial Stability Forum ("FSF") should expand its role to ensure that "all systemically important financial institutions, markets and instruments are subject to an appropriate degree of regulation and

¹⁶² The following countries are members of the G-20: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, the Republic of Korea, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, and the United States. G-20, What is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited Mar. 25, 2010).

¹⁶³ G-20, Declaration, Summit on Financial Markets and the World Economy (Nov. 15, 2008), *available at* http://www.g20.org/Documents/g20_summit_declaration.pdf.

¹⁶⁴ *Id.*

¹⁶⁵ G-20, Communiqué Annex, Restoring Lending: A Framework for Financial Repair and Recovery (Mar. 14, 2009), *available at* http://www.g20.org/Documents/2009_communique_annex_horsham_uk.pdf.

¹⁶⁶ *Id.* para. 1.

oversight”¹⁶⁷ and to strengthen “international cooperation to prevent and resolve crises, including through supervisory colleges.”¹⁶⁸

During the London Summit on April 2, 2009, G-20 leaders themselves agreed “to establish the much greater consistency and systemic cooperation between countries, and the framework of internationally agreed high standards, that a global financial system requires.”¹⁶⁹ The G-20 leaders affirmed their finance ministers’ recommendation and established the Financial Stability Board (“FSB”), as successor to the FSF,¹⁷⁰ with the goal of extending “regulation and oversight to all systemically important financial institutions, instruments and markets.”¹⁷¹ They also emphasized the use and development of colleges of supervisors in supervising global banks.¹⁷² Furthermore, the FSB would expand its membership to include all G-20 countries, FSF members,¹⁷³

¹⁶⁷ G-20, Communiqué, Meeting of Finance Ministers and Central Bank Governors para. 6 (Mar. 14, 2009), available at http://www.g20.org/Documents/2009_communique_horsham_uk.pdf.

¹⁶⁸ *Id.*

¹⁶⁹ G-20, Communiqué, The Global Plan for Recovery and Reform para. 14 (Apr. 2, 2009), available at <http://www.g20.org/Documents/final-communicue.pdf>.

¹⁷⁰ In 2008, in two separate reports, the Financial Stability Forum (“FSF”) had recommended the expanded use of colleges of supervisors. In its April 2008 report entitled *Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience*, the FSF recommended that all global banks be supervised by a college of supervisors that should build on existing examples of supervisory colleges both in the Basel II framework and in regional arrangements, such as within the EU. The purpose of the colleges is to enhance cooperation on supervisory issues, and each college would be organized differently depending on the structure of the global bank it was supervising. Similarly, the forum recommended that by 2009 the colleges should conduct an exercise to draw lessons about best practices of colleges of supervisors. FIN. STABILITY FORUM, REPORT OF THE FINANCIAL STABILITY FORUM ON ENHANCING MARKET AND INSTITUTIONAL RESILIENCE 42 (2008), available at http://www.financialstabilityboard.org/publications/r_0804.pdf.

In October 2008, the FSF updated its April 2008 report on how supervisors had implemented its extensive recommendations. The FSF noted that authorities had expanded their use of colleges of supervisors to enhance communication among supervisors, “building on existing examples of colleges, such as in the Basel II framework and in the EU.” FIN. STABILITY FORUM, REPORT OF THE FINANCIAL STABILITY FORUM ON ENHANCING MARKET AND INSTITUTIONAL RESILIENCE: FOLLOW-UP ON IMPLEMENTATION 24 (2008), available at http://www.financialstabilityboard.org/press/pr_081009f.pdf. Because of the FSF’s earlier work on international financial supervision, the G-20 expanded the FSF’s role and created the Financial Stability Board (“FSB”) with added responsibilities. *Id.*

¹⁷¹ G-20, *supra* note 169, para. 15.

¹⁷² *Id.* paras. 13–16.

