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Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement

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Introduction

Although the settlement and clearing of securities transactions has received much more attention by economists than by lawyers, recent initiatives of the European System of Central Banks (ECSB or 'Eurosystem') in this field raise some important and novel questions of law. In an era where we experience the emergence of a quasi-federal administration at EC level through the proliferation of Community agencies, does the European Central Bank (ECB) have power to establish such agencies? If so, which provisions could serve as legal basis and what powers may it delegate to them? Furthermore, is the ECB bound by the competition rules of the Treaty? If so, how and to what extent do they constrain its powers? What is the meaning of the requirement of Article 105 EC that the ECSB must 'act in accordance with the principle of an open market economy with free competition'? The purpose of this paper is to discuss such institutional and competition law aspects of Eurosystem action in relation to the settlement of securities transactions, in particular, the introduction of the Target 2-Securities platform (T2S). It is divided as follows. The first section provides an overview of the T2S system, examining its development, main features, and perceived advantages. The second section offers a brief examination of selected institutional aspects of the ECB and the ESCB, focusing on the principle of independence and the duty of inter-institutional cooperation. Section III proceeds to discuss the growth of agencies in Community law, focusing on their legal basis, the limitations of the *Meroni* case law, and judicial review of agency

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action. The fourth section turns to examine delegation of powers by the ECB, concentrating on the possible legal basis of T2S and the possible forms that its organizational framework may take. Section V explores the question whether the ECB is bound by the competition rules of the Treaty and discusses the principle of open market economy. Section VI provides an overview of the application of EC competition law on financial services, examines issues pertaining to clearing and settlement, with particular reference to the *Clearstream* decision, and discusses competition law aspects of T2S. The final section contains concluding remarks.

I. Target 2-Securities

A. Origins and Development

Despite progress made towards the integration of financial and securities markets in the EU, securities transactions occur mostly on a domestic rather than inter-state level. As a result, clearing and settlement remain largely domestic.¹ The settlement market in the EU is characterized by a high degree of fragmentation as individual States traditionally developed their own domestic infrastructures.² The ECB has identified no fewer than 18 Securities Settlement Systems (SSS) eligible for Eurosystem credit operations in the euro area alone.³ Such fragmentation and resulting disparities cause inefficiencies, act as a powerful countervailing force to integration, and discourage investment from overseas.⁴ The costs of cross-border settlement in the EU are estimated to be much higher than those of domestic settlement in the individual Member States and also those in the United States.⁵ In recent years, however, there has been an increase in cross-border trade and a

¹ See T Schaper, Trends in European Clearing and Settlement Industry—The European Code of Conduct and Target2-Securities, 15 February 2007, available at SSRN: <<http://ssrn.com/abstract=965407>>. Clearing refers to the process whereby the essential aspects of a securities transaction, ie the identity and quantity of the securities sold, the identity of the seller and the buyer, and the price and date of the transaction are confirmed. Settlement refers to the payment of the agreed price to the seller and the transfer of ownership or other interest in the securities traded to the buyer. For a general discussion of the process, see H S Scott, *International Finance* (11th edn, Foundation Press) ch 10; for international settlement, see M Yates, 'International Settlement' in M Blair and G Walker, *Financial Markets and Exchanges Law* (Oxford, 2007) 501 et seq.

² For an extensive bibliography, see R S Steigerwald and C A Johnson, 'The Financial Services Lawyer's Bookshelf: A Selected Bibliography of Payment, Clearing and Settlement Resources' (October 2006) 2(6) *The Journal of Payment Systems Law* 485.

³ See ECB, Latest Developments on Target 2-Securities at <<http://www.ecb.int/paym/market/secmar/integr/html/index.en.html>>.

⁴ The problems of arising from the fragmentation of clearing and settlement systems in the EU were thoroughly examined by the Giovannini Group on which see below.

⁵ See ECB, 'A Single Currency—An Integrated Market Infrastructure' (Frankfurt, 2008) 14. For references to specific studies, see Schaper, op cit, at 2. Typically, a foreign investor must incur higher transaction costs and needs to establish a relationship with a local agent in order to obtain access to the local central securities depository (CSD).

consequent increase in the demand for an integrated European settlement infrastructure.⁶

Target 2-Securities (T2S) is an integrated, pan-European securities settlement platform which seeks to overcome the drawbacks of the current fragmented system. The T2S project was launched by the Governing Council of the ECB on 17 July 2008 following consultations with European Central Securities Depositories (CSDs) which, in their overwhelming majority, expressed their support for the continuation of the project.⁷ The development and operation of T2S was assigned to the Deutsche Bundesbank, the Banco de España, the Banque de France, and the Banca d'Italia. The launch of the T2S was welcomed by Commissioner McGreevy as being of major economic significance and having the potential to make a strategic and economic contribution to integration and economic growth.⁸ As of June 2009, significant progress has been made towards the completion of the project. The Governing Council of the ECB has decided on the governance arrangement for the specification phase. This phase covers the time needed for the development of the General Functional Specifications (GFS) and of a first version of the User Detailed Functional Specifications (UDFS), which is expected by the end of 2009.⁹

⁶ For example, cross-border collateral for Eurosystem credit operations exceeded domestic collateral in both 2006 and 2007. See ECB, *op cit*, at 14.

⁷ The decision to explore in detail the setting up of T2S was taken by the Governing Council on 6 July 2006, following which a legal feasibility study was carried out. For the study, see <<http://www.ecb.int/pub/pdf/other/t2slegalfeasibility0703en.pdf>>. On 27 February 2007, the ECOFIN Council welcomed the ECB's initiative, subject, *inter alia*, to the conditions that participation to the project should not be compulsory, that the principles of competition law should be respected, and that appropriate governance structures should be set up. Subsequently, following further consultations with various political actors, including the Parliament, and industry input, the Governing Council provided information and invited all European CSDs to join the T2S initiative on 23 May 2008. Subject to certain reservations, almost all euro area CSDs, representing a very large share of settlement activity in the euro area, expressed themselves in favour of the continuation of the T2S initiative. They indicated that they would be prepared to use the service once in operation and enter into a legally binding contractual arrangement by the end of the first quarter of 2009. In the meantime, on 18 December 2007, the ECB had launched a public consultation on the methodology for calculating the economic impact of T2S and, following industry responses, it published the results of its economic impact analysis on 23 May 2008. The T2S project is also open to CSDs outside the euro area. The Danish CSD has already agreed to participate in T2S for Danish krone settlement and euro settlement, and the Swedish and Swiss CSDs have indicated that they intend to participate for euro settlement. See <<http://www.ecb.int/press/pr/date/2008/html/pr080717.en.html>>.

⁸ See Commission Press Release IP/08/1193, Brussels, 23 July 2008.

⁹ For the governance arrangements, see: <http://www.ecb.int/paym/t2s/pdf/governance_080523.pdf?30bc7140c6ca41ef1c9802ccc40cb907>. For the user requirements, see <http://www.ecb.int/paym/t2s/pdf/T2S_URD_V4_080717.pdf?9cba1b27f9f4bb66f41e48bbe85c9bd4>. See also progress report at <<http://www.ecb.int/pub/pdf/other/t2s-progressreport200710en.pdf?4c01d680d91ad72efc899c3f9e548c3d>>. Note that on 19 March 2009, the Governing Council of the ECB decided to establish a new governing structure for the T2S project. This is described in detail in <http://www.ecb.int/paym/t2s/progress/pdf/internal_governance_explanations.pdf?f55f9b9cb3ccbb012a49a0b2c57f14aa> and, in summary, is as follows. T2S is owned and operated by the Eurosystem which determines, and is responsible for, its scope, budget, and timely implementation. Ultimate responsibility and competence for decisions rests with the Governing

B. Definition and Features

Target 2-Securities¹⁰ is a technical, IT-based platform which enables the delivery versus payment, cross-border and domestic, settlement of securities against central bank money.¹¹ It is necessary to explain the component parts of this definition before outlining the basic features of the T2S system. A securities transaction results in an obligation on the seller to deliver securities and a corresponding obligation on the purchaser to provide payment. Settlement in central bank money signifies the provision of payment through entry in the books of the central bank as opposed to the books of a commercial bank. The balances of these cash settlement accounts therefore represent an account holder's claim on the national central bank.¹² Delivery versus payment (DvP) signifies, in general, a settlement procedure in which the purchaser agrees to make immediate payment upon delivery of the purchased security. More technically, it has been defined as:

a link between a securities transfer system and a funds transfer system that ensures that a delivery occurs if, and only if, another delivery occurs and vice versa. It can be conceived as a three-step procedure: (1) reserving/blocking securities in the securities accounts, and sending cash instructions to the central bank money cash accounts; (2) settling, with finality, the required funds in the central bank money cash account of the seller, and (3) settling, with finality, the securities in the securities account of the buyer.¹³

Council of the ECB. The governance structure of the T2S project has internal and external components. The internal components consist of the Governing Council, the T2S Programme Board, and the four banks which have undertaken responsibility for developing and operating the T2S platform, namely Deutsche Bundesbank, Banco de España, Banque de France, and Banca d'Italia. Representation of external interests occurs, inter alia, through a T2S advisory group and national user groups. The T2S Programme Board, which consists of eight members, has responsibility for the management of the project, including the execution of technical tasks and developing proposals on key strategic issues for the consideration of the Governing Council.

¹⁰ The initials 'TARGET' stand for Trans European Automated Real Time Gross Settlement Express Transfer. The T2S initiative follows on from the successful launch of TARGET 2 by the Eurosystem. TARGET 2 is the Real Time Gross Settlement system for the euro. It is offered by the Eurosystem and used for the settlement of central bank operations, large-value euro interbank transfers, and other euro payments. It provides real time processing, settlement in central bank money, and immediate finality. A real time gross settlement system (RTGS), such as TARGET 2, is a payment system in which processing and settlement take place continuously ('in real time') rather than in batches. This enables transactions to be settled with immediate finality. 'Gross settlement' means that each transfer is settled individually rather than on a net basis. The difference between TARGET 2 and its predecessor, known as TARGET, is that TARGET 2 uses a direct payment platform without intervention by any local RTGS. Under TARGET, by contrast, payments were processed by the national banks through their local RTGS systems. For further information, see the official ECB site for TARGET 2, <<http://www.ecb.int/paym/t2/html/index.en.html>> and also <<http://target2.net/content/view/20/1/>>.

¹¹ See the description of the Target 2-Securities in the ECB website at <<http://www.ecb.int/paym/t2s/html/index.en.html>>.

¹² This definition is taken from ECB, *The Use of Central Bank Money for Settling Securities Transactions*, May 2004, p 4.

¹³ See ECB, *op cit*, p 10.

T2S is a settlement platform which is designed to match, through real time link, the delivery versus payment settlement in euro central bank money of the cash leg of domestic and cross-border securities transactions over euro-denominated securities with the settlement of the securities leg thereof on the CSDs' securities accounts.¹⁴ The platform has a universal character in that it covers all such settlements irrespective of the location of the securities, their issuer, or the national CSD through which the relevant transaction is settled.¹⁵ Thus, T2-Securities is intended to provide a single harmonized venue where securities can be exchanged for euro with standardized communications protocols.¹⁶

T2S is a technical solution. It will be administered by the Eurosystem and is intended to provide services to existing CSDs. It does not entail the creation of a new settlement system or a new CSD. Existing CSDs which decide to participate will act as access points for customers to the settlement facilities of T2S.¹⁷ The legal relationships between national CSDs and their customers, and between the various CSDs, will not be affected. Similarly, the legal situation of the end users (banks and investment firms) and the securities accounts at the national level will remain unchanged.¹⁸ Thus, the introduction of T2S will not necessitate changes in national law,¹⁹ its basic aspects being a settlement engine and a securities accounts database.²⁰ Since T2S is not as such a CSD, the

¹⁴ This definition is provided by P Athanassiou, 'T2 Securities: An Overview of the Eurosystem's Aims and Competence' (2008) *Journal of International Banking Law and Regulation* 585, at 585–586.

¹⁵ *op cit*, 586.
¹⁶ See ECB, *A Single Currency—An Integrated Market Infrastructure* (Frankfurt, 2008) at 14. The technical aspects of T2-Securities have been described by Athanassiou, *op cit*, at 586 as follows (footnotes omitted): 'T2-Securities will interlink the settlement of book entries, recording the transfer of title of securities against the transfer of euro-central bank money. To this end, the T2-Securities technical facility will be processing transfer orders and making entries in the securities account databases of participating CSDs. Where cross-border transactions are concerned, T2-Securities will be establishing a link between the transfer of title and the corresponding cash transfers through the national T2-Cash accounts. Without prejudice to the above, the securities leg of a (domestic or cross-border) transfer will continue to be settled through a securities account held by the parties to the securities transfer with the relevant national CSD (or by participating CSDs with one another), while the cash leg will be settled through a T2-Cash account held by a national CSD, or its customers, with their respective National Central Bank.'

¹⁷ For a more detailed description, see See ECB, *A Single Currency – An Integrated Market Infrastructure* (Frankfurt, 2008) at 14 and the ECB website: <<http://www.ecb.int/paym/market/secmar/integr/html/index.en.html>>.

¹⁸ See Athanassiou, *op cit*, at 586 and the ECB feasibility study, *op cit*, at 7. The relationship between a CSD and its participants will continue to be governed by the contractual or other legal arrangement governing the participation in, and holding an account with, the CSD.

¹⁹ As Athanassiou observes, *op cit*, 586, for the purposes of the Settlement Finality Directive (Directive 98/26, [1998] OJ L166/45), T2S will be subject to the finality regime applicable to the participating CSDs. The finality of transfer orders processed in T2-Securities will be guaranteed through the national rules implementing the Directive while the proprietary aspects and the finality of the transfer itself will be determined in accordance with the law applicable to the CSD where the relevant securities account is located in accordance with Article 9(2) of the Directive. See for more details ECB feasibility study, *op cit*, 4–5.

²⁰ These are explained by the ECB feasibility study as follows, *op cit*, 3: 'The purpose of the *settlement engine* is to support the processing of transfer orders placed by the CSDs'. It is envisaged

European Code of Conduct for Clearing and Settlement²¹ does not apply directly to it but the ECB has declared its intention to comply with the Code and, more generally, competition law.

T2S will be fully owned and operated by the Eurosystem and, as such, it is intended to have the character of a universal service. This is based on the underlying premise that the availability of central bank liquidity for settling security transactions is a 'public good service' and should be available to all participants on the basis of uniform contractual arrangements.²² Thus, the distinct feature of T2S in comparison to national CSDs is that it will not be profit making but run on a full costs recovery basis. Furthermore, it is intended to be optional. CSDs will not be made subject to a general requirement to use T2S when accessing central bank money for settlement purposes and it is for them to decide whether to participate.²³

Although T2S is primarily intended to provide settlement for all securities (such as equities, debt instruments, investment funds, and warrants) held in the accounts of participating CSDs which are denominated in euro, it could also provide settlement for securities denominated in other EU currencies, subject to the consent of the respective central bank. It may also cover securities which are denominated in foreign currencies but settled in euro provided that they are held through a participating CSD.

Thus, it may be said that T2S involves a minimalist intervention seeking to assist the integration process of securities markets through as little interference as possible with the laws of the Member States. This appears to fit in with the overall approach of the ECB which sees its role in this area not as spearheading

that 'this single technical platform will be operated and owned by the Eurosystem, and will provide a technical infrastructure to support the CSDs in performing all the tasks that are part of the full cycle of a settlement transaction (eg the receipt and verification of transfer instructions, system verification regarding available stocks and funds, queue management, optimisation mechanisms, debits and credits on securities accounts and settlement-related reporting, etc.). The CSDs will continue to provide services associated with the custody function as well as asset-servicing and added-value services. As part of the settlement process, the single technical platform will make entries in the database and arrange for the required cash transfer orders in TARGET2. The *securities accounts database* will electronically compile and store data regarding securities accounts, i.e. the positions of account holders in respect of securities held in such accounts. Although from a technical viewpoint the database will be part of the T2S technical environment, from a legal perspective, the CSDs will continue to maintain securities accounts for their participants, thus retaining legal responsibility for them regarding the entering, maintaining and cancelling of records on their respective participants' accounts, as well as regarding the accuracy of the information processed.' According to the feasibility study, neither the specific physical location of the technical infrastructure nor the fact that accounts data are to be processed in such a common technical database is a determining criterion when it comes to establishing the legal location of an account, given that CSDs will continue to maintain the securities accounts of their participants from a legal point of view. The common technical location of the technical infrastructure will therefore have no impact on determining which national law is applicable.'

²¹ See European Code of Conduct for Clearing and Settlement issued on 7 November 2006 by the Federation of European Securities Exchanges. The Code is a voluntary self-commitment by the organizations belonging to FESE. For a discussion, see below.

²² Athanassiou, op cit, 586.

²³ Athanassiou, op cit, 586 but see n 11.

uniformity or substituting the free market but rather as seeking to pursue a threefold objective, namely to remove obstacles to integration by cooperating with public authorities and the private sector; to establish standards for securities settlement systems; and to promote the establishment of an integrated regulatory framework;²⁴ In this context, the ECB has received the support of the other Community institutions and it is notable that, following the launch of the T2S project, the Commission indicated that it would abstain from direct legislative intervention in the area of clearing and settlement.²⁵

C. Perceived Advantages

T2S is expected to contribute to the elimination of settlement disparities between domestic and cross-border transactions and thus promote the integration of securities markets. Also, by providing a single platform to all participating CSDs irrespective of their place of location, it will aid price transparency, lower costs, and increase competition. As the ECB puts it, market users will be able to transact and access their assets through participating CSDs in a way which accommodates rather than perpetuates national and regional differences.²⁶

As the ECB observes, the fragmentation of the market infrastructure in the euro area causes inefficiencies. Many buyers and sellers in different countries have to use some form of intermediation to carry out their trades. As long as settlement remains fragmented, transfers between separate systems—operating under different legal and regulatory regimes—will remain more complex and therefore more expensive, than domestic transfers.²⁷ The following may be identified among the principal expected benefits of T2S.²⁸

Cost effectiveness. The expectation is that the more efficient post-trading environment promoted by T2S will generate larger trading volumes thus leading to lower processing costs.

Liquidity. The pan-European character of the platform will lead to greater liquidity and access to a wider investor base thus lowering cost of capital. At the same time, increased market liquidity, together with cheaper portfolio diversification, can be expected to lead to higher investor returns.

Simplicity. The simplified form of processing is expected to lead to lower failure rates thus increasing certainty in transactions and further cost reduction.

Stability. The integrated model of the system and greater liquidity will increase efficiency and stability. Stability is further enhanced by the neutrality guaranteed by the ECB and the public good character of the service.

²⁴ See <<http://www.ecb.int/paym/market/secmar/integr/html/index.en.html>>.

²⁵ See the European Parliamentary Financial Services Forum, Briefing Paper on Target 2 securities, 5 June 2007, at <http://epfsf.org/meetings/2007/briefings/briefing_5jun2007_more.htm>.

²⁶ See ECB presentation of T2S at <<http://www.ecb.int/press/pr/date/2008/html/pr080717.en.html>>.

²⁷ See <<http://www.ecb.int/paym/market/secmar/integr/html/index.en.html>>.

²⁸ See ECB, *A Single Currency—An Integrated Market Infrastructure* (Frankfurt, 2008) at 16.

It may be noted that there is a fundamental tension inherent in the T2S project. On the one hand, participation of CSDs is optional and not compulsory. On the other hand, T2S can only bring its expected benefits and guarantee economies of scale if a sufficiently large number of market actors decide to join. The success of the project therefore depends on it generating sufficient momentum among market participants. As has been observed,²⁹

One of the ECB's central commitments is to deliver (cross-border) settlement at a cost per transaction which is lower than the cost of any national (domestic) transaction today. Such fees would be charged by T2S to its direct users, the CSDs. Only if these CSDs will be able to reduce their overall costs significantly through the outsourcing process, can the project be seen as commercially favourable by the CSDs and their end-users. The economic feasibility calculations presented so far indicate that costs below the lowest level of today's national costs may be achievable only if (almost) all major European national CSDs join and link up.

It is worth noting that the ECB is intending to facilitate direct connectivity to T2S for banks and is willing to extend the T2S platform to other non-euro currencies (with the agreement of the relevant national central bank). This may be termed the self-fulfilling prophesy conundrum, a situation often present in financial markets.

Among the legal issues that arise in relation to the setting up of T2S are the following: its governance structure, the legal basis for its establishment, its institutional form, and its compatibility with the rules of competition law. We will focus here on the institutional form of T2S and issues of competition law.³⁰ In exploring the problems arising, however, it is also necessary to look at its possible legal bases. Before doing so, however, it is necessary to recall briefly the basic principles governing the ECB and the ECSB.

II. Institutional Attributes of the ECSB and the ECB

A. Overview

According to the system established by the EC Treaty, the ESCB (Eurosystem) is composed of the ECB and the national central banks (NCBs).³¹ Under Article

²⁹ See, in this context, the comments made by the European Parliamentary Financial Services Forum, Briefing Paper on Target 2 securities, 5 June 2007, at <http://epfsf.org/meetings/2007/briefings/briefing_5jun2007_more.htm>.

³⁰ For the other legal problems arising, see the ECB feasibility study, *op cit*, and the ECB Legal Assessment, *op cit*.

³¹ See Article 107(1) EC. There is no intention here to discuss in detail the institutional framework of the ECB but simply to highlight some basic features. For a detailed discussion, see, among others, C Zilioli and M Selmayr, *The Law of the European Central Bank* (Hart, 2001); Zilioli and Selmayr (1999–2000) 19 YEL 347; R Smits, *The European Central Bank* (Kluwer, 1997); R Lastra, *Legal Foundations of International Monetary Stability* (Oxford, 2006) *ch 7 et seq.*

8(1) EC, the ECB and the ECSB must act within the limits of the powers conferred upon them by the Treaty. They are thus bound, as are all EC institutions and bodies, by the principle of conferred powers. Under the preemptory terms of Article 105(1) EC, the primary objective of the ESCB is to maintain price stability. Article 105(1) also identifies as a secondary objective, to be pursued without prejudice to the maintenance of price stability, to support the general economic policies of the Community with a view to contributing to the achievement of the general Community objectives as laid down in Article 2 of the Treaty. The paramount importance of price stability owes its existence to German influence. Article 105 is heavily based on Article 12 of the German *Bundesbankgesetz* of 1957, as Germany saw the adoption by the Community of the hierarchy of objectives provided for therein as a *quid pro quo* for the surrender of monetary sovereignty. In fact, as has been pointed out,³² price stability is elevated to a fundamental objective not only of the ESCB but also of the Community itself since Article 2 EC expressly refers to sustainable and non-inflationary growth and Article 4(2) EC includes, as an integral part of Community activities, the conduct of a single monetary and exchange rate policy, the primary objective of both being price stability.

The main tasks of the ESCB are the following:³³ (a) to define and implement the monetary policy of the Community; (b) to conduct foreign exchange operations; (c) to hold and manage the official foreign reserves of the Member States; and (d) to promote the smooth operation of payment systems. These functions correspond to the functions traditionally assigned to a central bank within a sovereign polity. To carry out these tasks, the ECB is vested with wide-ranging legislative powers and has a number of instruments at its disposal. Such instruments may regulate legal relations among the component parts of the ESCB or produce external effects vis-à-vis third parties. Article 110 in fact grants the ECB extensive regulatory and legislative functions resembling in certain respects the instruments provided for in Article 249 EC. Thus, the ECB may make regulations, adopt decisions, and also adopt non-binding recommendations and opinions.³⁴ It also has power to impose fines or periodic penalty

³² See Lastra, *op cit*, at 215.

³³ See Article 105(2) EC and Articles 2 and 3 of the ESCB Statute.

³⁴ Article 110(1) and (2) EC. For an extensive discussion of the rule-making powers of the ECB, see Zilioli and Selmayr, (1999–2000) 19 YEL at 388 *et seq.* These authors favour an extensive construction of ECB normative powers in the monetary field. They argue that the ECB's powers are not limited to cases in which a specific power to adopt regulations is granted by the ECSB Statute or by a Council act but extends to all cases in which it is necessary to implement the tasks assigned to it by the Treaty. The authors conclude that in the field of monetary policy, the ECB has powers 'similar in quality' to that given to the Council under Article 308 EC. Although an extensive interpretation of the powers of the ECB may well be justified in certain circumstances, the above line of argument appears to blur the distinction between implied powers and the residual competence granted by Article 308 which are, in fact, separate. A broad understanding of ECB powers is also favoured by J V Louis, 'A Legal and Institutional Approach for Building a Monetary Union' (1998) CML Rev 33 at 58 *et seq.*

payments on undertakings, subject to authorization and within the limits provided by the Council.³⁵

The ECB is a 'special institution'³⁶ provided for by the EC Treaty. Its special status is attributable to a number of features which distinguish it from the other institutions of the Treaty. First, whilst it is an integral part of the institutional structure of the Community, Article 7 EC does not refer to it as one of the institutions of the Community. Instead, the ECB is dealt with separately in Article 8.³⁷ As it will be argued below, however, this does not place the ECB in an inferior hierarchical position vis-à-vis the institutions proper.³⁸ Secondly, in contrast to the other institutions, the ECB enjoys separate legal personality both in the international sphere and vis-à-vis the Member States.³⁹ Thirdly, in carrying out its tasks, the ECB enjoys independence from the Community institutions and the Member States.

In relation to the Member States that have adopted the euro, the competence assigned to the Community in the field of monetary union is exclusive. This is expressly recognized by the aborted Constitutional Treaty and the Treaty of Lisbon⁴⁰ but it also reflects the position under the current treaties since, by definition, it would not be possible for monetary union to coexist with shared Member State competence. A ramification of competence exclusivity is institutional exclusivity in the sense that the tasks assigned to the ESCB can only be performed by the institutions and in accordance with the processes established in the Treaty to the exclusion of other actors.⁴¹

B. Institutional Balance and the Duty of Cooperation

The EC Treaty does not draw any order of hierarchy among the institutions of the Community. All institutions and bodies have been assigned different tasks and vested with powers to promote the objectives of the Community. They are

³⁵ Article 110(3). ³⁶ See R Lastra, at 223.

³⁷ Notably, the present juxtaposition between Articles 7 and 8 is not maintained by the Treaty of Lisbon which refers to the ECB as an integral part of the institutional framework of the Union: see Article 13 TEU as amended by the Treaty of Lisbon. In this respect, the Treaty of Lisbon is different from the aborted Constitutional Treaty Article I-19 of which, in line with current Article 7, did not mention the ECB as one of the main institutions of the Union. ³⁸ See below

³⁹ Article 107(2); this provision appears to refer to the international legal personality of the ECB, its legal personality vis-à-vis the Member States being dealt with in Article 19.1 of the ESCB Statute. See C Zilioli and M Selmayr, *The Law of the European Central Bank* (Hart, 2001) at 180. Zilioli and Selmayr point out that the international legal personality of the ECB, as is normally the case with central banks, is derivative, meaning that it is limited to the specific tasks assigned to them, and relative in the sense that its existence in the international sphere depends on recognition by other subjects of public international law: See op cit, 181–182. For the non assignment of legal personality to the ESCB see Fernandez Martin, op cit, 2. Note that the European Investment Bank (EIB) also has separate legal personality: see Article 266 EC.

⁴⁰ See TFEU, Article 3(1)(c); Constitutional Treaty, Article I-13(1)(c).

⁴¹ Fernandez Martin, op cit, 52. This is not to say, however, that the competence of the ECB on payment systems under Article 22 of the ESCB is exclusive. See below.

part of the same institutional family⁴² and can be said to have been placed in a position of 'different but equal'. More specifically, inter-institutional relationships are governed by the following principles. First, each institution must act within the limits of the powers conferred upon it by the Treaty.⁴³ This serves to underline that the institutions, as the Community itself, do not have any self-executing powers and may only act within the mandate granted to them, expressly or implicitly, by the founding Treaties. Secondly, according to the principle of institutional balance, each institution must respect, and not encroach upon, the powers of the other institutions.⁴⁴ In relation to the ECB, the principle of institutional balance has been expressly recognized by the EC Treaty which places the Bank, together with the Court of Auditors, in the position of a prerogatives-based applicant for the purposes of judicial review.⁴⁵ Thirdly, all institutions, including the ECB, are bound by the duty of sincere and loyal cooperation laid down in Article 10 EC.

Although this provision appears to impose duties only on Member States, the case law makes it clear that it also imposes mutual duties on the Community institutions to conduct inter-institutional dialogue in a spirit of sincere cooperation.⁴⁶ Owing to its all embracing character,⁴⁷ this duty also applies both in favour of and against the ECB. The potential importance of Article 10 in this context should not be underestimated. Although Article 10 cannot by itself create new duties and only applies in the absence of more specific provisions of Community law,⁴⁸ it has been used by the Court with creativity. The following have been identified, among others, as general obligations flowing from Article 10: the duty to abstain from measures which could hinder the internal functioning of the Community institutions; the obligation to abstain from measures which could hinder the development of the integration process; and the obligation to ensure the protection of rights stemming from primary and secondary Community law.⁴⁹ In recent years, the duty of sincere cooperation has found fruitful application particularly in the field of

⁴² See J M Fernandez Martin, 'The Competition Rules of the EC Treaty and the European System of Central Banks' (2001) *European Competition Law Review* 51 at 53.

⁴³ See Articles 7(1) for the institutions proper and Article 8 for the ECB and the ESCB.

⁴⁴ For the principle of institutional balance, see Case C-70/88 *Parliament v Council (Chernobyl case)* [1990] ECR I-2041 and the cases referred to below.

⁴⁵ See Article 230(3) EC.
⁴⁶ See eg Case C-65/93 *Parliament v Council* [1995] ECR I-643, para 23; Case 204/86 *Greece v Council* [1988] ECR 5323, para 16.

⁴⁷ Notably, the duty of cooperation has been applied as a general principle of EU law, transcending the specific provision of Article 10, in the third pillar, and has been held to be especially binding in the field of Justice and Home Affairs: see Case C-105/03, Judgment of 16 June 2005; Case T-228/02 *OMPI v Council* [2006] ECR I-4665, paras 122–123.

⁴⁸ See Case C-84/04 *Commission v Portugal* [2006] ECR I-9843, para 40; Case C-392/02 *Commission v Denmark* [2005] ECR I-9811, para 69.

⁴⁹ L W Gormley, 'The Development of General Principles of Law within Article 10 (ex Article 5) EC' in U Bernitz and J Nergelius, *General Principles of European Community Law* (Kluwer, 2000) at 114–115. See further Durand (1990) *CML Rev* 645.

competition law⁵⁰ and also lies behind the obligation of the Community institutions themselves to observe the fundamental freedoms.⁵¹

The ECJ has applied Article 10 in combination with Article 81 EC to place Member States under an obligation not to give legislative effect or encourage the adoption of anti-competitive agreements.⁵² This is of importance since although, as it will be argued, the ECB is not directly subject to the competition rules of the Treaty, it is under an obligation to observe the principle of free competition under Article 105(1) EC and arguably, in this context, a duty to cooperate with the Commission in the observance of competition law and also by the analogical application of the case law on Member States not to encourage the adoption of anti-competitive agreements.

C. Independence

The independence of the ECB and the national central banks is enshrined in Article 108 of the Treaty and Article 7 of the Statute of the ECSB and of the ECB (hereinafter ECSB Statute).⁵³ It should be understood as functional, institutional, and financial independence⁵⁴ but not as complete institutional autonomy. Article 108 EC⁵⁵ provides that, when exercising their powers and carrying out their duties, the ECB, the national central banks, and members of their decision-making bodies must not seek or take instructions from Community institutions or bodies, from any national government, or from any other body. The Community institutions and bodies and the Member States undertake to respect that principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

On the basis of this provision, the ECB has defended its independence forcefully choosing to stress its distance from the political institutions rather than see itself as another branch of the Community government. This generated a degree of inter-institutional competition which culminated in the *OLAF case*,⁵⁶ where the ECJ had the opportunity to pronounce on the status and the

⁵⁰ See J Temple Lang, 'Article 10 EC – The Most Important General Principle of Community Law' in U Bernitz, J Nergelius, and C Cardner, *General Principles of EC Law in a Process of Development* (Kluwer, 2008) 75 esp at 101 *et seq.*

⁵¹ See Gormley, *op cit*, at 117. For this obligation, see in more detail, below.

⁵² Case C-198/01 *Conorzio Industrie Fiammiferi and Autorita Garante della Concorrenza e del Mercato* [2003] ECR I-8055, para 45 *et seq.*

⁵³ See Protocol on the Statute of the European System of Central Banks and of the European Central Bank annexed to the EC by the TEU as subsequently amended.

⁵⁴ Lastra, *op cit*, 225.

⁵⁵ See also Article 7 of the ESCB Statute.

⁵⁶ Case C-11/00 *Commission v ECB* [2003] ECR I-7147. For an extensive discussion, see Zilioli and Selmayr, *op cit*; R Goebel, (2006) 29 *Fordham Int'l LJ* 610. For central bank independence and its affinity to judicial independence, see, among others, G. Tridimas, 'A comparison of Central Bank and Judicial Independence' in Alain Marciano (ed) *Constitutional mythology: theory and facts* (Edward Elgar, forthcoming).

independence of the ECB in the context of an inter-institutional dispute with the Commission.

The ECB adopted Decision 1999/726 with a view to combating fraud and other illegal activities detrimental to its financial interests.⁵⁷ The decision made the Directorate for Internal Audit responsible for conducting administrative investigations within the ECB and established an independent anti-fraud committee to which the Director of Internal Audit was accountable. The Commission took issue with that decision arguing that it infringed Regulation 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)⁵⁸ because it negated both the investigative powers conferred on OLAF and the applicability of the Regulation to the ECB.⁵⁹

The basic findings of the judgment may be summarized as follows. The Court firmly reiterated that the ECB is a Community body which falls within the framework of the Treaty and is bound to contribute towards the attainment of Community objectives.⁶⁰ The fact that it has its own separate budget does not mean that it is beyond the scope of Article 280 EC on the basis of which OLAF's powers of investigation were established. The expression 'financial interests of the Community' in Article 280 must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also those covered by the budget of other bodies, offices, and agencies established by the EC Treaty.⁶¹ The ECJ took a functional, but not unduly narrow, view on the requirement of consultation. It held that the failure to consult the ECB on the adoption of the OLAF Regulation did not infringe its prerogatives because, under Article 12.3 of the ESCB Statute, consultation is required only in areas where 'by virtue of the high degree of expertise that it enjoys, [it] is particularly well placed to play a useful role in the legislative process envisaged'.⁶² It follows that the ECB must be consulted only in relation to proposals which fall substantively within the sphere of the tasks assigned to it by the Treaty, ie monetary policy. Although the specific scope of the requirement of consultation remains to be ascertained, it is submitted that it should receive a wide interpretation and the ECB must be consulted on all matters which may have a reasonably incidental effect on monetary policy.

⁵⁷ [1999] OJ L291/36. The decision was adopted on the basis of Article 12.3 of the ESCB Statute which mandates the Governing Council to adopt rules of procedure which determine the internal organization of the ECB and its decision-making bodies.

⁵⁸ Regulation 1073/1999 ([1999] OJ L136/1) was adopted by the European Parliament and the Council on the basis of Article 280 EC. OLAF was established by Commission Decision 1999/352, [1999] OJ L136/20, its task being, inter alia, to conduct both internal and external administrative investigations with a view to combating fraud, corruption, and other illegal activities adversely affecting the Community's financial interests.

⁵⁹ Under Articles 1(3) and 4 of Regulation 1073/1999, OLAF has power to conduct internal fraud investigations 'within the institutions, bodies, offices and agencies established by, on the basis of, the Treaties'. Such investigations may be opened by OLAF acting on its own initiative or following a request by the Community body where the investigation is to be conducted.

⁶⁰ See paras 91–92 of the judgment.

⁶¹ Para 90 *et seq.*

⁶² Para 110.

The most important aspect of the judgment lies in the examination of the concept of independence. The ECB argued that the system of administrative investigations provided for by the Regulation conflicted with its independence, as guaranteed by Article 108 EC. In its view, the guarantee of independence covered not only the performance of the ESCB's basic tasks as set out in Article 105(2) EC but, more generally, the exercise of all the ECB's other powers, including those pertaining to its internal organization, which included the adoption of anti-fraud measures. The ECJ did not find this argument persuasive. It drew a distinction between, on the one hand, functional independence and, on the other hand, institutional autonomy in establishing control procedures, and held that the guarantee of independence from political control does not bring with it regulatory independence. Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives and tasks assigned to it. By contrast, such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law.⁶³ The ECJ based this on three considerations.⁶⁴ First, the fact that the ECB is subject to the principle of conferred powers. Secondly, the fact that it is also subject to various kinds of Community controls, notably review by the Court of Justice and control by the Court of Auditors. Finally, a series of Treaty provisions from which it was evident that it was not the intention of the Treaty draftsmen to shield the ECB from any kind of legislative action taken by the Community legislature.⁶⁵

The Court found that subjecting the ECB to OLAF's investigation powers did not undermine its independence. OLAF itself was independent from the Commission and had to operate within a strict statutory framework. The system of checks and balances provided for by the Treaty had sufficient safety valves. OLAF's remit was limited and subject to strict observance of the rules of Community law, including, in particular, the Protocol on the privileges and immunities of the European Communities, and human rights. The ECJ also attributed particular importance to two considerations. Fraud investigations carried out by OLAF are distinguishable from other forms of control, such as financial control, which are more rigid. Secondly, OLAF's internal investigations have to be carried out in accordance with the procedures provided for in decisions adopted by each institution. The ECB therefore had the chance to protect its independence.

The judgment appears correct. The Court drew, in effect, a distinction between the ECB as an institution assigned constitutional tasks in the performance of which it must act independently and the ECB as a bureaucracy which is subject to transversal provisions applicable to all institutions. Although it may not be possible to draw this distinction safely in all cases, the ECB had not

⁶³ Paras 134–135.

⁶⁴ Para 135.

⁶⁵ See eg Article 105(6) EC, Article 107(5) and (6) EC, and Article 110(1), first indent, and (3) EC.

shown how OLAF's powers of investigation would *in abstracto* prejudice its institutional and operational independence.⁶⁶

III. Community Agencies

A. Growth and Overview

One of the distinct features of the Community's institutional architecture has been the unprecedented growth in the number of independent agencies established at Community level since the 1990s.⁶⁷ Whilst there were just two Community agencies in the 1970s⁶⁸ and only four in 1993, there are currently 24 decentralized

⁶⁶ The approach of the ECJ accords with previous case law. In Case 85/86 *Commission v EIB* [1988] ECR I 281, the ECJ made similar findings in relation to the European Investment Bank. It held that the EIB's operational and institutional autonomy did not mean that it was totally separate from every rule of Community law since it was intended to contribute to the attainment of Community objectives and formed part of the framework of the Community. On that basis, the ECJ rejected the EIB's submission that the proceeds of the Community income tax paid by EIB's servants were not part of the Community budget and could be transferred to the reserves of the Bank. See also Case C-370/89 *SGEEM v EIB* [1992] ECR I-6211 where the ECJ held that, since the EIB is a Community body, the ECJ has jurisdiction to hear actions based on the non-contractual liability of the EIB under Article 178 (now 235) of the Treaty.

⁶⁷ Bibliography on agencies abounds. See, among others, P Craig, *EU Administrative Law*, ch 5; M Aglietta and L Scialom, 'The Challenge of European Integration for Prudential Policy', *Special Paper—LSE Financial Markets Group* (2003); M Bovens, 'New Forms of Accountability and EU-Governance', *Comparative European Politics* (2007) 5, 104–120; E Chiti, 'The emergence of a Community Administration: The case of European Agencies' (2000) CML Rev 309–343; D Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in Damien Geradin, Rodolphe Muñoz, and Nicolas Petit (eds), *Regulation through Agencies in the EU: a new paradigm of European governance* (Edward Elgar Publishing, 2005); R Dehousse, 'Misfits: EU Law and the transformation of European Governance', Jean Monnet Working Paper 2/02, available at: <<http://www.jeanmonnetprogram.org/papers/02/020201.rtf>>; M Everson, G Majone, L Metcalfe, and A Schout, 'The Role of Specialised Agencies in Decentralising EU Governance', Report presented to the Commission, available at: <http://ec.europa.eu/governance/areas/group6/contribution_en.pdf>. E Fisher, 'The European Union in the Age of Accountability' (2004) 24(3) *Oxford Journal of Legal Studies* 495–515; D Geradin and N Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform', Jean Monnet Working Paper 01/04, available at: <<http://www.jeanmonnetprogram.org/papers/04/040101.pdf>>; K Lenaerts and A Verhoeven, 'Institutional balance as a guarantee for democracy in EU governance' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford MA: Oxford University Press, 2002) 35–88; K Lenaerts, 'Regulating the regulatory process: "delegation of powers" in the European Community' (1993) 18(1) *EL Rev* 23–49; G Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1997) 3 *EIPASCOPE* 1–6 (also available at <http://aci.pitt.edu/786/01/scop97_3_2.pdf>). G Majone, 'Ideas, Interests and Institutional Change: The European Commission Debates the Delegation Problem', available at: <http://www.portedeurope.org/IMG/pdf/cahier_4_2001.pdf>; R Nickel, 'Participatory Governance and European Administrative Law: New Legal Benchmarks for the New European Public Order', *EUI Working Papers*, Law No 2006/26; E Vos, 'Agencies and the European Union' in T Zwart and L Verhey (eds), *Agencies in European and Comparative Perspective* (Intersentia, 2003); X Yataganas, 'Delegation of Regulatory Authority in the European Union, The relevance of the American model of independent agencies', Jean Monnet Working Paper 3/01.