¹⁷³ Finance ministries and central banks from the following nations are members of the Financial Stability Board: Argentina, Australia, Brazil, Canada, China, France, Germany, Hong Kong, India, Indonesia, Italy, Japan, Mexico, the Netherlands, the Republic of Korea, Russia, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Turkey, the United Kingdom, and the United States. The following international organizations and standard-setting bodies are also members: the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the Organization for Economic Cooperation and Development, the World Bank, the Basel Committee on Banking Supervision, the Committee on the Global Financial System, the Committee on Payment and Settlement Systems, the International

Spain, and the European Commission¹⁷⁴—further recognizing the global nature of the financial system.

The G-20 leaders generally charged the FSB with assessing “vulnerabilities affecting the financial system,” and then with identifying and overseeing actions to address them.¹⁷⁵ Related to colleges of supervisors, the FSB was tasked with “promot[ing] co-ordination and information exchange among authorities responsible for financial stability” and “set[ting] guidelines for, and support[ing] the establishment, functioning of, and participation in, supervisory colleges, including through ongoing identification of the most systemically important cross-border firms.”¹⁷⁶ In fact, twenty-eight colleges for systemically important institutions were in place by April 2009.¹⁷⁷ While there is no official list of the most systemically important financial institutions, the *Financial Times* in November 2009 reported such a list, which follows the article as Annex B.

Meeting again in September 2009 in Pittsburgh, the G-20 leaders assessed progress on their previously agreed goals and noted an improvement in the world economy since they met in London.¹⁷⁸ They expressed their resolve to ensure that the “regulatory system of banks and other financial firms reins in the excesses that led to the crisis” and “where reckless behavior and a lack of responsibility led to crisis, we [the G-20] will not allow a return to banking as usual.”¹⁷⁹ The G-20 declared themselves to be “the premier forum for our international economic cooperation,”¹⁸⁰ replacing the G-7 in that role. The G-20 noted the substantial progress achieved in establishing supervisory colleges and reinforcing international cooperation among supervisors.¹⁸¹ Furthermore, the G-20 recognized that solving cross-border insolvency of systemically important financial institutions must occur so that governments

Association of Insurance Supervisors, the International Accounting Standards Board, and the International Organization of Securities Commissions. Financial Stability Board, Links to FSB Members, <http://www.financialstabilityboard.org/members/links.htm> (last visited Mar. 25, 2010).

¹⁷⁴ G-20, *supra* note 169.

¹⁷⁵ G-20, Declaration, Strengthening the Financial System—London Summit 1 (Apr. 2, 2009), available at <http://www.londonsummit.gov.uk/resources/en/PDF/annex-strengthening-fin-sysm>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 2.

¹⁷⁸ Leaders’ Statement: The Pittsburgh Summit, pmbl., paras. 1–6 (Sept. 24–25, 2009), <http://www.pittsburghsummit.gov/mediacenter/129639.htm>.

¹⁷⁹ *Id.* pmbl., para. 16.

¹⁸⁰ *Id.* pmbl., para. 19.

¹⁸¹ *Id.* pmbl., para. 11.

will be less likely to bail out institutions in order to prevent a collapse of the financial system.¹⁸²

In November 2009, the G-20 finance ministers met in St. Andrews to review progress thus far.¹⁸³ They called for the Basel Committee for Banking Supervision to issue stronger prudential standards for banks by the end of 2010.¹⁸⁴ They reported that more than thirty colleges have been established for complex financial institutions¹⁸⁵ and requested the Basel Committee, the FSB, and the International Association of Insurance Supervisors to review the operations of colleges in 2009.¹⁸⁶ The Basel Committee expects to issue principles and guidelines on the operations of colleges of supervisors in early 2010.¹⁸⁷

CONCLUSION

Colleges of supervisors are not a complete solution for improved supervision of global financial institutions. However, they potentially could be a significant improvement in closing regulatory gaps and increasing information flow among home and host supervisors regarding systemically important financial institutions. Banks and other financial institutions operate in global markets, yet financial supervision is still conducted by national supervisors. The success of integrating European financial markets, particularly the wholesale markets, facilitated by the common currency, the euro, has highlighted the need for improved supervisory coordination among EU supervisors. However, colleges of supervisors are not supranational agencies. The possibility of a lack of accountability and “finger pointing” in the event of a bank failure or crisis is still present.¹⁸⁸ Participation in a college of supervisors does not prevent unilateral action by a national supervisor, as

¹⁸² *Id.* pmb., paras. 10–11.