⁶⁸ These were the European Centre for the Development of Vocational Training and the Foundation for the Improvement of Living and Working Conditions.

agencies.⁶⁹ This number does not include the so-called executive agencies, established under Council Regulation (EC) 58/2003,⁷⁰ nor the European Institute of Innovation and Technology (EIT), which is currently being set up.⁷¹ In addition to first pillar agencies, a number of agencies have been established under the Common Foreign and Security Policy⁷² and also under the Third Pillar.⁷³

⁶⁹ These agencies are the following (see <http://europa.eu/agencies/community_agencies/>):

Community Fisheries Control Agency (CFCA)
Community Plant Variety Office (CPVO)
European Agency for Reconstruction (EAR)
European Agency for Safety and Health at Work (EU-OSHA)
European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)
European Aviation Safety Agency (EASA)
European Centre for Disease Prevention and Control (ECDC)
European Centre for the Development of Vocational Training (Cedefop)
European Chemicals Agency (ECHA)
European Environment Agency (EEA)
European Food Safety Authority (EFSA)
European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)
European Fundamental Rights Agency (FRA)—previously EUMC
European GNSS Supervisory Authority (GSA)
European Joint Undertaking for ITER and the Development of Fusion Energy (Fusion for Energy)
European Maritime Safety Agency (EMSA)
European Maritime Safety Agency (EMSA)
European Medicines Agency (EMA)
European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)
European Network and Information Security Agency (ENISA)
European Railway Agency (ERA)
European Training Foundation (ETF)
Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)
Translation Centre for the Bodies of the European Union (CdT)
European Institute for Gender Equality (under preparation).

⁷⁰ Council Regulation (EC) 58/2003, [2003] OJ L11/1. For these agencies, see below.

⁷¹ Regulation (EC) 294/2008, [2008] OJ L97/1.

⁷² Currently, there are three agencies under the second pillar (for details, see <http://europa.eu/agencies/security_agencies/index_en.htm>): The European Defence Agency (EDA), the European Union Institute for Security Studies (ISS), and the European Union Satellite Centre (EUSC). EDA was established under a Joint Action of the Council of Ministers on 12 July 2004, its main objectives being to improve the EU's defence capabilities especially in the field of crisis management, promote EU armaments cooperation, strengthen the EU defence industrial and technological base, and create a competitive European defence equipment market, and promote research, with a view to strengthening Europe's industrial and technological potential in the defence field. ISS was set up in 2002 based on a Council Joint Action on 20 July 2001, ([2002] OJ L200), its aim being to contribute to the generation of a common European security culture and support the strategic debate by providing the best possible interface between European decision-makers and the diverse circles of non-official specialists. ISS performs mainly data analysis and frames recommendations necessary for EU policy-making. It organizes research and debate on key security and defence issues bringing together officials, experts from within the EU and beyond, and developing a transatlantic dialogue on security issues with the US and Canada. EUSC was established by a Council Joint Action on 20 July 2001, ([2001] OJ L200, 25.07.01). It is an Agency of the Council dedicated to the exploitation and production of information deriving from the analysis of earth observation space imagery and is designed to support decision-making in CFSP.

⁷³ There are three third pillar agencies (for details, see <http://europa.eu/agencies/pol_agencies/index_en.htm>). Eurojust is governed by Council Decision of 28 February 2002 No 2002/187/

Community agencies do not find a direct legal basis in the Treaty. They are established by Community legislation in order to accomplish specific technical, scientific, or managerial tasks. They perform specific functions and objectives and typically work under the monitoring of the Commission. The growth of Community agencies began in the 1990s and was associated with the completion of the internal market. At that time, consensus emerged at the political level that a number of scientific and technical tasks should be allocated to specialized agencies to enable the Commission to cope with the increasing regulatory demands of the maturing internal market. Those demands coupled with a desire for geographical devolution of the Community's centres of power, led the Heads of State and Government of the Member States meeting in Brussels on 29 October 1993, to take a decision fixing the headquarters of seven agencies. These commenced their operations in 1994 or 1995 although in the case of some of them the regulations on which they were founded had been adopted some years before.⁷⁴ A third wave of agencies came into existence in the 2000s. The seats of those agencies were decided by the Heads of State and Government of the Member States in December 2003.

In parallel to the development of Community agencies, the 1990s also experienced a considerable growth of independent regulatory authorities at the national level. The establishment of such authorities was, to a considerable extent, the result of the process towards the liberalization of State monopolies pursued by the Commission. Thus, national independent authorities have been established in the telecommunications, energy, and railway sectors as well as in the general field of competition law under Regulation 1/2003.⁷⁵ It will be noted that these national authorities are different from Community agencies in a number of respects.⁷⁶ First, whilst the main motivation behind the growth of

JHA (OJE L63/1, 6.3.2002) as amended by Council Decision of 18 June 2003 No 2003/659/JHA (OJE L245/44, 29.9.2003). Its mission is to enhance the development of Europe-wide cooperation in criminal justice cases, especially in serious cross-border and organized crime. To this end, it is designed to improve the coordination of investigations and prosecutions and support national investigations. Europol was set up in 1992 and is designed to assist Member States to cooperate more closely and effectively in preventing and combating organized international crime, including drug trafficking, immigration networks, and terrorism. Europol offers a supporting but important service, *inter alia*, by facilitating the exchange of information, providing expertise and technical support for investigations and operations, and maintaining a computerized system to allow the input, access, and analysis of relevant data. Finally, CEPOL, the European Police College brings together senior police officers across Europe by organizing seminars and conferences. See Council Decision 2005/681/JHA of 20 September 2005.

⁷⁴ See the Europa agencies website <http://europa.eu/agencies/community_agencies/history/index_en.htm>.

⁷⁵ Council Regulation 1/2003 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

⁷⁶ See Geradin and Petit, *op cit*, at 9–10.

Community agencies has been the need for specialization and expertise, the growth of national agencies has been dictated by the need to provide for independence. The objective of dismantling State monopolies in key sectors of the economy could only be achieved if regulatory tasks could be removed from politicians and be assigned to independent regulators, hence the development of national public agencies. A second difference flows from the first. Whilst Community agencies are typically assigned well circumscribed tasks and have limited executive powers, national authorities enjoy considerable discretion in the regulatory field.

The number of Community agencies remains low in comparison to that in the United States where there are about 87 major federal regulatory agencies.⁷⁷ Still, this comparison is unfair. The European Community is not a federal State and has had a much shorter life than the US. The proliferation of Community agencies illustrates the growth of technocracy. As already stated, the main reason for their development can be found in the quest for expertise and specialization. Some issues are so complex, technical, or specialized that sensible decisions on them can only be taken by, or at least with the input of, experts.⁷⁸ The need for such expertise has become all the more important given that the Community has moved beyond negative integration, ie dismantling obstacles to trade, and into the field of positive integration, in fields as varied as consumer protection, environment, and health. The more the Community moves into the field of risk regulation, namely 'the assessment and management of risks that may result from natural events or human activities',⁷⁹ the greater the need for specialist input. From this perspective, the proliferation of Community agencies can be seen as the natural progress of Community governance and as mirroring the growth of the administrative State in national polities. It is also associated with a shift of emphasis from legislation to regulation and implementation in the field of the internal market. As Dehousse has noted, following the completion of the internal market project, there has been a notable decline in the number of legislative measures adopted by the Community but an increase in administrative rulemaking, ie regulatory measures of general application which take the form of regulations or directives.⁸⁰ This multi-tier model of Community governance has been formalized in the field of financial services following the implementation of the Lamfalussy process.⁸¹ So far, the process has been considered to be a success and it has been decided to extend its application beyond the field of securities

⁷⁷ Breyer, Stewart, Sunstein, and Spitzer, *Administrative Law and Regulatory Policy*, at 147.

⁷⁸ See Dehousse, *op cit*, at 1–2.

⁷⁹ See R Dehousse, 'Misfits: EU Law and the Transformation of European Governance', p 1, Jean Monnet Paper, available at <<http://www.jeanmonnetprogram.org/papers/02/020201.html>>. and S Breyer, *Breaking the Vicious Circle. Towards Effective Risk Regulation* (Harvard University Press, 1993).

⁸⁰ See for the data, Dehousse, *op cit*.
⁸¹ See Final Report of the Committee of Wise Men on the Regulation of the European Securities Markets, 15 February 2001 (Lamfalussy Report), available at <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf>.

markets in the neighbouring areas of insurance and banking.⁸² In formal terms, the distinction between legislation and administrative rule-making in the Community is more difficult to draw than at national level since the range of instruments provided for in Article 249 EC do not establish a clear hierarchy of norms.⁸³

The perceived advantages of agencies is that they provide the expertise necessary to deal with highly complex assessments in technical and specialized fields, lighten the workload of the Community institutions,⁸⁴ reduce transaction costs by streamlining the decision-making process, provide independence from political interests, and even enhance citizens' understanding of the mission and tasks of the EU. By contrast, the main criticisms commonly associated with administrative agencies are that they add a layer of bureaucracy, make the decision-making process less transparent, encourage blame shifting, lead to unaccountable government, and detract from democracy, becoming effectively a 'headless fourth branch of government'⁸⁵. Agencies create problems of accountability and legitimacy. They are not elected by the citizens and may not be subject to the strict requirements of independence that constrain the judiciary. They also pose a threat to personal liberty as they often combine the powers of legislating, taking individual decisions, managing and judging, powers which under the principle of separation of powers should be entrusted to different organs of government.⁸⁶ In the light of such criticisms, the role of the law is to strike a balance facilitating efficient and optimum decision-making in the public interest with respect to fundamental democratic principles. It is pertinent to recall here the principles outlined in the Commission's White Paper on Good Governance, namely independence, accountability, transparency, and participation which provide essential yardsticks vis-à-vis which the organization, structure, and conduct of Community agencies must be assessed.⁸⁷

⁸² Note that, following the de La Rochiere Report and as part of its financial institutions reform package, the Commission proposes the transformation of the three existing Level 3 committees under the Lamfalussy process to fully fledged independent agencies. See EC Commission Communication for the Spring 2009 European Council, Driving European Recovery, Brussels, COM (2009) 114 final, 4 March 2009, p 6. Available at <http://ec.europa.eu/commission_barroso/president/pdf/press_20090304_en.pdf>.

⁸³ Cf Articles 288–292 of the TFEU as provided by the Lisbon Treaty. For a discussion of the hierarchy of norms under these provisions as provided by the aborted Constitutional Treaty, see P Craig, 'The Hierarchy of Norms' in Tridimas and Nebbia (eds), *European Union Law for the Twenty-First Century*, Vol 1, 75 *et seq.*

⁸⁴ This is expressly recognized, for example, in the preamble to Regulation 58/2003 on executive agencies, *op cit*: see recital 4.

⁸⁵ The expression was coined by President Franklin Roosevelt's Committee on Administrative Management, see Breyer et al, *op cit*, at 146.

⁸⁶ For a more detailed analysis, see Breyer et al, *op cit*, 146–147.

⁸⁷ For a recent critique, see A Renda, 'Advancing the EU better regulation agenda: selected challenges for Europe', Centre for European Policy Studies, September 2008, available at SSRN, <<http://ssrn.com/abstract=1291030>>.

Finally, it should be noted that the establishment of agencies is but one form of delegation recognized in the Community legal order. The other forms of delegation will be examined in due course insofar as relevant to our inquiry.⁸⁸

B. The Agencies Landscape: Typology and Common Features

The aims and tasks of the various Community agencies are defined by their respective constitutive instruments. They are diverse and vary in nature, subject-matter, and scope so that a general typology of agencies is not easy to undertake. In general, it is stated that the general aims of Community agencies, which transcend their specific objectives, are the following:⁸⁹

- 1) they introduce a degree of decentralisation and dispersal to the Community's activities;
- 2) they give a higher profile to the tasks that are assigned to them by identifying them with the agencies themselves;
- 3) some answer the need to develop scientific or technical know-how in certain well-defined fields;
- 4) others have the role to integrate different interest groups and thus to facilitate the dialogue at a European (between the social partners, for example) or international level.

As will be explained below, an important limitation on agency powers under the *Meroni* case law is that Community agencies cannot enjoy extensive discretionary powers. Subject to this caveat, one may distinguish the following types of agencies in accordance with the functions allocated to them: regulatory agencies, quasi-regulatory agencies, decision-making agencies, executive agencies, and agencies that have principally a role of cooperation and coordination.⁹⁰

The term regulatory agency is here used to signify a body that has power to promulgate rules of general application. The growth of such agencies in Community law has been prevented as a result of the *Meroni* principle.⁹¹ A quasi-regulatory agency is one which has 'strong recommendatory power'.⁹² The European Aviation Safety Agency (EASA) is perhaps the most striking example of such an agency in the Community. It drafts detailed rules which are passed by the Commission to implement the basic regulation. It is also empowered to publish codes which are treated as binding by the industry.⁹³ The European Maritime Safety Agency (EMSA), the European Food Safety Authority (EFSA), and the European Medicines Agency (EMA) also belong to the category of

⁸⁸ See below.

⁸⁹ This description is taken from the official europa website: see <http://europa.eu/agencies/community_agencies/history/index_en.htm>

⁹⁰ This classification follows the typology suggested by Craig, op cit, at 154 *et seq.*

⁹¹ See below. ⁹² Craig, op cit, 155. ⁹³ Craig, op cit.

quasi-regulatory agencies. A decision-making agency is one which has the power to take individual decisions applying the law which are binding on third parties. A prime example of such an agency is the Trademarks Office (OHIM). EASA and EFSA also belong to this category as they combine quasi-regulatory functions with decision-making ones. In Community law, the term executive agency refers formally only to one type of agency namely those established under Council Regulation 58/2003.⁹⁴ These agencies are entrusted with specific tasks related to the management of Community programmes and are established for a fixed period. There are currently six such agencies.⁹⁵ Executive agencies are discussed further below in relation to T2S.⁹⁶ Finally, some agencies have only a coordinating and supporting role, under which they facilitate the operational cooperation between, or provide services to, national authorities. This applies for example to FRONTEX, Eurojust, and Europol.

The above typology, however, is unable to capture the true extent of powers and responsibilities that agencies may possess. For one thing, an agency may have been assigned more than one of the roles outlined above; for another, the use of terms such as 'regulatory' or 'executive' may give rise to more questions than they answer. Even agencies which bear only a coordinating or supporting role may retain discretion in setting their priorities. Also, insofar as the role of an agency is to carry out an evaluation or a risk assessment, its expertise by necessity puts it in a preferential position to influence the decision-making process. This is the case, for example, with EFSA, EASA, and EMEA. It is also the case with the Border Agency, FRONTEX, which on the basis of its constitutive measure appears to have fewer powers. The key tasks of FRONTEX include identifying key threats to border security, pointing out the need for joint operations, and providing Member States' border guard services with early warnings. The statutory setup of an agency may not, in some cases, give an accurate picture of its power and contribution to decision-making. Political actors may have different understandings and expectations as to the mission of an agency and seek to influence its direction.⁹⁷ A lot may thus depend on the political dynamic generated by the institutional setup.

Despite the diversity of their objectives and tasks, Community agencies are characterized by certain common organizational features. These have been identified to be the following.⁹⁸ As regards their management structures,

⁹⁴ Council Regulation (EC) 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes [2003] OJ L11/1.

⁹⁵ These are the following: Education, Audiovisual and Culture Executive Agency (EACEA); European Research Council Executive Agency (ERC); Executive Agency for Competitiveness and Innovation (EACI); Executive Agency for Health and Consumers (EAHC); Research Executive Agency (REA); Trans-European Transport Network Executive Agency (TEN-T EA). The seat of such agencies must be that of the Commission, namely Brussels or Luxembourg. See further <http://europa.eu/agencies/executive_agencies/index_en.htm>.

⁹⁶ See below.
⁹⁷ See in this respect the analysis of FRONTEX by the House of Lords EU Committee: FRONTEX: the EU external borders agency (9th Report of Session 2007–08, HL Paper 60).

⁹⁸ See <http://europa.eu/agencies/community_agencies/function/index_en.htm>.

agencies typically have an administrative or management board, an executive director, and one or more technical or scientific committees. The membership of the administrative or management board is laid down by the regulation establishing the agency. Agency boards invariably include representatives from the Member States and one or several Commission representatives, and may also include members appointed by the European Parliament or representatives of the social partners. In the case of the Translation Centre for the Bodies of the European Union, the board also includes representatives of the users, namely other agencies. With the current European Community including 27 countries, the size of each board varies from 16 to 78 members (quadripartite Agencies). Non-member countries may also take part in certain cases, but they are not entitled to vote.

The executive director acts as the agency's legal representative. The distribution of powers between the administrative or management board and the executive director is laid down by the constitutive regulation and may be spelled out in its rules of procedure. The technical or scientific committee(s) are made up of experts specializing in the relevant field. They may also assist the board (in the case of budgetary committees) and the executive director by drafting opinions on questions put to them or by acting as information relays, as is for example the case with the Committee for Proprietary Medicinal Products, managed by the European Agency for the Evaluation of Medicinal Products or the advisory college of the European Training Foundation. In the majority of cases an agency's internal audit is carried out either by the Commission's Financial Controller or, if so stipulated in the rules of procedure, by an auditor appointed by the agency. In either event, however, the agencies are subject to the external control of the Court of Auditors.

Finally, most of the agencies are financed from a Community subsidy set aside for the purpose in the EU general budget. Some agencies, however, are partially or entirely self-financed. This is the case with the European Agency for the Evaluation of Medicinal Products, the Office for Harmonisation in the Internal Market, the Community Plant Variety Office, and the European Aviation Safety Agency, all of which are able to charge fees. It is also the case with the Translation Centre for the Bodies of the European Union, which receives financial contributions from its clients, in particular, the other Community agencies which use its services.

C. Legal Basis

The EC Treaty does not provide for an express legal basis for the setting up of agencies. Since, under the judgment in *Meroni*, the institutions may create independent bodies where that is necessary for the performance of their tasks, agencies can be established under the specific Treaty provisions which authorize the institutions to pursue the task in question. In practice, most agencies have

been established under Article 308. This has been the case, notably, with executive agencies under Regulation 58/2003. This is also the case with the European Agency for Safety and Health at Work (EU-OSHA),⁹⁹ and the European Union Agency for Fundamental Rights (FRA).¹⁰⁰ The use of Article 308 for the establishment of agencies, especially FRA, shows that that provision has been invoked with creativity and, in some respects, pushed to its limits. It will be recalled that the European Union is not a human rights organization and that in Opinion 2/94 the Court refused to sanction the use of Article 308 to facilitate the accession of the Community to the ECHR.¹⁰¹

In recent years, there has been a tendency to rely on specific Treaty provisions for the founding of agencies. Thus, EASA was based on Article 80(2) EC (transport). Similarly, EFSA was founded on the joint legal basis of Articles 37, 95, 133, and 152(4)(b) EC,¹⁰² whilst the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), in view of its subject matter, was based on Articles 62(2)(a) and 66 EC pertaining to freedom, security, and justice.¹⁰³

In *UK v Council and Parliament (ENISA case)*,¹⁰⁴ the ECJ upheld the use of Article 95 EC as the legal basis for the establishment of the European Network and Information Security Agency (ENISA). The mission of ENISA is to support the Member States, the institutions, and the business community in preventing and resolving network and information security problems. To this end, ENISA can advise and assist the Commission and the Member States on information security, collect and analyse data on security incidents in Europe, promote risk assessment exchange of best practices, and track the development of standards for products and services. The UK government was alone in voting against the adoption of Regulation 460/2004 which established the Agency. Before the Court, it argued that Article 95 could be used solely for the adoption of harmonization instruments, namely to achieve a result which could be attained by the simultaneous enactment of identical legislation in each Member State but not to establish a new entity existing alongside national legislation. The ECJ however rejected a narrow interpretation of Article 95. It held that that provision may be used as the legal basis for the setting up of a separate body provided that the tasks conferred on it are closely linked to the subject-matter and the

⁹⁹ See Council Regulation 1654/2003 amending Regulation 2062/94 establishing a European Agency for Safety and Health at Work [2003] OJ L245/38.

¹⁰⁰ See Council Regulation 168/2007 [2007] OJ L53/2.

¹⁰¹ Opinion 2/94 on the Accession of the EC to the ECHR [1996] ECR I-1759. Note however that that ruling appears to be something of aberration in the light of subsequent case law. Most recently, the ECJ endorsed a particularly inventive interpretation of Article 308 to found Community competence to impose economic sanctions against individuals: see Joined Cases C-402/05 P & C-415/05 *P Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008.

¹⁰² See Regulation (EC) 178/2002, [2002] OJ L31/1.

¹⁰³ See Council Regulation (EC) 2007/2004, [2004] OJ L349/1.

¹⁰⁴ Case C-217/04 *UK v Council and Parliament (ENISA case)*, Judgment of 2 May 2006.

objectives of harmonization legislation.¹⁰⁵ This would be the case where the body in question 'provides services to national authorities and/or operators which affect the homogenous implementation of harmonizing instruments and which are likely to facilitate their application'.¹⁰⁶

In upholding the use of Article 95, the ECJ pointed out that ENISA was part of a normative context circumscribed by Community directives on electronic communications, and its establishment was an appropriate means of preventing the emergence of disparities likely to create obstacles to the smooth functioning of the internal market. The agency was charged with collecting information, enhancing cooperation among the actors involved, and providing independent technical advice. It was thus designed to contribute to the harmonized transposition and application of the technical requirements laid down in the directives in the laws of the Member States.¹⁰⁷

The importance of the ECJ's ruling in the *ENISA* case lies in the fact that it extends the remit of Article 95 beyond harmonization legislation strictly understood, and also recognizes that independent agencies may have a useful role to play in the achievement of core Community objectives. The ECJ provides in effect the green light for a multi-stage model of internal market governance.

Notably, Kokott AG took a much more nuanced approach and came to the conclusion that ENISA could not be established on the basis of Article 95. She agreed that the use of Article 95 was not confined to measures which themselves approximate the laws of the Member States and included measures which effect approximation indirectly, for example by providing for procedures that bring about approximation. He came however to the conclusion that the ENISA Regulation could not be considered such an intermediate step. He agreed that ENISA's advisory function could support the legislative activity of the Community institutions and encourage approximation. However, its contribution to the harmonization process remained potential and unpredictable. The questions whether and in what form ENISA would contribute to the approximation of laws depended on all sorts of factors including the cooperation of institutions, bodies of the Member States, and representatives of the industry. Even where ENISA contributed to the approximation of laws, the corresponding measures would not necessarily be based on Article 95(1) EC. ENISA's establishment was therefore not so much an intermediate step on the way to the approximation of laws as 'a step into the uncertain'.

¹⁰⁵ Para 44.

¹⁰⁶ Para 45.

¹⁰⁷ The ECJ also took into account that it was a temporary agency. Under Regulation 460/2004, ENISA was established for a period of five years and the Commission was required to assess its impact in the light of its objectives and its working practices. It thus followed that, before making a decision on the fate of the Agency, the Community considered that it was appropriate to carry out an evaluation of its effectiveness and the contribution to the implementation of Community Directives on electronic communication services.

The Advocate General's view appears unduly narrow. The scope of Community powers under Article 95 should be determined by reference to the substantive content of the measures adopted and not by the instrumentalities of approximation. The power to harmonize includes the power to experiment with the instrumentalities of harmonization. ENISA does not have any decision-making powers but rather fulfils a coordinating and advisory function. As such, it can legitimately be viewed as an intermediate step in the process of harmonization and the fact that its contribution to that process depends on other actors is simply a reflection of its limited powers. The Opinion of the Advocate General in fact forecloses institutional experimentation of which we need more rather than less. By requiring certainty of result, it leaves in fact little room for innovation and hinders the quest for optimum structures of government.

The legal basis of a Community agency may give rise to political tensions where the agency operates in an area covered by opt-outs. This is aptly illustrated by *UK v Council (FRONTEX case)*.¹⁰⁸ The case concerned Regulation 2007/2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States (FRONTEX).¹⁰⁹ The main tasks of the Agency are inter alia to coordinate operational cooperation between Member States in the field of management of external borders, assist them in training of national border guards, including the establishment of common standards, and provide them with the necessary support in organizing joint return operations. The Agency is also to evaluate, approve, and coordinate proposals for joint operations and pilot projects made by Member States, and may itself launch such initiatives in cooperation with Member States. Furthermore, it is to set up and keep centralized records of technical equipment for control and surveillance of external borders belonging to Member States.

The Regulation was adopted on the basis of Articles 62(2)(a) and 66 EC. As a measure, the Regulation was a development of the provisions of the Schengen *acquis* within the meaning of Article 5(1) of the Schengen Protocol and, as such, it was adopted without the participation of the UK. The UK government wished to participate in the adoption of the Regulation and notified the Council to this effect on the basis of Article 5(1) of the Schengen Protocol. Having been refused participation, it sought the annulment of the Regulation. Dismissing the action, the ECJ held that, under Article 4 of the Schengen Protocol, the United Kingdom and Ireland cannot be allowed to take part in the adoption of a measure under Article 5(1) of the Protocol without first having been authorized by the Council to accept the area of the *acquis* on which that measure is based. The ECJ held that the interpretation proposed by the United Kingdom would have the consequence of depriving Article 4 of the Schengen Protocol of all effectiveness, in that the United Kingdom and Ireland could take part in all proposals and

¹⁰⁸ Case C-77/05 *UK v Council*, Judgment of 18 December 2007.

¹⁰⁹ Council Regulation (EC) 2007/2004, [2004] OJ L349/1.

initiatives to build upon the Schengen *acquis*, under Article 5(1), even though they had not accepted the relevant provisions of that *acquis* or had not been authorized to take part in them under Article 4. The Court also dismissed the United Kingdom's argument that a distinction should be drawn between 'Schengen-integral' measures and merely 'Schengen-related' measures. Such distinction had no basis either in the EU and EC Treaties or in secondary Community law.¹¹⁰

The ECJ further held that the Regulation had been adopted on the correct legal basis. The Regulation was intended to improve checks on persons at the external borders of the Member States and, as such, it was a measure designed to build upon the Schengen *acquis* within the meaning of Article 5(1) of the Schengen Protocol. It therefore fell within the Schengen Protocol and could not be adopted merely as a Title IV measure.

D. Limits on the Power to Delegate

As Craig observes¹¹¹ the setting up of agencies is subject to both legal and political limits. We will examine those in turn and then focus on the question whether the same limitations may be said to apply to the ECB.

(i) Legal Limitations

The legal limitations on the power to delegate derive from the judgment in *Meroni*¹¹² which was decided under the ECSC Treaty. The High Authority had set up two private law entities with separate legal personality and assigned to them the responsibility of administering the financial arrangements for the ferrous scrap scheme, which had been introduced with a view to stabilizing Community prices. The ECJ found that the delegation of powers was unlawful. In its judgment, the Court set out a number of constraints on the authority of the Community institutions to delegate their powers which have been reiterated in subsequent case law. These constraints apply equally to the ECB even though it may not, strictly speaking, be classified as a Community institution. There seems to be no reason why the delegation of powers by the ECB should be examined within a framework other than that established by *Meroni*. These limitations will now be examined in turn.

1. *The delegation of powers to an agency must be necessary for the performance of tasks assigned to the delegating institution by the Treaty.*¹¹³ This condition flows from the principle of conferred competences. Since, under Article 7(1) EC, the Community institutions may only act within the limits of the powers conferred upon them by the Treaty, an institution may not establish an agency unless this is in furtherance of its constitutionally assigned tasks. This

¹¹⁰ See para 73. ¹¹¹ Craig, at 160.

¹¹² Case 9/56 *Meroni v High Authority* [1957-58] ECR 133.

¹¹³ *Meroni*, op cit, 151.

condition, however, does not appear particularly onerous. In fact, *Meroni* does not require an express legal basis as a prerequisite of allowing an institution to delegate its powers. A general power to legislate appears, in principle, to encompass the authority to delegate powers, subject to the conditions of lawful delegation being fulfilled. In fact, the Court of First Instance (CFI) and Léger AG have taken the view that, under Community law, delegation is lawful unless expressly prohibited,¹¹⁴ although such dicta have been made in the context of staff cases and may not necessarily reflect the general posture of the case law. Implied restrictions on the power to delegate may also exist and the extent of the power to delegate will depend on the area in question and the nature of the tasks assigned.

2. *The delegating authority cannot confer on the agency powers different from those which it itself possesses.*¹¹⁵ This condition serves to avoid abuse since, in its absence, the delegating authority would be able to extend its powers or avoid legal constraints simply by conferring its powers to a delegate.
3. *The exercise of the powers conferred on the agency must be subject to the same conditions as those to which it would be subject if the delegating authority was exercising them directly.*¹¹⁶ The rationale of this condition is the same as that of the previous one. It applies in particular in relation to process rights and requirements such as the requirement to give reasons, publish administrative acts, respect the rights of the defence, etc. One of the main concerns of the Court in *Meroni* which led it to annul the contested decision was that the exercise of the powers conferred on the private agencies was not subject to the conditions to which it would have been subject, if the High Authority had exercised them directly.¹¹⁷ This condition has particular importance not only as a prerequisite of the validity of delegation but also as a rule of interpretation. It may lead to the imposition of implied limits on the powers of the authority to which a delegation has been made. In an administrative system which recognizes that delegation can validly be made, one would be prepared to accept, wherever possible, that limitations which would constrain the delegating authority are also applicable by implication to the authority receiving the delegation even in the absence of express provision to that effect. This is in accordance with the general rule of construction that, wherever possible, a provision should be interpreted so as to comply with a higher-ranking rule of law.
4. *The delegation of powers cannot be presumed but must be expressly provided.*¹¹⁸ Thus, to the extent that the delegating institution can delegate its powers, it

¹¹⁴ See Case T-333/99 *X v ECB* [2001] ECR II-3021, para 102. Léger, *op cit*, para 29.

¹¹⁵ *Meroni*, *op cit*, 150 and Léger, *op cit*, para 31.

¹¹⁶ *Meroni*, *op cit*, 149–150; and Léger, *op cit*, para 31.

¹¹⁷ *Meroni*, *ibid.*

¹¹⁸ *Meroni*, *op cit*, 150; and Case C-301/02 *Tralli ECB*, Judgment of 26 May 2005 per Léger AG at para 31 of the Opinion.

must take an express decision to that effect and implied delegation is not valid. This was recently reiterated in *FMC Chemical SPRL v European Food Safety Authority (EFSA)*,¹¹⁹ where in rejecting the argument that the Commission had delegated its powers to adopt binding decisions to EFSA, the CFI stated that powers cannot be presumed to have been delegated and that, even when empowered to delegate its powers, the delegating authority must take an express decision to that effect.

5. *The powers delegated may only involve clearly defined executive powers, the use of which must be entirely subject to the supervision of the delegating institution.*¹²⁰

By contrast, discretionary powers involving a wide margin of discretion and involving a real transfer of responsibility cannot be delegated. This is by far the most important limitation set by *Meroni* and will be examined in detail in the next section.

(ii) *Discretionary Powers*

In *Meroni*, the ECJ drew a distinction between, on the one hand, delegation of clearly defined executive powers the exercise of which can be subject to strict review on the basis of objective criteria determined by the delegating authority and, on the other hand, delegation of discretionary powers implying a wide margin of appreciation which may make possible the execution of economic policy. Whilst the former is permitted under the Treaty, the latter is not. The reason for this restrictive approach is to ensure observance of the principle of institutional balance. Under the Treaty, each institution must act within the limits of its powers. If it were possible for an institution to delegate its discretionary powers, that would render the Treaty guarantees ineffective, since it would replace the choices of the delegator by the choices of the delegate and 'bring about an actual transfer of responsibility'.¹²¹

Since, under *Meroni*, an institution may not delegate discretionary powers entailing a wide margin of discretion, it follows that institutions may not delegate their core functions. The case law however provides little guidance as to the distinction between clearly defined executive powers and powers which entail the exercise of wide discretion. In *Tralli*,¹²² Leger AG appeared to suggest that this distinction can learn by analogy from the distinction drawn in the context of Articles 202 and 211 EC between essential rules which the Council cannot delegate to the Commission and implementing rules which can be so delegated. This analogy however is not without problems.

¹¹⁹ Case T-311/06 *FMC Chemical SPRL v European Food Safety Authority (EFSA)*, Judgment of 17 June 2008, para 66.

¹²¹ *Meroni*, op cit, 152.

¹²² op cit.

Article 202 provides that, in adopting legislation, the Council may confer on the Commission implementing powers in respect of the rules which it lays down. This delegation is subject to certain requirements and the Council may also reserve the right, in specific cases, to exercise the implementing powers directly itself. On the basis of this provision, the Court has laid down a distinction between rules which are essential to the subject-matter envisaged and which cannot be delegated by the Council and rules which, being merely of an implementing nature, can be delegated to the Commission.¹²³ In general, the Court has endorsed a broad concept of delegation both as regards the specificity of the Council's mandate and as regards the scope of delegation. It has understood narrowly the powers which are essential and cannot be delegated by the Council, thus empowering the Commission to exercise considerable discretion in adopting implementing measures. In certain fields, such as the common agricultural policy, it has held that the concept of 'implementation' must be given a wide interpretation, having regard to the scheme of the Treaty and practical considerations.¹²⁴ Whilst essential rules include provisions which are intended to give concrete shape to the fundamental guidelines of Community policy, the same cannot be said about rules introducing penalties which can validly be adopted by the Commission.¹²⁵ Furthermore, once the Council has laid down in its basic regulation the essential rules governing the matter in question, it may delegate to the Commission general implementing power without having to specify the essential components of the delegated power; for that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act. Nor can secondary legislation require the Council to be more specific. General implementing powers within the confines of Article 202 may be delegated to the Commission.¹²⁶

The power of delegation under the *Meroni* principle appears narrower than the Commission's powers of implementation under Article 202. In any event, the two types of delegation may be said to differ from each other in a number of respects. First, Article 202 refers to the delegation of specific powers concretizing legislation and it entails *par excellence* the transfer of regulatory powers. *Meroni* refers to the establishment of a new agency and appears to exclude transfer of rule-making power. Secondly, in the context of implementing powers exercised by the Commission, the interests of the Council as the delegating authority are safeguarded by the comitology procedures. Thirdly, the Commission's powers of implementation are specifically provided for in the Treaty whilst an

¹²³ See, inter alia, Case 25/70 *Köster* [1970] ECR 1161, para 6, and Case C-240/90 *Germany v Commission* [1992] ECR I-5383, paras 36 and 37.

¹²⁴ See, eg Case 23/75 *Rey Soda* [1975] ECR 1279 and Joined Cases 279/84, 280/84, 285/84, and 286/84 *Rau and Others v Commission* [1987] ECR 1069, para 14; Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Weichert v Council and Commission* [2004] ECR II-0000, para 118.

¹²⁵ *Germany v Commission*, op cit, para 37.

¹²⁶ op cit, paras 41–42.

institution's power to establish agencies is self-generating and thus more limited. Fourthly, the broad understanding of implementing powers in the context of Article 202 promotes the federalization of Community government by expanding the powers of the Commission. The same does not apply in relation to granting broad discretionary powers to Community agencies.

In short, a broad understanding of delegation of powers from the Council to the Commission is encouraged by an instrumental rationale of integration and, in any event, there is in place a system of checks and balances which serve to keep the Commission under control and which the Council can utilize against any attempt to have its authority usurped. By contrast, neither of these attributes is necessarily present where it comes to delegation of powers to new Community agencies.

This is not to say that *Meroni* should necessarily be interpreted restrictively. As already discussed, there are powerful arguments in favour of allowing agencies greater scope of manoeuvring and Leger AG's Opinion may reflect this approach. *Meroni* should not be treated as an unmovable signpost. The case itself related to a situation where the High Authority had delegated a task falling within its core activities in the field of economic policy. As the Court observed, the ECSC Treaty provided a number of objectives which were generally defined and, to some extent, irreconcilable and thus could not all be pursued at the same time. It was for the institutions to give priority to one or other of them. Delegation of such a fundamental balancing exercise, especially in a novel international organization, appeared to amount to an abrogation of responsibilities.¹²⁷ For a case decided before the primacy and direct effect of Community law were established, *Meroni* has shown an unusual degree of endurance. The truth is, however, that, although reiterated several times, the ruling has not been tested. Post-*Meroni* the ECJ has not in fact articulated any standards on the basis of which it can be ascertained whether a given delegation of Community powers may avoid the condemnation of incompatibility with the Treaty. It appears, however, that the ECJ has relaxed the principle in relation to delegation of powers pertaining to the internal organization and management of an institution.¹²⁸ Also, a condition that must be fulfilled in order for delegation to be lawful is that the agency must be subject to an effective system of supervision and control by the delegating institution.¹²⁹ In short, on the one hand, delegation must not be too restrictive: the Constitution cannot be interpreted 'to

¹²⁷ It is difficult to see how *Meroni* could have been decided differently. The Court was faced with a new and as yet untested international experiment: the establishment of a supranational institution in the form of the High Authority to which Member States had delegated discretionary powers the exercise of which entailed the making of value judgments in the field of economic policy and compromising conflicting objectives. Allowing such a body to establish another body and delegate to it some of its powers would be not only an abrogation of its responsibilities but a threat to national sovereignty.

¹²⁹ See *Meroni*, op cit, 151.

¹²⁸ See eg *Tralli*, op cit.

demand the impossible'.¹³⁰ On the other hand, the delegation of powers must not be 'vagrant' but 'canalized within banks that keep it from overflowing'.¹³¹

In *Meroni*, the ECJ saw the prohibition of the delegation of discretionary powers as being a fundamental guarantee not only of the rules which govern the powers of the Community institutions vis-à-vis each other but mainly as a guarantee of the undertakings and private actors affected by the decisions made by the institutions. Thus, at a broader level the underlying rationale of the judgment is not only to guarantee the rule of law in inter-institutional relationship but to protect the citizen vis-à-vis the administration.

(iii) Political Limitations

The enduring character of the *Meroni* doctrine is underpinned by political considerations.¹³² The Commission, whilst acknowledging the benefits of expertise and specialization that agencies carry, has traditionally favoured a unitary conception of executive function. In the Commission's model of Community governance, delegation of powers to agencies must be seen in the light of, and be limited by, the need to respect 'the unity and integrity of the executive function'.¹³³ This function should continue to be vested to the Commission for reasons of accountability and legitimacy. Under this model, the delegation of true regulatory powers would not be compatible with the Commission's required responsibility vis-à-vis the citizens, the Member States, and the other Community institutions.

In this respect, the conservatism of the ECJ as illustrated in *Meroni* and the executive's reluctance to let go have been self-reinforcing, leading in effect to a considerable degree of centralization in administrative decision-making and, arguably, being to the benefit of integration. Such centralization has helped the Commission to keep more control of the policy agenda than it would otherwise command since the expansion and strengthening of independent committees would be likely to change the balance of political powers giving more control to Member States through representation in agency structures.¹³⁴

Still, this model, based on the unity of a broadly conceived executive function, has come under stress for a number of reasons. First, the broader the powers the Community acquires in the field of risk assessment, the more it becomes necessary to rely, at least de facto, on specialist decision-making bodies. Secondly, a number of factors have contributed to greater multi-polarity in decision-making. These include the increase in the number of Member States, the rise in the powers of the Parliament, the emergence of the ECB as a powerful independent actor, and the more vocal representation of the industry in certain

¹³⁰ See *Amalgamated Meat Cutters v Connally* 337 F. Supp. 737 (DDD 1971).

¹³¹ Justice Cardozo in *ALA Schechter Poultry Corp v US* 295 US 495 (1935).

¹³² See, for more detail, the analysis of Craig, *op cit*, at 162–164.

¹³³ Communication from the Commission, The Operating Framework for the European Regulatory Agencies, COM (2002) 718, at p 1.

¹³⁴ Craig, *op cit*, at 164.

areas, such as financial services. These developments have made for a more dispersed decision-making model in which Community agencies may be seen as a source of unity rather than a source of repatriating competences to the Member States.

E. Judicial Review of Agency Action

The case law in this area seems to have evolved significantly. Whilst earlier judgments refused to accept that applications for review of agency action were admissible on the ground that the action was attributable to the Commission and not the agency, more recently, there has been a growing judicial and political recognition that agencies may adopt reviewable acts.