¹⁸³ G-20, Progress Report on the Economic and Financial Actions of the London, Washington and Pittsburgh G20 Summits (Nov. 7, 2009), *available at* <http://www.g20.utoronto.ca/2009/2009progressreport1107.pdf> [hereinafter Progress Report].

¹⁸⁴ G-20, Communiqué, Meeting of Finance Ministers and Central Bank Governors, United Kingdom, para. 6 (Nov. 7, 2009), *available at* http://www.g20.org/Documents/2009_communique_standrews.pdf.

¹⁸⁵ G-20 Progress Report, *supra* note 183, at 18.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Dani Rodrik, *A Plan B for Global Finance*, *ECONOMIST*, Mar. 14, 2009, at 80.

seen in the Dutch government's nationalization of the Dutch operations of Fortis.¹⁸⁹

Colleges of supervisors are not decision-making bodies; rather, they are designed to share prudential information about a particular financial institution. The vast majority of communications among bank supervisors is currently bilateral, between two particular supervisors, not through colleges of supervisors. Typically, the information flows one way, from the host supervisor to the home supervisor. While the G-20 and the EU proposals on colleges stress two-way communications between supervisors, full cooperation among supervisors will be hindered because of the absence of a cross-border insolvency procedure for financial institutions. Since an orderly way to resolve the claims against a cross-border financial institution currently does not exist, supervisors must necessarily focus on protecting their national interests—the rights of residents within their jurisdiction who may have claims against a failing financial institution.

Various international bodies have issued principles and statements regarding the resolution of cross-border financial institutions, but none have yet been implemented.¹⁹⁰ The EU has issued a Directive on the Reorganization and Winding Up of Credit Institutions,¹⁹¹ but the directive principally focuses on determining which national court has jurisdiction over the proceedings in a particular case rather than providing a complete, EU-wide system for resolving in an orderly manner the claims against a failing credit institution.¹⁹² Until such a regime is implemented, national governments are unlikely to relinquish their sovereignty over the resolution of claims against an insolvent financial institution. As seen in the creation of the European Banking Authority, the United Kingdom insisted on placing a brake on EBA decisions because of the

¹⁸⁹ See Volz, *supra* note 72, at A27; Press Release, Ministry of Finance, The State of the Netherlands Fully Acquires Fortis Bank Nederland, Fortis Insurance Netherlands, Fortis Corporate Insurance and the Fortis Share in ABN AMRO Holding (Oct. 3, 2008), *available at* http://www.minfin.nl/english/News/Newsreleases/2008/10/The_State_of_the_Netherlands_fully_acquires_Fortis_Bank_Nederland_Fortis_Insurance_Netherlands_Fortis_Corporate_Insurance_and_the_Fortis_share_in_ABN_AMRO_Holding.

¹⁹⁰ BASEL COMM. ON BANKING SUPERVISION, REPORT AND RECOMMENDATIONS OF THE CROSS-BORDER BANK RESOLUTION GROUP (2009); FIN. STABILITY FORUM, FSF PRINCIPLES FOR CROSS-BORDER COOPERATION ON CRISIS MANAGEMENT (Apr. 2, 2009), *available at* http://www.financialstabilityboard.org/publications/r_0904c.pdf; see also Barry Eichengreen, *Out of the Box Thoughts About the International Financial Architecture* (Int'l Monetary Fund, Working Paper No. WP/09/116, 2009), *available at* <http://www.imf.org/external/pubs/ft/wp/2009/wp09116.pdf>.

¹⁹¹ Council Directive 2001/24, The Reorganization and Winding Up of Credit Institutions, 2001 O.J. (L125) 15 (EC).

¹⁹² *Id.* arts. 10, 20.

possibility of a member state expending government funds to comply with an EU decision counter to the member state's public policy choice.¹⁹³ While colleges of supervisors may improve the surveillance function over cross-border financial institutions by improving the flow of prudential information, true supervisory cooperation will not be realized until a credible, international regime for the resolution of financial institutions is designed and implemented.