Where an agency is vested only with advisory powers, an action for annulment should be directed against the Commission which takes the final decision and not against the agency since its advice does not have binding force.¹³⁵ Also, where agency action is imputable to the Commission, for example, because in practice any decision of the agency in question is subject to the Commission's prior agreement, the proper defendant would be the Commission. This point is illustrated by *DIR v Commission*.¹³⁶ The Commission had concluded agreements with EFDO, a private association based in Germany, concerning the financial implementation of the MEDIA programme for the promotion of the European audiovisual industry. EFDO administered a fund granting preferential loans to film distributors. The criteria on the basis of which the loans were granted were laid down in guidelines drawn up by EFDO and approved by the Commission. The applicants were film distributors whose request for funding had been rejected by EFDO on the instructions of the Commission. The CFI held that, in accordance with Council Decision 90/685 which made the Commission responsible for the implementation of the MEDIA programme, and the *Meroni* principle, which prohibited the delegation of wide discretionary powers, the agreement between the Commission and EFDO made a funding decision subject 'in practice' to the prior agreement of the Commission's representatives. Before each meeting of the EFDO selection committee, the Commission's services were informed by EFDO of all the applications lodged and, after examining the applications, the Commission officials responsible made their views known.¹³⁷ In those circumstances, the decisions of the agency were imputable to the Commission since it was responsible for their content and could be called upon to defend them in court.¹³⁸ *DIR* stands

¹³⁵ Case T-133/003 *Schering-Plough v Commission and EMEA*, unpublished CFI order of 5 December 2007 challenging an act of the European Agency for the Evaluation of Medicinal Products.

¹³⁶ Joined Cases T-369/94 and T-85/95 *DIR International Film and Others v Commission* [1998] II-357.

¹³⁷ *op cit*, para 52.

¹³⁸ *op cit*, para 53.

therefore as authority that an agency does not exercise discretionary power if its decisions are subject to the prior agreement of the Commission.

Actions against agencies have been rejected in other cases,¹³⁹ and the general posture of the case law is in keeping with the principle that acts adopted on the basis of a delegation of powers 'are ordinarily imputable to the delegating institution',¹⁴⁰ with the result that the action against the act of the body to which power has been delegated is admissible as being brought against the delegating institution.¹⁴¹

¹³⁹ In Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077, the ECJ dismissed an action brought by Spain against an act of Eurojust. The application was based on Article 230 EC and challenged calls for applications for recruitment of Eurojust staff. The ECJ held that the contested acts were not included in the list of acts the legality of which the Court may review under Article 230 EC. It also held that Article 41 TEU did not provide for the application of Article 230 EC to third pillar provisions, the jurisdiction of the Court in such matters being defined in Article 35 TEU. It concluded however that the contested acts were not exempt from judicial review. Under Council Decision 2002/197/JHA setting up Eurojust, its staff was to be subject to the Community staff regulations and it followed that candidates for recruitment had access to the Community courts under the conditions laid down in Article 91 of the Staff regulations. The judgment leads to the odd result that individuals but not Member States may challenge a measure under Article 230 EC. The reasoning is pragmatic but by no means uncontroversial. If the jurisdiction of the ECJ on third pillar matters is governed exclusively by Article 35 TEU, it is not clear how its jurisdiction under Article 230 can be extended to third pillar issues through an act of an Agency set up under the third pillar. In Case T-148/97 *Keeling v OHIM* [1998] ECR II-2217, the CFI rejected as inadmissible an action based on Article 230 brought against a decision of the President of the Office for Harmonisation in the Internal Market by a member of its Board of Appeal. The CFI held that OHIM was not a Community institution nor was it mentioned as a potential defendant in Article 230 EC. The CFI also observed that other remedies were potentially available against the contested decision, including staff actions (Article 236 EC).

¹⁴⁰ See, to this effect, Case T-49/04 *Hassan v Council and Commission*, Judgment of 12 July 2006, para 59; Joined Cases 7/56 and 3/57 to 7/57 *Algeria and Others v Common Assembly of the ECSC* [1957] ECR 39, at 58; Joined Cases 32/58 and 33/58 *SNUPAT v High Authority* [1959] ECR 127, at 127.

¹⁴¹ In some cases, an action can be directed against both the delegating institution and the institution to which power has been delegated. An example is provided by Council Regulation 881/2002 imposing economic sanctions against persons associated with the Al-Qaeda network. The Regulation provided that all funds and economic resources held by persons and entities listed in the Annex must be frozen. Article 7(1) empowered the Commission to amend or supplement the Annex on the basis of determinations made by the UN Security Council or the UN Sanctions Committee on the findings of which the Annex was originally based. The Commission adopted Regulation 2049/2003 amending Council Regulation 881/2002 and added the applicant's name in the list. The applicant brought proceedings against the Council and the Commission and the CFI held that it was admissible to challenge both regulations. The claim for annulment of Regulation 881/2002 could not be regarded as out of time given that it was not directed against Regulation 881/2002 in its original form, but rather against the version of that regulation as amended by Regulation 2049/2003. The claim for annulment could be brought against the Commission since it was the author of Regulation 2049/2003. The claim for annulment of Regulation 881/2002 could validly be directed against the Council as the author of that Regulation as amended by the Commission. The CFI held that that solution was in keeping with the principle that acts adopted on the basis of a delegation of powers are ordinarily imputable to the delegating institution, with the result that the action against the act of the body to which power has been delegated is admissible as being brought against the delegating institution.

By contrast, where an agency itself takes a binding decision, such decision is subject to annulment under Article 230 EC even if the regulation setting up the agency does not expressly provide for the possibility of challenging its decisions. In *Sogelma v EAR*,¹⁴² the CFI was concerned with review of decisions taken by the European Agency for Reconstruction (EAR). The Agency was set up with independent legal personality and, under Regulation 2667/2000, was responsible for administering programmes for the reconstruction of Serbia and Montenegro, including the preparation and evaluation of invitations to tender and the awarding of contracts. Sogelma, who had submitted a tender following a procurement notice published by EAR, sought to annul EAR's subsequent decision to cancel the tender. Regulation 2667/2000 granted the CFI jurisdiction in disputes relating to compensation in the case of the EAR's non-contractual liability and in relation to EAR decisions relating to access to documents but did not grant it jurisdiction to hear actions for annulment against other decisions taken by the EAR. Referring to *Les Verts*¹⁴³ the CFI held that:¹⁴⁴

The general principle to be elicited from that judgment is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review. It is true that *Les Verts*, paragraph 24, refers only to Community institutions and the EAR is not one of the institutions listed in Article 7 EC. None the less, the situation of Community bodies endowed with the power to take measures intended to produce legal effects vis-à-vis third parties is identical to the situation which led to the *Les Verts* judgment: it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review.

The CFI pointed out that the cancellation of a tender procedure was an act which adversely affected the applicant and brought about a distinct change in his legal position, since he could no longer expect to be awarded the contract. EAR had been delegated decisions which the Commission itself would have taken. Such decisions could not cease to be acts open to challenge solely because the Commission had delegated powers to the EAR. The opposite solution would give rise to a legal vacuum.

The Court also rejected an argument based on the existence of alternative remedies. EAR had argued that the rights of tenderers were protected by the procedure laid down in the instructions to tenderers. They could have recourse to procedures established by the Commission, whose acts are open to challenge under Article 230 EC. The CFI however held that the instructions to tenderers did not provide for the Commission to adopt, in the course of the procedure, a decision which was open to judicial review. Further, the Commission had not set up any specific procedure to deal with any complaints.

¹⁴² Case T-411/06 *Sogelma—Società generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (EAR)*, Judgment of 8 October 2008.

¹⁴³ Case 294/83 *Les Verts v Parliament* [1986] ECR 1339.

¹⁴⁴ Para 37.

Sogelma v EAR is an important judgment because it recognizes an independent course of review against agency action and, by implication, it confirms that agencies do not necessarily act as the alter ego of the delegating institution and may have decision-making powers of their own. It also confirms the limits of the alternative remedies argument. An instrument setting up an agency may provide for alternative remedies or a procedure to be followed by the aggrieved party before recourse to the court can be made; such steps however must provide full and effective remedy and must not detract from the right to judicial review as specified in Article 230 of the Treaty.¹⁴⁵

F. Latent Discretion

Whilst, in terms of formal reasoning, the judgments in *DIR* and *Sogelma* are correct, they may not give an accurate picture of the extent of the powers enjoyed by agencies. Where agency action is formally subject to Commission approval, it may not be possible to determine in the abstract the actual degree of control exercised by the Commission. In terms of judicial protection this may not be a great problem. Insofar as an aggrieved party can have recourse against the entity to which the action is imputable, the requirements of the right to a remedy are complied with. Indeed, in the light of the judgment in *Sogelma*, there appears to be no remedial gap. The rights of the persons concerned are the same whether the action is attributable to the Commission or the agency.¹⁴⁶ In terms of governance, however, the recognition of latent or de facto discretion to agencies is important.

In *FMC*,¹⁴⁷ a manufacturer of plant protection products sought the annulment of an opinion taken by the European Food Safety Authority (EFSA) by which it recommended to the Commission that carbosulfan, a substance used in the making of such products, should not be authorized. On the basis of EFSA's opinion, the Commission adopted a decision withdrawing authorization for products containing that substance. The applicant argued that EFSA's opinion was a binding act which expressed the culmination of a special procedure. The CFI however rejected that argument. It held that, under Article 8 of Regulation 451/2000, the procedure for the evaluation of active substances comprised three successive stages: (i) the drawing-up of a draft assessment report by the rapporteur Member State; (ii) the adoption by EFSA of an opinion on whether the

¹⁴⁵ Some regulations setting up agencies provide for the possibility of administrative proceedings before the Commission against prejudicial acts of agencies. An action for annulment before the ECJ may then lie only against the final decision taken by the Commission to reject the appeal: see eg Regulation 58/2003 on executive agencies, Article 22.

¹⁴⁶ The applicant, however, would be well advised to bring an action against both the Commission and the agency in question. This would avoid the possibility of the action being rejected as inadmissible on the ground that it was directed against an improper defendant and, subsequently, the applicant having a new action against the correct defendant being rejected as inadmissible on the ground that the time limit of Article 230(5) has expired. ¹⁴⁷ *op cit*.

active substance can be expected to meet the safety requirements; and (iii) the preparation by the Commission of a finalized review report, which was submitted to the comitology committee together with a draft directive or decision. Only the directive or the decision produced binding legal effects capable of affecting the interests of the parties concerned. The CFI held that neither Article 5 of Directive 91/414, which described the conditions to be fulfilled in order for an active substance to be included in the Directive, nor Article 8 of Regulation 451/2000 suggested that the Commission was obliged to comply with EFSA opinions in substantive terms.

FMC stands as authority for the proposition that, where an agency is charged with providing an opinion to the Commission from which the latter can depart, the Commission has not delegated to the agency the power to take binding decisions since only the Commission's final decision has binding effects vis-à-vis third parties.¹⁴⁸

The judgment is correct but it does not provide an accurate portrayal of the extent of the powers that EFSA enjoys. Notably, under Article 8(8) of Regulation 451/2000, where the Commission decides to withdraw authorization from a substance, it must give reasons. Given, however, the technical expertise of EFSA, if the Commission decides to withdraw authorization despite EFSA's advice, the requirement to give reasons imposes a high burden on the Commission. Given the level of expertise required, the Commission may find it impossible to discharge the requirement to give reasons unless it can somehow recreate the technical assessment. This however may be impossible to do since the Commission itself lacks the expertise.

EFSA's crucial input in the decision-making process becomes clearer when one looks at its role under Community legislation. It is designed to act as an 'independent scientific point of reference in risk assessment'.¹⁴⁹ Article 7 of Regulation 1935/2004, which describes EFSA's role, states that provisions liable to affect public health must be adopted after consulting EFSA. Under Article 11 (2) of the Regulation the Commission must provide an explanation where it does not follow the opinion of EFSA. It is clear that, to a substantial degree, effective control over decision-making has been transferred from the

¹⁴⁸ Notably, in *FMC*, in rejecting the action for annulment against EFSA, the CFI distinguished the *Vitamins case* (see below). In its judgment in *Vitamins*, in response to criticisms made by the applicant with regard to the powers of EFSA, the ECJ appeared to suggest that (para 88) such criticisms could be advanced in support of an action for annulment of a final decision or an action for damages against EFSA. In *FMC*, the applicant saw this statement as a judicial acknowledgment of the possibility of bringing an action against a final decision of EFSA refusing an application for modification of a positive list of vitamins under Directive 2002/46/EC. The CFI however understood the *Vitamins* judgment differently. It held that the ECJ had merely mentioned the possibility of an action for the annulment of a final decision refusing an application for modification of positive lists without specifying that that decision would actually be adopted by EFSA and in no way confirmed that an action for annulment may be brought against a final decision of EFSA. It is submitted that the CFI's narrow understanding of the *Vitamins dicta* is correct.

¹⁴⁹ See Regulation 1935/2004, Preamble, recital 15.

Commission to EFSA. Save in the case of conclusive scientific evidence, the real discretion lies in the hands of EFSA rather than the Commission since the latter can hardly disagree unless it recreates fully the decision-making process which is unable to do as it lacks expertise. This does not transform EFSA into a regulatory authority since its powers under the Regulation are well-circumscribed. It serves to underline however that agencies, especially in the field of risk assessment, enjoy considerable discretion. It is submitted that this is compatible with *Meroni* and, indeed, necessary. It would make little sense to provide for the establishment of agencies if they could enjoy no discretion whatsoever. The concern of judicial intervention is to ensure that political accountability goes hand in hand with sensible and expert decision-making.

G. The Lisbon Treaty

It will be noted that judicial review of agency action receives specific mention in the Treaty of Lisbon. Article 263(5) of the Treaty on the Functioning of the EU,¹⁵⁰ which is the successor to current Article 230 EC, states as follows:

Acts setting up bodies and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies or agencies intended to produce legal effects in relation to them.

This in fact reflects existing practice and does not appear to make a substantive amendment to current Treaty arrangements. It was included as an umbrella provision to cover the cases where means of redress are provided for by Union measures. Currently, EC measures which set up agencies or bodies may provide for one of the following.¹⁵¹ They may grant to the ECJ jurisdiction to hear actions for judicial review against acts adopted by those agencies or bodies under the terms of Article 230(4).¹⁵² They may provide that acts of such bodies are referable to the Commission for verification of their legality, in which case the Commission's decision can be challenged under Article 230(4).¹⁵³ Finally, they may be silent as to the possible means of redress.¹⁵⁴ Article 263(5) does not restrict those options. It makes it clear, however, that acts of such agencies or bodies which produce legal effects are amenable to judicial review in accordance with the fundamental principle of judicial protection provided for in Article 47 of the Charter. Two points may be made in relation to Article 263(5). First, acts

¹⁵⁰ This was originally Article III-270(5) of the aborted constitutional Treaty.

¹⁵¹ See the Final Report of the Discussion Circle on the Court of Justice which submitted evidence to the Constitutional Convention, 25 March 2003 CONV 636/03, para 24 of the Report.

¹⁵² See eg Council Regulation 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, [1997] OJ L151/1.

¹⁵³ See Council Regulation 2062/94 establishing a European Agency for Safety and Health at Work, [1994] OJ L216/1.

¹⁵⁴ See Regulation 1406/2002 of the European Parliament and the Council establishing a European Maritime Safety Agency, [2002] OJ L208/1.

setting up agencies or bodies may specify the means of redress but, in any event, they cannot make access to justice subject to stricter conditions than those specified in Article 263(4) (currently Article 230(4)). Secondly, the provision does not necessarily apply to agencies or bodies established by Union acts adopted under the CFSP, since these have special characteristics.¹⁵⁵

H. Other Forms of Delegation of Powers

It should be noted that the establishment of agencies is only one form of delegation recognized in the Community legal order. The principal forms of delegation may be said to be the following.

1. Delegation of power to amend primary legislation (*passerelle* provisions).
2. Delegation of regulatory powers by the Council to the Commission via the comitology procedure.
3. Delegation of powers to Community agencies.
4. Delegation by a Community institution to its own internal decision-making bodies.

The first type of delegation is beyond the scope of this inquiry and need not detain us for long. Suffice it to say that, in some cases, provisions of the founding treaties allow the Council to amend Treaty provisions without recourse to the ordinary procedure for constitutional revision provided for in Article 48 TEU. Such *passerelle* provisions are included on specific and mainly technical matters in the TEU,¹⁵⁶ the EC Treaty¹⁵⁷ and, typically, in the Treaties of accession for new Member States. Notably, heavy use of *passerelle* clauses is made in the Treaty of Lisbon.¹⁵⁸ Such transition from primary to secondary Community law leads to an enhancement of Community decision-making methods and a corresponding decline of inter-governmental ones.

The third and the fourth types of delegation can occur by the ECB as will be discussed below.¹⁵⁹ The second type of delegation, which is subject to the disciplines of comitology, was briefly examined above. In view of its affinity with delegation of powers to agencies, it is pertinent to examine here the judgment of the ECJ in the *Vitamins* case¹⁶⁰ where the ECJ drew parallels with *Meroni*.

¹⁵⁵ See also here the comments of the Circle, *op cit*, 10.

¹⁵⁶ See Article 42 TEU (*passerelle* from the third pillar to Title IV of the EC Treaty).

¹⁵⁷ See eg Article 107(5) (amendment by the Council of the ESCB Statute), Article 245 EC (amendment of the ECJ Statute by Council decision).

¹⁵⁸ See eg Article 48(7) TEU as amended by the Treaty of Lisbon (*passerelle* from unanimity to qualified majority voting).

¹⁵⁹ For the establishment of agencies by the ECB, *see* the following section.

¹⁶⁰ Joined Cases C-154 and C-155/04 *The Queen on the application of Alliance for Natural Health v Secretary of State for Health*, Judgment of 12 July 2005. For a further example, *see* *BAT*, *op cit*, discussed below.

Private parties challenged Directive 2002/46 which introduced a positive list of food supplements.¹⁶¹ The Directive provides essentially that only vitamins and supplements listed in its annexes may be used and, from 1 August 2005, trade in substances not listed therein is prohibited. The Advocate General found the Directive deficient in three respects:¹⁶² first, it made no mention of the substantive criteria which the Commission must follow in deciding to permit the inclusion of new substances in the positive lists. Second, it did not make clear whether the Directive allows private parties to submit substances for evaluation with a view to having them included. Third, on the assumption that private parties were able to do so, there was no clear procedure for that purpose which provided minimum guarantees for protecting their interests. Geelhoed AG viewed the first shortcoming as a particularly serious one. Given the restrictive effects of the positive list on commercial freedom, he considered it indispensable that the Directive must itself prescribe the substantive parameters governing the Commission's power to make additions. Although the Advocate General structured his reasoning on the basis of the principle of proportionality, he read it as incorporating elements of legal certainty, good administration, and the right to judicial protection. The ECJ, by contrast, rescued the validity of the Directive by employing the following technique: it shifted the obligation to observe the above requirements to the Community administration, and read implied administrative duties in the Directive. It unequivocally recognized the importance of process rights. The introduction of a positive list must be accompanied by a procedure designed to allow a substance to be added and that procedure must respect the general principles of Community law, in particular, the principle of sound administration and legal certainty. The Court laid down the following substantive requirements:¹⁶³

- The procedure must be accessible in the sense that it must be expressly mentioned in a measure of general application which is binding on the authorities concerned.
- It must be capable of being completed within a reasonable time.
- An application to have a substance included in the list may be refused only on the basis of a full assessment of the risks posed to public health.
- That assessment must be made on the basis of the most reliable scientific data available and the most recent results of international research.
- Finally, if the procedure results in a refusal, the refusal must be open to challenge.

The ECJ pointed out that Article 4(5) in combination with Article 13(2) of the Directive made applicable for the purposes of adding vitamins or minerals to

¹⁶¹ Directive 2002/46 on the approximation of the laws of the Member States relating to food supplements, [2002] OJ L183/51.

¹⁶² Opinion of Geelhoed AG, paras 68–69.

¹⁶³ *op cit*, para 73.

the positive lists the comitology procedure provided for in Council Decision 1999/468.¹⁶⁴ The Court viewed that procedure as satisfying the above requirements although it criticized the Directive as being less than perfect in terms of transparency and completeness and charged the Commission with ensuring transparency and prompt action.¹⁶⁵

The Court also took the view that the Commission had power to modify the positive lists only on the basis of objective criteria connected exclusively with public health. This derived from statements in the preamble to the Directive, which 'ideally' should have been included in the provisions of the Directive, in combination with their concrete expression through the positive lists.¹⁶⁶ Thus the Court concluded that the legislature had done just enough to pass the threshold of validity but only at the expense of shifting the standards of good governance to the Community administration and leaving the door wide open to a second round of litigation against concrete administrative decisions refusing addition of substances.¹⁶⁷

The judgment may be seen as an acknowledgment, and the natural consequence, of the maturity of Community government. Ample discretion for the legislature to roam in the field of public health and restrict economic freedom must be accompanied, as a *quid pro quo*, by high standards of administrative competence.¹⁶⁸

The *Vitamins* case also confirms that, when the Community legislature wishes to delegate its power to amend aspects of the legislative act at issue, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria.¹⁶⁹ This requirement was derived from *Meroni* and applies equally to agencies.

The ECJ has taken a more liberal view in relation to delegation of powers pertaining to the internal organization and management of the Community institutions. This more liberal approach is justified for two reasons. First, according to settled case law, the Community institutions and bodies have a wide discretion as regards their internal organization on the basis of the responsibilities entrusted to them.¹⁷⁰ Secondly, within the internal organization of Community bodies, the principle of institutional balance is of lesser importance. The ECJ has held, in fact, that the principle is intended to apply only to relations between Community institutions and bodies.¹⁷¹

¹⁶⁴ [1999] OJ L184/23. ¹⁶⁵ *Alliance for Natural Health*, op cit, paras 81–82.

¹⁶⁶ Ibid, para 92. ¹⁶⁷ Ibid, para 88.

¹⁶⁸ Note that the case was distinguished in *FMC*, op cit.

¹⁶⁹ See *Vitamins* case, op cit, para 90.

¹⁷⁰ See, inter alia, Case C-15/00 *Commission v EIB* [2003] ECR I-7281, para 67, and *Pfugradt v ECB*, op cit, above, para 43.

¹⁷¹ See, inter alia, Case C-70/88 *Parliament v Council* [1990] ECR I-2041, paras 21 to 23. This is not to say however that a more liberal approach to the delegation of powers within the Eurosystem, ie between the ECB and the NCBS, is necessarily justified. In this context, any possible delegation may take place subject to full respect of the powers of the Governing Council and the Executive Board.

IV. Delegation of Powers and the ECB

A. Internal Organization

The Court has had the opportunity to examine the delegation of internal organization powers in relation to the ECB in *Tralli v ECB*.¹⁷² It held that a Community institution is entitled to lay down organizational measures delegating powers to its own internal decision-making bodies, in particular as regards the management of its own staff.¹⁷³ In such a case, the conditions governing the valid delegation of powers are those specified in *Meroni*, namely, the following.¹⁷⁴ First, a delegating authority cannot confer upon the body in question powers different from those which the authority has itself received. Secondly, the exercise of the powers entrusted to the body to which the powers are delegated must be subject to the same conditions as those to which it would be subject if the delegating authority exercised them directly, particularly as regards the requirements of reasoning and publication. Finally, even when entitled to delegate its powers, the delegating authority must take an express decision transferring them and the delegation can relate only to clearly defined executive powers.

In *Tralli*, the Court held that the Governing Council of the ECB, which is entrusted by the ESCB Statute with laying down the conditions of employment of the ECB staff, had validly delegated the adoption of staff rules implementing the conditions of employment to the executive board of the Bank. Delegation was express. Also, the delegated powers in question which related to the probation of new employees remained within the limits of the executive powers conferred on the Executive Board by Article 21.3 of the Rules of Procedure.

Tralli involved also a different type of delegation. The Rules of Procedure of the Executive Board provided that the Board may authorize one of its members to take under its responsibility clearly defined management or administrative measures. The appellant, an employee who had been dismissed for misconduct before the end of his extended probationary period, argued that the decision to extend his probationary period belonged to the Executive Board and could not be delegated to the Vice-President of the ECB. The ECJ disagreed, applying to ECB the principles of the case law developed in relation to the collegiality of Commission action. The Commission may, without undermining the principle of collegiate responsibility which governs its functioning, authorize its members to adopt certain decisions in its name. That system of delegation of authority does not have the effect of divesting the Commission of its decision-making power since the decisions taken by the Member are adopted in the name of the

¹⁷² Case C-301/02 P *Tralli v ECB*, Judgment of 26 May 2005.

¹⁷³ *Tralli*, op cit, para 42; See also Case C-409/02 P *Pflugradt v ECB* [2004] ECR I-0000, para 34.

¹⁷⁴ *Tralli*, op cit, para 43.

Commission, which is fully responsible for them. The Court has based that assessment, inter alia, on the need to ensure that the decision-making body is able to function, which corresponds to a principle inherent in all institutional systems.¹⁷⁵ The same principle was applied in *Tralli*. The delegation of powers within the ECB did not have the effect of divesting the Executive Board of its rule-making power. Decisions to extend the probationary period were adopted by the Vice-President in the name of the Executive Board, which remained fully responsible for them. The delegation of authority at issue was limited to individual decisions and did not in any way cover matters of a general nature.

B. Agencies and the ECB: Possible Legal Basis of T2S

The determination of the appropriate legal basis for the establishment of T2S is of obvious importance. According to the principle of conferred powers, a Community measure cannot be adopted unless the authoring institution has power to promulgate it. The legal basis of a measure cannot depend on the subjective intentions or preferences of the institution which authors it but must rest on objective factors which are amenable to judicial review. It must be determined, in particular, by reference to the aim and the content of the measure.¹⁷⁶ These principles which have been developed in the case law in relation to acts adopted by the political organs of the Community apply equally to the ECB and the ESCB.

The identification of the appropriate legal basis is also important because it determines the possible form and structure that the T2S facility may take. There are conceivably three possibilities within the current structure of the Treaties. A legal basis may be found within Title VII of the Treaty or the ESCB Statute which would enable the ECB to act as the sole author of the measure. Alternatively, a measure may be adopted with the assistance of another Community institution on the basis of a Treaty provision outside Title VII. This might require empowerment by the Council, eg on the basis of Article 308 of the Treaty, which may then be followed by more specific, implementing action by the ECB. Another option might be the establishment of an executive agency on the basis of Regulation 58/2003. The possibility of adopting a measure jointly by the ECB and another institution appears to be foreclosed by the Treaty as none of its provisions empowers the ECB to act in that way.

This section discusses the issue of legal basis. The possible legal forms that the T2S facility may take are discussed in the next section.

¹⁷⁵ See eg Case 5/85 *AKZO Chemie v Commission* [1986] ECR 2585, paras 35 to 37.

¹⁷⁶ See eg Case C-300/89 *Commission v Council* [1991] ECR I-2867 ('Titanium dioxide'), para 10; Case C-176/03 *Commission v Council* [2005] ECR I-7879, para 45; and Case C-440/05 *Commission v Council* [2007] ECR I-0000, para 61.

The most obvious legal basis for the adoption of a measure introducing T2S appears to be Article 22 of the ESCB Statute which, under the heading 'clearing and payment systems', states as follows:

The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Community and with other countries.

This provision grants the ECB power to carry out one of the tasks assigned to it under Article 105(2) of the Treaty, namely to promote the smooth operation of payment systems.¹⁷⁷ Article 22 appears to provide for two separate types of power. First, it empowers the ECB and the national central banks to provide facilities. Secondly, it bestows regulatory powers on the ECB. This second aspect enables the ECB to assume a regulatory role in order to sustain the sound operation of clearing systems and money transfer mechanisms and ensure liquidity and avoid systemic risks.¹⁷⁸ The two aspects, namely the provision of facilities and the oversight role, can coexist and be exercised by the adoption of the same measure but this need not be the case. They are separate but complementary powers which appear to enable the ECB to act both in the sphere of public and private law. At least the first type of power, ie the establishment of facilities, is not an exclusive ECB competence.

Article 22 is sufficiently wide to enable the ECB to adopt the instruments necessary for the introduction and running of T2S. Such a project comes within the language of the Article. In fact, the text itself provides few limitations although, in accordance with the principle of conferred powers, it should be interpreted in the light of the objectives and tasks assigned to the ESCB and the principle of proportionality. A literal interpretation suggests that Article 22 authorizes the ESCB to establish facilities relating to payment and clearing open to the banking industry and other financial institutions. Such facilities may relate to clearing and payment systems in money markets or securities markets, and may involve setting the conditions for the use of such systems.¹⁷⁹ The intervention of the ESCB and the ECB in that sphere is subject to the condition of efficiency, which is expressly laid down in Article 22, the condition of soundness and stability, deriving from Articles 105(1) and (5), the requirement to respect the principle of the open market with free competition, which also derives from Article 105(1), and the requirement of proportionality, which derives from Article 5(3) of the Treaty. Subject to those, the ECB may adopt measures conferring rights or imposing obligations on economic agents.¹⁸⁰

¹⁷⁷ See Article 105(2), fourth indent, EC and Article 3(1), fourth indent of the ESCB Statute.

¹⁷⁸ See R Smits, *The European Central Bank* (Kluwer, 1997) at 297–298.

¹⁷⁹ *op cit*, at 298.

¹⁸⁰ See Zilioli and Selmayr, *The Law of the European Central Bank*, *op cit*, at 39 and 93 who, overall, favour a broad interpretation of ECB and ESCB powers.

Although this is not beyond doubt, Article 22 also appears to authorize the ESCB to establish an agency for the purposes of running T2S. As a general rule, it is submitted that the power of ECB to set up agencies should be subjected to the same conditions as those laid down in *Meroni* in relation to the Commission. Whatever the precise status of ECB, there appears to be no reason why its capacity should be differentiated in this respect from that of the other Community institutions. In *Tralli* the CFI already applied to ECB the same methodology as that applied to the other institutions in relation to internal delegation of powers. The *Meroni* conditions in this respect are sufficiently strict to guard against the possibility of abuse. More specifically, Article 22 appears sufficiently broad to allow for agency creation, provided that the conditions for its application discussed above are fulfilled. Article 22 does not specify the addressees of ESCB action.¹⁸¹ It is rather results-driven. It enables the ESCB and the ECB to offer a facility and therefore to establish the mode for its administration, including an agency with a separate legal personality, subject to the *Meroni* principles.

Finally, it will be noted that under Article 22, the ECB may act either by means of direct regulation or by means of 'indirect implementation'¹⁸² as it proceeded in relation to the adoption of TARGET, ie through a guideline and agreements with the national central banks. This system would also appear more appropriate for the introduction of T2S.

Another possibility might be to establish an executive agency under Regulation 58/2003.¹⁸³ It will be recalled that, under Community law, the term executive agency bears a specific meaning signifying agencies established by the Commission under the aforementioned Regulation. This is an umbrella regulation which authorizes the Commission to set up agencies with independent legal personality for the purpose of managing Community programmes. The term 'Community programme' is defined widely to mean any activity or initiative which the relevant basic instrument or budgetary authorization

¹⁸¹ Cf the reasoning of the Court in the *ENISA* case, discussed above. Although the ECJ's reasoning referred to Article 95 and cannot be transposed to the present situation, it may be instructive. In fact, Article 95 is narrower than Article 22 ESCB because the former relates to harmonization of national laws whilst the latter has no such limitation. In *ENISA* the ECJ took a broad view of the instrumentalities of coordination. It stated that nothing in the wording of Article 95 EC implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonization in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate (see para 44). It also stressed 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. Such is the case in particular where the Community 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' (emphasis added) (para 45).

¹⁸² See Zilioli and Selmayr, *The Law of the European Central Bank*, op cit, at 127.

¹⁸³ [2003] OJ L11/1.

requires the Commission to implement for the benefit of one or more categories of specific beneficiaries and which requires the commitment of expenditure.¹⁸⁴ The decision to set up such an agency rests with the Commission and is subject to a detailed cost–benefit analysis.¹⁸⁵ The decision is taken under the regulatory comitology procedure.¹⁸⁶

It would appear that the mandate granted to the Commission by Regulation 58/2003 is sufficiently broad to enable the establishment of an agency to run T2S. In particular, the development of a settlement platform can fall within the definition of a Community programme as defined in the Regulation and can meet the cost-effectiveness analysis required under Article 3(1) of the Regulation. The objectives and tasks of the platform also appear to fall under the tasks of executive committees as set out in Article 6 of the Regulation. Recourse to Regulation 58/2003 seems *prima facie* to offer some advantages. The existing institutional and structural framework already provided therein can be used; the cooperation of the Commission is assured; and any tensions regarding the application of competition law on T2S are neutralized since the agency will operate under the auspices of the Commission, which will ensure compatibility with the competition rules of the Treaty.

There are however significant disadvantages, if not insuperable obstacles. It is not clear how the ECB can be accommodated within a structure which is fundamentally designed for the performance of tasks assigned to the Commission. If the development of settlement facilities falls within the ambit of the powers given to the ESCB, in terms of legal basis, Regulation 58/2003 provides an unlikely home. The representation of the ESCB can only be secondary since both the director and the members of the steering committee of the agency are to be appointed by, and be accountable to, the Commission.¹⁸⁷ The agency will also be physically remote from Frankfurt since it will have to be based in the seat of the Commission, ie Brussels or Luxembourg.¹⁸⁸ Finally, it will be under the budgetary control of the Commission.

The problems mentioned above make the vehicle of an executive agency under Regulation 58/2003 an unsuitable instrument for T2S. They also risk prejudicing the independence of the ECB.

Still, an element of Regulation 53/2008 may be salutary here. The cost-effectiveness exercise which must be carried out by the Commission as a

¹⁸⁴ Regulation 58/2003, Article 2(b).

¹⁸⁵ Under Article 3(1) of the Regulation, the cost-benefit analysis must take into account, *inter alia*, the following factors: the identification of the tasks justifying outsourcing, the costs of coordination and checks, the impact on human resources, possible savings within the general budgetary framework of the European Union, efficiency and flexibility in the implementation of outsourced tasks, simplification of the procedures used, proximity of outsourced activities to final beneficiaries, visibility of the Community as promoter of the Community programme, and the need to maintain an adequate level of know-how inside the Commission.

¹⁸⁶ Regulation 58/2003, Article 24(2).

¹⁸⁷ See Regulation 58/2003, Articles 8, 10, and 20.

¹⁸⁸ *op cit*, Article 5.

condition for the establishment of an executive agency would be very useful and arguably essential, also as a condition for choosing the optimum administrative structure of T2S. This will also serve to ensure that the principle of subsidiarity is complied with. In this context, it will be recalled that, although Article 22 may serve as the legal basis for the provision of a settlement platform, the ECB's competence in this field, in contrast to monetary policy, is not exclusive and therefore the principle of subsidiarity is applicable.¹⁸⁹

In conclusion, the best way forward for the development of T2S seems to be the establishment of an independent agency at Community level by the ECB on the basis of Article 22 of the Statute. Such an agency will not be strictly speaking an 'executive agency' as it will not be governed by Regulation 58/2003 but it will operate under the constraints of the *Meroni* case law and, in effect, it cannot exercise true regulatory powers although it may have decision-making powers, carry out executive functions, and play a wider advisory and recommendatory role within the *Meroni* constraints.¹⁹⁰

C. Possible Forms of T2S Structure

The institutional structure of T2S may conceivably take one of the following forms:

1. the establishment of an independent agency at Community level;
2. the setting up of an EEIG;
3. the setting up of a European Company (*Societas Europae*);
4. the establishment of a corporate entity governed by private law under one of the laws of the Member States.

We will examine the form of a European Economic Interest Grouping (EEIG) as being the most credible alternative to an independent Community agency. By contrast, a European Company,¹⁹¹ or a body governed by national law, seems a

¹⁸⁹ Argument for this is derived also from Article 3 TFEU, as provided for by the Lisbon Treaty, which grants to the Community exclusive competence in relation to 'monetary policy'.

¹⁹⁰ In effect, the term 'executive agency' has two meanings. First, in terms of general administrative law, it means an agency which has only executive as opposed to legislative powers, eg power to execute decisions taken by another body or power to take binding decisions in application of general rules adopted by another body. Secondly, in the specific context of Community law, it means an agency governed by Regulation 58/2003. This means that (a) it must be set up by the Commission; (b) it must have as its purpose to run a specific Community programme; (c) it must comply with the requirements of Regulation 58/2003. The present article submits that the best way for running the T2S project is not through an executive agency set up under Regulation 58/2003 but by an independent agency set up by the ECB under Article 22 of the Statute which will be assigned powers within the *Meroni* constraints. In view of its objectives, it is very likely that such an agency will be assigned executive functions and thus be an 'executive agency' within the generic meaning of that term.

¹⁹¹ See Council Regulation 2157/2001 on the Statute for a European Company, [2001] OJ L294/1.

less suitable vehicle for running T2S. In contrast to an EEIG, a European Company is a corporate form designed for the carrying out of profit making activities and, as such, inappropriate for the T2S system. A private entity governed by national law would make the exercise of public functions by the ECSB subject to national law, thus giving rise to legal uncertainty and lessening substantially the control that ECSB can exercise over it.¹⁹²

The EEIG was established by Regulation 2137/85¹⁹³ to facilitate transnational cooperation among European businesses and especially, but by no means exclusively, small and medium enterprises. Its distinct feature is that it is a corporate form established on the basis of Community law rather than on the basis of a national legal system. It was modelled on the French *groupement d'intérêt économique* (GIE) which has found widespread use as a form of corporate cooperation in France. A notable example of the *groupement* in France in the sphere of financial services is the credit card organization Carte Bleue. In Community law, owing to its flexible nature, the EEIG has proved a success with more than 1,200 groupings currently existing for widely diverse purposes.¹⁹⁴

An EEIG must be formed by at least two members coming from two separate Member States.¹⁹⁵ Members of an EEIG may be individuals, companies, or firms within the meaning of Article 48 EC, and other legal bodies governed by private or public law which have been formed in accordance with the law of a Member State and which have their registered or statutory office and central administration in the Community.¹⁹⁶ Thus, the EEIG offers the possibility of a mixed composition, ie to give a somewhat improbable example, a grouping may be formed by a French tax consultant, a German university, a Greek limited company, and a British local authority.

Although Regulation 2137/85 does not envisage the possibility of a Community body being a member of an EEIG, a purposive interpretation of Article 4(1) is not inconceivable. The purpose of the Regulation is to offer a flexible

¹⁹² For the same reasons, it would be inappropriate to entrust the running of T2S to a national public authority. Furthermore, the establishment of a national public body would require a legal basis under national law and give rise to further complications resulting from the application of national administrative laws pertaining, inter alia, to agency powers, control procedures, budgetary matters, etc.

¹⁹³ Regulation 2137/85 on the European Economic Interest Grouping (EEIG), [1985] OJ L199/1.

¹⁹⁴ In addition to facilitating classic forms of interstate cooperation among companies, entrepreneurs, universities, and professional associations, the form of EEIG has been used for example, by groups of nuclear power companies, regional airports, German and French national technical inspection services to carry out environmental impact studies, the French—German cultural TV station ARTE, Belgian Trappist monks in relation to beer producing activities, and the European Federation of Harley-Davidson clubs. See The European Economic Interest Grouping, memorandum by Libertas—European Institute GmbH, European EEIG Information Centre, Stuttgart, <http://www.libertas-institut.com>, version of 1 October 2001, p 8.

¹⁹⁵ Regulation 2137/85, op cit, Article 4(2). ¹⁹⁶ Article 4(1).

legal vehicle so as to facilitate cooperation. Since bodies governed by the public law of the Member States may be members of a grouping and, according to Community law, Community institutions and agencies with separate legal personality must typically be recognized 'in each of the Member States the most extensive legal capacity accorded to legal persons under its law',¹⁹⁷ it may be argued that a Community body can also be a member of an EEIG.¹⁹⁸

There is no limit to the number of members that an EEIG might have except under the laws of France and Greece where, in exercise of the discretion given to Member States by Article 4(3) of the Regulation, the maximum number of persons has been restricted to 20.¹⁹⁹

The formalities for the establishment of an EEIG are easy to fulfil. It requires a contract and registration in the Member States where the grouping will have its official address.²⁰⁰ Certain information must be disclosed to the public to ensure certainty of commercial transactions.²⁰¹ Under the influence of the continental *siège réel* doctrine, the official address of an EEIG must be fixed either (a) where the grouping has its central administration or (b) where one of the members of the grouping has its central administration or, in the case of a natural person, his principal activity, provided that the grouping carries on an activity there.²⁰² Once formed, a grouping has the capacity to have rights and obligations, enter into contracts or make other legal acts, and sue and be sued in its own name.²⁰³ The issue whether a grouping has separate legal personality is determined by the State of its registration.²⁰⁴ In practice, with some notable exceptions, such as Germany and Italy, national laws bestow groupings with separate legal personality.

The law applicable to the contract for the formation of a grouping and its internal organization is the internal law of the State of its registration.²⁰⁵

The purpose of the EEIG is to facilitate the development of the economic activities of its members on a trans-border basis whilst they retain their economic and legal independence. Its activities are of an ancillary nature and its purpose cannot be to make a profit for itself.²⁰⁶ As a result, its activities are

¹⁹⁷ See eg for the ECB, Article 9 of the ESCB Statute and for Community executive agencies, Article 4(2) of Regulation 58/2003.

¹⁹⁸ Note however that, under Article 4(4), a Member State may, on grounds of public interest, prohibit or restrict participation by certain classes of natural or legal persons.

¹⁹⁹ See *Libertas* memorandum, op cit, at 3.

²⁰⁰ Regulation 2137/85, Articles 5–7.

²⁰¹ op cit, Articles 8–9.

²⁰² Regulation 2137/85, Article 12. For restrictions on the cross-border transfer of the official address, see Article 14(4).

²⁰³ Article 1(2).

²⁰⁴ Article 1(3).