Nevertheless, the creation of colleges of supervisors for all systemically important financial institutions is an improvement in financial supervision. Within the EU, the creation of these colleges of supervisors, with coordination by European supervisory authorities such as the EBA, may be a precursor to European-wide financial services regulation. However, until an international regime for bank insolvency is established, colleges of supervisors can only modestly improve the international framework for financial supervision.

¹⁹³ See, e.g., *HIGHLIGHTS-EU Finance Ministers' Meeting*, REUTERS, June 9, 2009, <http://www.reuters.com/article/idUSL9600035>.

ANNEX A

EUROPEAN UNION FINANCIAL SUPERVISION LEGAL FRAMEWORK

October 29, 2008	Barroso appoints Larosi�re group.	From Financial Crisis to Recovery: A European Framework for Action, COM (08) 114 final (Oct. 29, 2008).
February 25, 2008	Larosi�re Report issued.	JACQUES DE LAROSI�RE ET AL., THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU 15–27 (2009), <i>available at</i> http://ec.europa.eu/economy_finance/focuson/crisis/documents/de_larosiere_report_en.pdf .
March 4, 2009	The European Commission issues a COM document based on the Larosi�re Report.	Communication for the Spring European Council: Driving European Recovery, vol. 1, COM (09) 114 final (Mar. 4, 2009).
June 9, 2009	ECOFIN Council approves the ESFS and the ESRC.	Press Release, The Council of Econ. & Fin. Ministers, Council Conclusions on Strengthening EU Financial Supervision (June 9, 2009), <i>available at</i> http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/108389.pdf .
June 19, 2009	The European Council approves the ESFS and the ESRC.	Presidency Conclusions, Brussels European Council, July 10, 2009, <i>available at</i> http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/108622.pdf .
September 16, 2009	Capital Requirements Directive Amendments published.	Council Directive 2009/111, 2009 O.J. (L 302) 97 (EC).
September 23, 2009	The European Commission adopts three regulations creating European supervisory authorities.	Proposal for a Regulation of the European Parliament and of the Council Establishing a European Banking Authority, COM (2009) 501 final (Sept. 23, 2009); Proposal for a Regulation of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority, COM (2009) 502 final (Sept. 23, 2009); Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority, COM (2009) 503 final (Sept. 23, 2009).

October 26, 2009	The European Commission adopts proposed directive amending sectoral legislation.	Proposal for a Directive of the European Parliament and of the Council Amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority, COM (2009) 576 final (Oct. 26, 2009).
December 2, 2009	ECOFIN Council approves regulations creating the European supervisory authorities.	Press Release, 2981st Council Meeting Econ. & Fin. Affairs (Dec. 2, 2009), <i>available at</i> http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/111706.pdf .
December 11, 2009	The European Council agrees on a general approach on draft regulations regarding European supervisory authorities.	Council Conclusions EUCO 6/09 of 11 Dec. 2009, at 5, <i>available at</i> http://ec.europa.eu/internal_market/finances/docs/committees/supervision/20090923/com2009_501_en.pdf .

ANNEX B

SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS

<i>Financial Institution</i>	<i>Headquarters Country</i>
Goldman Sachs	United States
JPMorgan Chase	United States
Morgan Stanley	United States
Bank of America Merrill Lynch	United States
Citigroup	United States
Royal Bank of Canada	Canada
HSBC	United Kingdom
Barclays	United Kingdom
Royal Bank of Scotland	United Kingdom
Standard Chartered	United Kingdom
UBS	Switzerland
Credit Suisse	Switzerland
Société Générale	France
BNP Paribas	France
Santander	Spain
BBVA	Spain
Mizuho	Japan
Sumitomo	Japan
Mitsui	Japan
Nomura	Japan
Mitsubishi UFJ	Japan
UniCredit	Italy
Banca Intesa	Italy
Deutsche Bank	Germany
ING	The Netherlands

Source: Patrick Jenkins & Paul J. Davies, *Thirty Groups on Systemic Risk List*, FIN. TIMES (London), Nov. 30, 2009, at 1.