²⁰⁵ Article 2(1). This choice of law rule applies except with regard to matters relating to the status or capacity of natural persons and to the capacity of legal persons, which presumably are to be determined not by the internal law of the State of registration but by its conflict of law rules. In the event of a Community body being a member of an EEIG, their legal capacity is determined directly by Community law, as stated above: see note

²⁰⁶ See Article 3(1) and Preamble, recital 5.

subject to a number of express limitations. Under Article 3(2) of Regulation 2137/85, a grouping may not:

- (a) exercise, directly or indirectly, a power of management or supervision over its members' own activities or over the activities of another undertaking, in particular in the fields of personnel, finance, and investment;
- (b) directly or indirectly hold shares of any kind in a member undertaking; the holding of shares in another undertaking is possible only in so far as it is necessary for the achievement of the grouping's objects and if it is done on its members' behalf;
- (c) employ more than 500 persons;
- (d) be used by a company to make a loan to a director of a company, or persons connected with him, when the making of such loans is restricted or controlled under the Member States' laws governing companies;
- (e) be a member of another EEIG.

It is submitted that, although there is no concrete authority on the point, it would not be impossible for the ESCB to take part in the formation of an EEIG. As stated above, Community bodies should be placed on an equal footing with bodies governed by the public laws of the Member States. If the ECB may not itself participate, the possibility might exist for the national central banks to take part.²⁰⁷ The fact that the purpose of an EEIG is to facilitate or develop the 'economic activities' of its members²⁰⁸ is not necessarily a barrier to such participation. According to the preamble of Regulation 2137/85 the concept of economic activities must here be understood in its 'widest sense'.²⁰⁹ Clearly, the ESCB may not exercise any of its core activities (eg monetary policy) via the establishment of an EEIG but the running of a settlements facility is an economic activity within the meaning of competition law²¹⁰ which, arguably, can be legitimately undertaken through the vehicle of a grouping.

Despite the possibility of establishing an EEIG, it seems preferable for the institutional structure of T2S to take form of a separate agency established at Community level. This is for the following reasons.

First, a Community agency will be more in keeping with the public law nature of ECB's intervention and the overriding principle of independence.

Secondly, although the view has here been expressed that the ECB may be able to participate in the formation of an EEIG, this remains an untested point and appears to entail higher risks than asserting the capacity of ECB to set up an independent agency.

²⁰⁷ An issue which arises in this context is whether national law might prohibit the participation of a central bank in the formation of an EEIG on grounds of public interest under Article 4(4) of Regulation 2137/85. Since however national central banks within the eurozone form part of the ESCB, national autonomy in this context is restricted.

²⁰⁹ See recital 5.

²¹⁰ See below.

²⁰⁸ Article 3(1).

Thirdly, a Community agency will be less dependent on national law. The possibility, for example, exists that an EEIG may be sued before national courts. A Community agency, on the other hand, will be governed by the jurisdiction of the Community courts in relation to its extra-contractual liability and any binding acts that it may be authorized to adopt. Also, in view of its status as a Community body, it will be possible to specify by an arbitration clause that the Community courts will have jurisdiction in disputes arising from contracts entered by it.²¹¹ On the assumption that the best location of the entity responsible for running T2S is Frankfurt, the fact that German law does not bestow an EEIG with separate legal personality may lead to practical inconveniences and make this form less suitable. Fiscal considerations may also need to be taken into account. For example, an EEIG would be liable to VAT as well as employment taxes under national law. Furthermore, various formalities under national law will have to be complied with.

Fourthly, the establishment of an agency will enable the ECB to retain a greater degree of control over the agency's management structures and greater flexibility to make the necessary adjustments during its operation. Issues pertaining to capital participation and shareholder liability are, arguably, more efficiently dealt with under the form of an agency than under the form of an EEIG.

Finally, the competition law dimension will be different. As will be explained below, the ECB and any Community agency established under its aegis will be under an obligation to respect the substantive competition rules of the Treaty. Nonetheless, the setting up of an EEIG rather than an agency will complicate matters in this respect. Whilst an agency will be bound by the principle of an open market economy with free competition, an EEIG will be bound directly by the competition rules of the Treaty and be subject to the enforcement powers of the Commission. It will also be subject to competition procedures of national law and, potentially, face litigation before national courts.

V. EC Competition Law and the ECB

A. Is the ECB Subject to the Provisions of the Treaty on Competition Law?

The possible application of the competition rules of the Treaty on action undertaken by the Eurosystem has not received much attention. It first came to the fore at the time of the introduction of TARGET, the real time gross payments settlement system administered by the ESCB. TARGET was put into place by the European Monetary Institute, the predecessor to the ECB,

²¹¹ See Article 238 EC and, for the ECB, Article 35.2 and 35.4 of the Statute.

and became operative at the beginning of stage three of EMU. The Commission provided a preliminary assessment of the TARGET system distinguishing among three categories of payments:²¹² payments directly related to monetary policy and involving the ESCB, interbank payments, and payments involving bank customers. The first category of payments was beyond the scope of Article 81 EC since the parties involved were not undertakings. By contrast, interbank and customer payments fell within the scope of Article 81.²¹³ In relation to those two categories, the Commission expressed two concerns. The first related to fixed charges, ie the plan to charge all parties involved in a transaction a standard rate for payments effected through TARGET. The Commission however acknowledged that the system would facilitate the establishment of an effective mechanism for managing cross-border interbank transactions which was likely to bolster the reliability of the money market within the euro zone. The second concern related to the level of the charge. The Commission stressed that the rates charged had to cover all costs, including operating costs.²¹⁴

In short, although the Commission did not adopt a formal decision, it appeared to take the view that Eurosystem action fell within the bounds of Article 81(1) but could be exempted under Article 81(3). It also declared its determination to ensure that monetary union takes place in accordance with the competition rules of the Treaty.²¹⁵ By contrast, the ECB has taken the view that Articles 81 to 87 EC do not apply directly to central bank activities of the Eurosystem. It considers, however, that it is bound to act in accordance with the principle of an open market economy with free competition under Article 105 (2) EC and that aspects of Articles 81 and 82 may apply to it by analogy through that provision.²¹⁶

The view expressed by the ECB appears to be more in line with the scheme and the institutional system set up by the EC Treaty. The ECB is a Community body which is entrusted with public law tasks and is bound by the objectives, the scheme, and the institutional structure of the Treaty. It carries out a public function and is entrusted with the exercise of tasks traditionally assigned to a national central bank. It 'falls squarely within the Community framework'.²¹⁷ To the extent therefore that the ECB and the ESCB perform

²¹² EC Commission, XXVII the Report on Competition Policy—1997 SEC (98) 636, Luxembourg 1998, para 95.

²¹³ Ibid.

²¹⁴ EC Commission, XXVII the Report on Competition Policy—1997 SEC (98) 636, Luxembourg 1998, para 95.

²¹⁵ See ECB, Legal Assessment of Legal Aspects of Target 2 Securities, 21 May 2008, at p 12. The document is available from <<http://www.ecb.int/ecb/legal/html/index.en.html>>. This view is articulated further by J M Fernandez Martin, *The Competition Rules of the EC Treaty and the European System of Central Banks* (2001) *European Competition Law Rev* 51.

²¹⁶ See *OLAF* case, op cit, above, n 57, para 92.

public functions, they are not subject to the rules of competition law.²¹⁸ For example, it would be odd, to say the least, if the ECB was subjected to the provisions of competition law when setting interest rates. There are additional reasons why the ECB should not be directly subject to the Articles 81 to 89. If the ECB was subject to the enforcement powers of the Commission, that would be incompatible with the principle of institutional balance and also prejudice its independence. It thus appears that, in view of the institutional structure established by the Treaty, the ECB is not subject directly to Articles 81 and 89 in relation to the powers exercised by it under Chapter II of Title IV of the Treaty on monetary policy.

This is not to say, however, that the ECB is free to undermine competition law. The Community institutions themselves are not above the Treaty. They are bound to respect the principle of free competition just as they are bound to respect the fundamental freedoms. According to this view, the ECB is bound pursuant to Article 105(1) EC and Article 2 of the ESCB Statute to respect the principle of open market economy with free competition. This principle also imposes the obligation to avoid anti-competitive conduct but account has to be taken of the fact that the ECB intervenes in the market as a public authority. Furthermore, the case law on Articles 81, 82, and 86 suggests that a public body may exercise public power, and thus be exempt from the application of Community law, in relation to some of its operations, but carry out other activities, which are economic in character and thus subject to the disciplines of competition law. This case law does not apply directly to the ECB since, as already stated, it is not subject to Articles 81 to 89 as such but it is relevant to our inquiry because it may inform the interpretation of the general duty of the ECB to respect the principle of open market economy.

There are, in fact, two aspects to this argument, one substantive and one procedural. Under the first, the substantive prohibitions of anti-competitive conduct, as provided for in the Treaty, do not apply directly to the ECB. This has procedural implications. It means that the Commission cannot exercise its powers in the field of competition law over the ECB. Also, market actors who might feel that they are disadvantaged as a result of anti-competitive conduct by the ECB would not have the normal remedies available under the Treaty, Regulation 1/2003, or national law. Instead, the only way to hold the ECB accountable would be via an action for judicial review before the ECJ or via the preliminary reference procedure. If the Commission, as the guardian of the Treaty, or any other institution considered that the ECB had acted in breach of the principle of free competition or, more generally, beyond its powers, it could initiate an action before the ECJ.²¹⁹ Thus, as far as inter-institutional relations

²¹⁸ See eg Case C-364/92 SAT *Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

²¹⁹ The ECB is also subject to actions for damages: See Article 288(2) EC.

are concerned, the main procedural implication of placing the ECB beyond the direct application of Articles 81–89 is that it disables the enforcement powers of the Commission in the field of competition law, making Article 230 the exclusive route for questioning ECB conduct.²²⁰ A further, wider, implication is that restrictions on competition resulting from ECB action in the performance of its tasks will be assessed bearing in mind the wide discretion that the ECB enjoys as a public actor.

Although the ECB is beyond the direct application of the Commission's powers in the field of competition law, one should recall here the duty of sincere cooperation provided for in Article 10 EC. As discussed above, this duty binds not only the Member States but also the institutions in their mutual relations and here it may be of particular importance in ensuring compliance with the principle of free competition by the ECB and the ESCB and any public or private entities constituted by them. It will be recalled that Article 10 imposes, *inter alia*, the duty to abstain from measures which could hinder the internal functioning of the Community institutions; the obligation to abstain from measures which could hinder the development of the integration process; and the obligation to ensure the protection of rights stemming from primary and secondary Community law.²²¹

The duty of the Community institutions to respect competition law, the open market economy principle and discretion in the field of economic policy will now be analysed in more detail.

B. Obligation of Community Institutions to Respect the Fundamental Freedoms and Competition Law

Although the primary addressees of the Treaty provisions on free movement are the Member States, these provisions also bind the Community institutions. Thus, the ECJ has held that the institutions must exercise their powers to establish a common organization of the market in agriculture so as to cause the least possible disruption to the internal market.²²² It has also held that Article 28 binds not only Member States but also the Community institutions.²²³ However, where Community measures restrict fundamental freedoms, the Court is more readily prepared to defer to the discretion of the institutions. It tends to allow

²²⁰ Martin Fernandez, *op cit*, 55. ²²¹ See above.

²²² Case 61/86 *UK v Commission* [1988] ECR 431, at para 9; Joined Cases 80 and 81/77 *Les Commissionnaires Reunis and les Fils de Henri Ramel v Receveur des Douanes* [1978] ECR 927, para 24.

²²³ See, for example, Case 37/83 *Rewe-Zentrale v Landwirtschaftskammer Rheinland* [1984] ECR1229, para 18; Case C-39/90 *Denkavit Futtermittel* [1991] ECR I-3069. See P Oliver, *Free Movement of Goods in the European Community* (4th edn) 62 *et seq.*

them greater latitude with regard to justification for restrictions on trade²²⁴ and implied as much in its judgment in *Meyhui*.²²⁵

By contrast, the case law has not examined the question whether the Community institutions themselves are subject to the provisions of the Treaty on competition law. At first sight, an affirmative answer to this question would appear odd. Little support for this can be found in the text of the Treaty articles. Articles 81 and 82 are not expressly directed to the Member States much less to Community institutions. Within the scheme of the Treaty, competition law is not a freedom but a policy. Although Articles 81, 82, and 86(2) are directly effective, there are fundamental distinctions between free movement and competition law. The primary addressees of the free movement of provisions are the Member States whilst the primary addresses of the competition law provisions are businesses. Competition law is backed by a distinct system of enforcement which grants the Commission extensive latitude to articulate policies, set priorities, and focus on sectors. This is not to say that prioritization may not take place in the field of free movement. Agenda setting there occurs through the normal decision-making channels which apply on the adoption of Community legislation. But there is a qualitative difference: whilst free movement is built through the process of adjudication before the ECJ and the ordinary process of Community law-making, competition law is subject to the overwhelming influence and policy discretion of the Commission which, in exercising its enforcement powers, may adopt decisions finding violations, exonerate undertakings, or exempt agreements. If the enforcement panoply of the Commission applied vis-à-vis other institutions, that might disturb the principle of institutional balance and suggest that there is a hierarchical relationship among the institutions.

On the other hand, it is clear that the Community institutions may not undermine the objectives and the rules of the Treaty. They may only act within the scope of the powers conferred upon them by the Treaty and must act in furtherance of the Community interest as concretized by the specific provisions

²²⁴ See eg Joined Cases C-154 and C-155/04 *The Queen on the application of Alliance for Natural Health v Secretary of State for Health*, Judgment of 12 July 2005; Case C-51/93 *Meyhui v Schott Zwiesel Glaswerke* [1994] ECR I-3879; Cf Case 27/80 *Fietje* [1980] ECR 3839 and Case C-369/89 *Piageme v Peeters* [1991] ECR I-2971; Case C-284/95 *Safety Hi-Tech Srl v S & T Srl* [1998] ECR I-4301, para 62. For a discussion of the proportionality standard in such cases, see T Tridimas, *The General Principles of EU Law*, 193–194.

²²⁵ See *Meyhui*, op cit, at para 21. For a more lax proportionality test, see also Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, para 27 *et seq* and further *Alliance for Natural Health*, op cit. Thus, in upholding the discretion of the Community legislature, the Court takes into account that the Community provisions which impose some restrictions on free movement may replace otherwise justifiable diverse national provisions with a single set of rules: Case 46/76 *Bauhuis v Netherlands* [1977] ECR 5, at 16–18; for further case law, see Kapteyn op cit, 639–640. For the annulment of a Community measure, see Joined Cases C-363 etc/93 *Lancry v Direction Generale des Douanes* [1994] ECR I-3957. On the basis of the case law, Gormley, op cit, at 117, concludes that the Council may not introduce obstacles to the free movement of goods in the absence of a clear and specific authorization in the Treaty.

of the various chapters of the Treaty. Also, to the extent that these rules apply to Member States, it would be odd to exempt Community institutions and other bodies from them. In recent years, the Court has increasingly stressed that both Community and national authorities should be subject to equivalent standards as different tiers of the same government structure. This is the case, for example, in relation to the conditions of liability for breach of Community law and also, in some respects, in relation to the standards judicial review. One may therefore suggest that a middle road must here be followed where the following parameters must be taken into account. First, Community institutions must be afforded a degree of discretion commensurate with their public law responsibilities; Secondly, they must respect the principle of institutional balance and the duty of cooperation laid down in Article 10 of the Treaty. Thirdly, and no less importantly, in discharging their public responsibilities, they must respect the substantive rules of the Treaty, including the fundamental freedoms as well as the rules on competition. In particular, the Community institutions must respect both the principle of competition *for* the market, concretized mostly through public procurement principles, and the principle of competition *in* the market, expressed through Articles 81 and 82. These obligations apply *mutatis mutandis* also to the ECB irrespective of the fact that it is not mentioned as one of the institutions proper of the Community in Article 7 EC.

C. The Principle of Open Market Economy

The principle of open market economy is mentioned in the Treaty and its protocols no fewer than five times, thus being one of the most oft-professed principles by EU primary law. Article 4(1) EC states that, for the purposes of attaining the objectives of the Community, the activities of the Member States and the Community must include the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market, and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition. The same principle also underpins monetary union (Article 4(2)) and the coordination of national economic policies (Article 98(1)). Furthermore, Article 105(1) which specifies the objectives of the ESCB, commits the Eurosystem to act 'in accordance with the principle of an open market economy with free competition, favouring the efficient allocation of resources and in compliance with the principles set out in Article 4 of this Treaty'.²²⁶

The principle of open market economy may be approached at several levels. It is one of the fundamental underpinnings of economic and monetary policy and,

²²⁶ This is repeated in Article 2 of the ESCB Statute. A further, now obsolete, reference is made in Article 4.1 of the Statute of the European Monetary Institute, see Protocol No 19 annexed to the EC Treaty.

more generally, the economic constitution²²⁷ of the Community. It thus has a general programmatic and constitutional value. By virtue of Article 4, it becomes a fundamental postulate and a mechanism through which the underlying objectives of the Community laid down in Article 2 EC are to be achieved. The Treaty recognizes that the rule of law and monetary stability are the twin pillars on the basis of which a market economy may thrive.²²⁸ Historically, the open market economy principle can be seen as the ideological dividend resulting from the end of the cold war. It was included in the EC Treaty by the Treaty of Maastricht. It can be said that, since then, the Community has formally ceased to be politically neutral as Article 4 appears to reject a model of centrally planned economy.

The principle has a directional value in that it mandates the actors involved, ie the Community institutions, the Member States, and the ECSB, each within its sphere of competence, to discharge their responsibilities and exercise their powers subject to certain constraints.²²⁹ The precise legal implications of the open market economy principle however are more difficult to determine. It serves to strengthen and support other provisions and principles underlying the Treaty both in relation to intra-Community policies and the external relations of the Community. Thus, the free market concept underpins the provisions on internal market, competition, and also countenances the pursuance of a liberal common commercial policy.²³⁰

Articles 4, 98 and 105(1) may be used as an aid to the interpretation of other Treaty provisions.²³¹ The Court however has resisted attempts to derive specific rights from the general provisions of Articles 2, 3, and 4 EC and, in

²²⁷ According to Streit and Mussler, the concept of economic constitution refers to all legal rules which constrain the conduct of economic agents and are constitutive for or conducive to a specific type of economic system. For further discussion, see P Brentford, 'Constitutional Aspects of the Independence of the European Central Bank' (1998) ICLQ 75 at 80.

²²⁸ For the link between the rule of law and monetary stability, see further G Tridimas, 'A Comparison of Central Bank and Judicial Independence', School of Economics and Politics, Research paper, University of Ulster, 2008.

²²⁹ Notably, Articles 4(1) and (2) refer to the principle of an open market economy with free competition whilst Article 105(1) directs the ESCB to act 'in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources' (emphasis added). The same addition appears in Article 98(1) in relation to the conduct of economic policy by the Community and its Member States. This formulation may be interpreted to have an additional substantive meaning, ie as requiring the public actors concerned in discharging their functions to use public resources as efficiently as possible. It is however doubtful whether a literal interpretation of Articles 98(1) and 105(1) supports such an interpretation. It is better to interpret the reference to the efficient allocation of resources as clarifying the open market economy principle of which, in economic terms, it constitutes an integral part. See further for an analysis and references to the bibliography: Kapteyn and VerLoren Van Themaat, *op cit*, at 964 and fn 66.

²³⁰ For the link between the open market economy principle and the common commercial policy, see P J G Kapteyn and P VerLoren van Themaat, *Introduction to the Law of the European Communities* (3rd edn, Kluwer, 1998) 963.

²³¹ The ECJ has recognized the interpretative value of Articles 2 and 3 EC: see eg Case 126/86 *Zaera v Instituto Nacional de la Seguridad Social* [1987] ECR 3697; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215; Case C-341/95 *Bettati* [1998] ECR I-4355, para 75.

Echirolles Distribution SA,²³² it held that the principle of open market economy as specified in Articles 4 and 98 is not directly effective. It is, rather, a general principle whose application calls for complex economic assessments which are a matter for the legislature or the national administration. This appears to suggest that the lack of direct effect is also an attribute of the principle as included in Article 105(1).

One can hardly take issue with the findings of the Court in *Echirolles Distribution*. The principle of open market economy with free competition is not in itself an objective but a commitment, in broad terms, to a mechanism through which the Community objectives are to be pursued. It is an ideological posture honoured by historical experience which provides a constraining power but does not dictate specific outcomes. The Treaty seeks to pursue simultaneously and reconcile several objectives and it does not follow from Articles 4 and 98 that the Community places greater value on the principle of free competition than on the objectives listed in Article 2 EC.²³³ The Treaty strikes a middle path, leaving ample discretion to the political actors. It takes as a starting point that market forces rather than the State should allocate resources and favours a liberal economic system but, to reflect political consensus across Europe, seeks inevitably to accommodate the market economy with a developed welfare State.²³⁴ Thus, for example, open market economy principles need to be balanced with Article 16 EC on services of general economic interest which may be seen as a countervailing force.²³⁵ Where the limits of State action lie is a moot point. Some commentators, for example, view the inroads on contractual freedom made by various consumer protection directives as being incompatible with the open market economy principle.²³⁶ The bottom line is that Articles 4 and 98 do not impose on the Member States clear and unconditional obligations which may be relied on by individuals.

The same applies to the open economy market principle as enshrined in Article 105(1). It has been suggested that it was included in Article 105(1) with two considerations in mind. First, in order to prevent the imposition of quantitative limitations on the provision of credit by financial institutions, which has traditionally been a favourite instrument of French monetary policy and, secondly, to protect the ESCB from undertaking rescue operations as a lender of

²³² Case C-9/99 *Echirolles Distribution SA v Association du Dauphine* [2000] ECR I-8207, para 25.

²³³ Joined Cases C-49, 50, 52–54, and 68–71/98 *Finalarte and others* [2001] ECR I-7831 per Mischo AG at para 46 of the Opinion.

²³⁴ See for a recent discussion, F G Jacobs, 'The State of International Economic Law: Re-thinking Sovereignty in Europe' (2008) JIEL 5, esp at 27.

²³⁵ See Case C-147/97 *Deutsche Post AG v Gesellschaft für Zahlungssysteme* [2000] ECR I-825 per La Pergola AG, at para 52 and further L Flynn, Review of Article 90 EC Case-law of the Court of Justice of the European Communities (contribution to the conference on Postal Services, Liberalisation and EC Competition Law, Brussels, 12 June 1998) at 27.

²³⁶ See the critique of B Heiderhoff and M Kenny, 'The Commission's 2007 Green Paper on the Consumer Acquis: Deliberate Deliberation?' (2007) ELRev 740.

last resort.²³⁷ The principle of open market economy, however, does not contain precise legal obligations²³⁸ and cannot be approached in isolation from the provisions of the Treaty governing the various freedoms and policies.²³⁹

The meaning of Article 105(1) is that the ESCB is not beyond market forces but there to support them. However, in pursuance of its primary objective which is to maintain market stability, it enjoys vast discretion. More generally, the maintenance of confidence in the market may, depending on the circumstances, require intrusive intervention by public authorities since without confidence there can be no market system. In this sense, the obligatory content of Articles 4, 98 and 105(1) may vary depending on market conditions and the economic outlook. It is thus difficult to derive precise judicially enforceable standards from Article 105(1) other than the prohibition of unjustified and particularly severe central planning. It may thus be conceivable to envisage *in extremis* a concrete minimum legal obligation flowing from the Article, such as, for example, the prohibition of complete nationalization of the services industry. There is no denying that the ECB and the political actors at Community and national level enjoy a large margin of discretion in the conduct of economic and monetary policy and neither Article 4 nor Article 105(1) prohibit them from imposing quantitative controls on credit, deposit taking, or portfolio choices of banks within the limits of their respective competences.

References to the principle have occasionally been made in the case law, mostly as embodied in Articles 4 and 98. Notably, in *CIF*, the ECJ saw the principle as complementing the competition rules of the Treaty and underpinning the obligation of Member States not to require or favour anti-competitive agreements.²⁴⁰ In *Ospelt*, Geelhoed AG saw the free movement of capital not only as a condition for the establishment of the internal market but also giving expression to the principle of an open market economy with free competition as embodied in Articles 4 and 105 EC.²⁴¹ In *Echirolles*

²³⁷ See J V Louis in Stuyck (ed), *Financial and Monetary Integration in the European Economic Community: Legal, Institutional and Economic Aspects* (Deventer, 1993) at 18.

²³⁸ R Lastra, *Legal Foundations of International Monetary Stability* (Oxford, 2006) at 216 concludes that, in view of the generic nature of the principle, it is difficult to hold the ECB accountable for its performance in the pursuit of that principle.

²³⁹ Similarly to Article 3, the principle of open market economy is to be applied in conjunction with the respective chapters of the Treaty which concretise its requirements. See eg Case C-341/95 *Bettati* [1998] ECR I-4355, para 75; *Echirolles Distribution*, op cit, para 22.

²⁴⁰ Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorita Garante della Concorrenza e del Mercato* [2003] ECR I-8055, paras 46–47.

²⁴¹ Case C-452/01 *Ospelt v Unabhängiger Verwaltungssenat des Landes Vorarlberg* [2003] ECR I-9743, Geelhoed AG, at para 34. In Case C-275/92 *Customs and Excise Commissioners v Schindler* [1994] ECR I-1039, Gulmann AG at paras 123–124 rejected the suggestion that the principle as established in Article 98 requires the opening of the market in lottery services. References to the principle have also been made by English courts but with little impact on the outcome of the proceedings, see eg *R (on the application of Vallaj) v Special Adjudicator* [2002] Imm AR 16; *R (on the application of BT3G Ltd) v Secretary of State for Trade and Industry* [2001] Eu LR 325.

*Distribution*²⁴² Alber AG viewed the principle more in the context of the Community's economic and monetary policy than as a factor in defining the internal market.

The principle of open market economy as laid down in Article 105(1) imposes a general obligation on the ECB and the ESCB to respect the competition rules of the Treaty and avoid the imposition of unjustified restrictions on competition in its regulatory or operational interventions. As we saw above, the Court itself has indicated the affinity between the principle of open market economy and the provisions on competition and there is no denying that they share the same underlying objectives, along with promoting the Lisbon agenda. Two aspects may be highlighted in this context. First, although the provisions of competition law aim to catch primarily the behaviour of private actors, they apply also to public undertakings and to Member States themselves. In particular, a Member State may be in breach of Articles 10 and 81 EC where it requires or favours the adoption of anti-competitive agreements or concerted practices or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.²⁴³ Secondly, the principle of open market economy, just as the objectives of competition rules, requires the Community institutions to have regard to the interests of consumers and increase consumer benefit.²⁴⁴

It is reasonable to suggest that the requirements of the principle do not go beyond the requirements of Articles 81 and 82, namely that conduct which is compatible with the latter is also compatible with the former. In this respect, Articles 81 and 82 provide a maximum threshold. Furthermore, in carrying out its statutory tasks, the ECB enjoys wide discretion commensurate with its responsibilities. The exercise of its discretion is subject to review but, as in the case with the other Community institutions, where it comes to economic policy decisions, the Court is likely to recognize considerable latitude applying the standard of manifest error. This standard is flexible and allows the Court itself to employ varying degrees of scrutiny but serves to highlight the tenor of judicial intervention. Under this standard, the ECJ does not approach a measure as being 'suspect' in the way it would approach, for example, a measure which provides for a difference in treatment on grounds of nationality, sex, or age or a private agreement that restricts competition. At this juncture, it may be helpful to look more closely at judicial review of economic policy decisions as carried out by the ECJ.

²⁴² *op cit*, Alber AG, at para 47.

²⁴³ See eg *Clif*, *op cit*, paras 46–47.

²⁴⁴ See eg Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969 and, on appeal, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission*, Judgment of 6 October 2009.

D. Discretion and Economic Policy

Although the Court is prepared to assess whether a measure is appropriate and necessary in view of all relevant circumstances and to scrutinize the way the institution concerned has exercised its discretion, where it comes to the adoption of legislative measures involving economic policy choices, it will defer to the expertise and the responsibility of the adopting institution exercising only 'marginal review'.²⁴⁵ In *Fedesa*,²⁴⁶ it held that the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation. Where there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued. The Court qualified that principle, however, by stating:²⁴⁷

with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. . .

The expression 'manifestly inappropriate'²⁴⁸ delineates what the Court perceives to be the limits of judicial function with regard to review of measures involving choices of economic policy. The test grants to the Community institutions ample discretion and applies to both aspects of proportionality, ie suitability and necessity. Although in a number of cases the suitability and effectiveness of a measure has been contested,²⁴⁹ argument concentrates usually on the requirement of necessity. Necessity is more important because, in applying the principle of proportionality, the Court does not act as an appellate body exercising review of the merits but is concerned primarily with the restrictive effects of the measure on the freedom of the individual. The enquiry whether such restrictive effects are justified centres on their necessity to achieve the objective in view. In practice, review of suitability is closely linked to review of necessity and a measure which is clearly unsuitable to achieve its objectives cannot be justified and will be struck

²⁴⁵ See H G Schermers and D Waelbroeck, *Judicial Protection in the European Communities* (6th edn, Kluwer, 2001) 397, paras 806 *et seq.*

²⁴⁶ *Ibid.*, para 14. See also Case 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, paras 21–22; Case 179/84 *Bozzetti v Invernizzi* [1985] ECR 2301, para 30.

²⁴⁸ In other cases the Court has stated that the measure must not be 'patently' or 'manifestly unsuitable' to achieve its objectives. See Case 138/78 *Stölting v Hauptzollamt Hamburg-Jonas* [1979] ECR 713, para 7; Case 59/83 *Biovilac v EEC* [1984] ECR 4057, para 17.

²⁴⁹ See eg *Stölting*, *op cit*; *Schröder*, *op cit*; *Crispoltoni*, *op cit*, note also Case C-11/00 *Commission v ECB* [2003] ECR I-7147, above, where the ECB unsuccessfully questioned the suitability of OLAF to investigate its activities.

down by the Court.²⁵⁰ In assessing whether a measure is suitable to achieve its objectives, it is relevant to consider the actual effects of the measure. But the fact that a measure has failed to attain its objectives in practice does not mean that it is manifestly inappropriate. The Court has held that the legality of a Community act cannot depend on retrospective considerations of its efficacy.²⁵¹ Where the Community legislature is obliged to assess the future effects of rules to be adopted and these effects cannot be foreseen with accuracy, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question.²⁵²

According to the case law, the discretion of the decision-maker does not apply only to the nature and scope of the measures to be taken but also to some extent to the findings of the basic facts.²⁵³

The manifestly inappropriate test applies not only in relation to agricultural measures but in any area involving decision of economic or social policy where the Community legislature enjoys wide discretion. According to standard case law,²⁵⁴

Where the evaluation of a complex economic situation is involved, the Community institutions enjoy a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether that exercise discloses manifest error or constitutes a misuse of powers or a clear disregard of the limits of its discretion.

The test has been applied, *inter alia*, in the following areas: agricultural policy,²⁵⁵ fisheries policy,²⁵⁶ transport policy,²⁵⁷ social policy,²⁵⁸ health

²⁵⁰ See eg Case C-368/89 *Crispoltoni I* [1991] ECR I-3695. In that case the Court held that a measure which retroactively fixed maximum quantities was incapable of achieving its objective of limiting production since production decisions had already been taken by producers before its adoption. See also Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, discussed later in this section.

²⁵¹ Case 40/72 *Schroeder v Germany* [1973] ECR 125, para 14. See also *Crispoltoni II*, *op cit*; Joined Cases C-267–285/88 *Wuidart and Others* [1990] ECR I-435, para 14.

²⁵² See the cases referred in the previous footnotes and, for more recent confirmation, Case C-189/01 *Jippes and others* [2001] ECR I-5689, para 84; Case C-150/94 *United Kingdom v Council* [1998] ECR I-7235, para 49. Note however that the Community institutions may be under an obligation to adapt existing measures following a fundamental change of circumstances: see, in relation to currency fluctuations, Case 248/80 *Glunz v Hauptzollamt Hamburg-Waltershof* [1982] ECR 197, para 23, and Joined Cases T-177 and T-377/94 *Altmann and Casson v Commission* [1996] ECR II-2041.

²⁵³ Case 138/79 *SA Roquette Freres v Council* [1980] ECR 3333; Case C-122/94 *Commission v Council* [1996] ECR I-881; *OMPI II*, *op cit*.

²⁵⁴ Case T-180/00 *Astipescas v Commission* [2002] ECR II-3985, para 79; *Omega Air*, *op cit*, para 64; Joined Cases C-248–9/95 *SAM Schiffahrt and Stapf v Germany* [1997] ECR I-4475, para 23.

²⁵⁵ *Fedesa*, *op cit*.

²⁵⁶ *Astipescas*, *op cit*, para 79; Case C-179/95 *Spain v Council* [1999] ECR I-6475, para 29; Case C-120/99 *Italy v Council* [2001] ECR I-7997, para 44; Joined Cases C-296/93 and C-307/93 *France and Ireland v Commission* [1996] ECR I-795, para 31.

²⁵⁷ *SAM Schiffahrt*, *op cit*; *Omega Air*, *op cit*.

²⁵⁸ Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, para 58.

protection,²⁵⁹ and measures to combat fraud against Community finances.²⁶⁰ In those areas, the test applies both to internal Community measures and the conclusion of international agreements.²⁶¹ A similar test has also been applied in relation to the Commission's discretion whether to follow a complaint and conduct investigations for breach of competition law,²⁶² whether to exempt agreements under Article 81(3) EC,²⁶³ and whether to find that State aid is compatible with the common market under Article 87(3) EC.²⁶⁴ Although the language used by the Court in some of the above areas may be different, the emphasis remains on the discretion of the decision-maker.

It would be incorrect, however, to give the impression that the Court's examination is one-sided. In fact, there seems to be an inherent contradiction between the Court's emphasis on the concept of 'manifest error', on the one hand, and the general posture of the case law that 'as a general rule the Community judicature undertakes a comprehensive review' of the case, on the other hand.²⁶⁵ The above equivocation reflects the delicate nature of judicial intervention and strives to ensure that the judicature remains 'master of its tasks' keeping control of the degree of scrutiny that it exercises in each case.²⁶⁶ As a general rule, it may be said that, in recent years, the CFI has been more willing to enter into the merits of economic assessments made by the Commission in the field of competition law²⁶⁷ and the ECJ has, to some extent, been more critical of the exercise of Community competence.²⁶⁸ This however has not been achieved through a more rigorous application of the principle of proportionality but rather

²⁵⁹ See eg *Jippes*, op cit; Case C-419/01 *The Queen v Secretary of State for Health, ex p British American Tobacco Ltd* [2002] ECR I-11453; *Upjohn* op cit.

²⁶⁰ *Commission v ECB*, op cit, n 38 above, para 157.

²⁶¹ See Case T-572/93 *Odigitria v Council and Commission* [1995] ECR II-2025, para 36–38; confirmed on appeal: C-293/95 P [1996] ECR I-6129.

²⁶² Case T-7/92 *Asia Motor France v Commission* [1993] ECR II-669.

²⁶³ See eg Case T-395/94 *Atlantic Container Line and Others v Commission* [2002] ECR II-875, para 257; Case T-86/95 *Compagnie Générale Maritime and Others v Commission* [2002] ECR II-1011, paras 339–340.

²⁶⁴ The manifest error test also applies in relation to decisions pertaining to the Community civil service in areas where the Community administration enjoys wide discretion, eg recruitment and promotion. See Schermers and Waelbroeck, op cit, 399–400, and for recent confirmation: Case T-144/02 *Eagle v Commission*, Judgment of 5 October 2004, para 113.

²⁶⁵ See eg, on competition law, Case C-7/95 *Deere v Commission* [1998] ECR I-3111, para 34.

²⁶⁶ Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, at 3278 per Cosmas AG at fn 3.

²⁶⁷ This is illustrated, in particular, by the 2002 merger cases where the CFI annulled decisions prohibiting mergers finding that the Commission had committed manifest errors of assessment in its economic analysis. See the CFI judgments in Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585; Case T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-4071; and Cases T-5/02 *Tetra Laval BV v Commission* [2002] ECR II-4381.

²⁶⁸ See the annulment of the Tobacco Advertisement Directive in Case C-376/98 *Germany v Parliament and Council* (Tobacco case) [2000] ECR I-8419. Note however that in subsequent cases the ECJ has refused to extend the application of its reasoning in that case and has cleared important harmonization measures: see C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079 and *British American Tobacco Ltd*, above.

through an exhaustive examination of the institutions' reasoning, a re-creation of the decision-making process and, in the case of competence, a stricter interpretation of Treaty provisions that empower Community legislative intervention.

In order to determine whether a measure is necessary, the Court is receptive to argument that the same objective may be attained by less restrictive means. The case law suggests however that, in relation to policy measures, the Court does not apply the less restrictive alternative test scrupulously relying instead on some notion of reasonableness or arbitrary conduct. In *Fedesa*²⁶⁹ it was claimed that the prohibition of certain hormones on health protection grounds was not necessary. The Court stressed that the Council enjoyed discretion and held that since it had made no manifest error in considering that the prohibition was appropriate, it was also entitled to take the view that the objectives pursued could not be achieved by less onerous means. The less restrictive alternative argument has been unsuccessfully submitted in a number of other cases²⁷⁰ and recent case law suggests that, in fact, the Court pays lip service to it.²⁷¹

It is submitted that the same general standard is also applicable *mutatis mutandis* to the ECB. It is true that the ECJ did not follow this standard in its judgment in *OLAF* but this can be explained by the circumstances of the case which involved excess of authority in the context of an inter-institutional conflict and not the scope of the ECB's substantive powers in the field of monetary policy.²⁷² It is also true that the ECB is not a democratically accountable institution.²⁷³ This may indeed be a factor which influences the level of judicial scrutiny;²⁷³ it should however be borne in mind that democratic accountability is not the only consideration which accounts for judicial deference.²⁷⁴ Thus, the perceived democratic deficit is a consideration which will be taken up in the mix of factors determining the level of judicial scrutiny in a particular case but does not in itself suggest that the manifest error test will not be applied.

On the basis of these considerations, it may be said that ECB action which restricts free trade is lawful where it satisfies cumulatively the following requirements:

- (a) it must be justified in the general Community interest. The definition of the Community interest must be guided by the tasks and objectives of the

²⁶⁹ op cit, n 18 above.

²⁷⁰ See eg the cases referred to above (*Crispoltoni*, *Wuidart*, etc) and also Case C-280/93 *Germany v Council (Bananas case)* [1994] ECR I-4973; Case C-8/89 *Zardi* [1990] ECR I-2515; Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, per Reischl AG, at 3380 *et seq.*

²⁷¹ See *Omega Air*, op cit; *BAT Case*, op cit, *Jippes*, op cit. ²⁷² See above.

²⁷³ See eg Joined Cases C-402/05 P & C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008.

²⁷⁴ For the debate surrounding the accountability of the ECB, see Lastra, op cit, 226–227, and F Amtenbrink and R Lastra, 'Securing Democratic Accountability of Financial Regulatory Agencies—A Theoretical Framework'. R V De Mulder, *Mitigating Risk in the Context of Safety and Security—How Relevant is a Rational Approach?* (Rotterdam: OMV, 2008) 115–132. Available at SSRN: <<http://ssrn.com/abstract=1330309>>.

ESCB and, ultimately, the Community. It should be recognized in this context that the ECB enjoys discretion in defining what is appropriate action in pursuance of the objectives assigned to it by the Treaty.

- (b) it must be proportionate, ie must not restrict market freedom beyond what is necessary to achieve its objectives;
- (c) it must be intended to promote competition;
- (d) it must satisfy the requirements of equality, objectivity, and transparency.

VI. Competition Law Aspects of Clearing and Settlement

A. Competition Law and Financial Services: An Emerging Agenda

(i) Overview

Although from an early stage the Commission had taken the view that Articles 81 and 82 EC apply to banking and insurance,²⁷⁵ there have in fact been few cases in the area of financial services and it was not until 2005 that the Commission focused its attention on it by launching sector inquiries in banking and insurance.²⁷⁶ There are clearly distinct elements in the financial services sector.²⁷⁷ First, the banking sector, as the recent credit crunch has poignantly reminded us, plays a crucial role in the national economy by providing credit, facilitating payments, and ensuring liquidity. Banking may thus be better viewed not as a sector but as an essential transversal service which underlies all sectors of the economy. Secondly, there is, as a structural feature of the sector, a higher degree of coordination and interdependency between market players than in other sectors. This is necessary, for example, in order to operate a payments system or provide settlement and trading of securities transactions. Thirdly, from the point of view of free movement, there is a sharp imbalance between the wholesale sector, which operates at the European and global level, and the retail sector which remains largely national in character. Finally, the application of competition law cannot be seen in isolation from the liberalization programme pursued by the Commission which, since the launch of the Financial Services Action Plan in 1998 has seen the adoption of more than 40

²⁷⁵ This view was confirmed by the ECJ. See Case 172/80 *Zuchner v Bayerische Vereinsbank* [1981] ECR 2021; Case 45/85 *Verband der Sacheversicherer* [1987] ECR 405.

²⁷⁶ See Commission Communication, Sector Inquiry under Article 17 of Regulation (EC) 1/2003 on retail banking, COM (2007) 33 final, Brussels 31 January 2007 and full Report at <http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/financial_services>; and Commission Communication, Sector Inquiry under Article 17 of Regulation (EC) 1/2003 on business insurance (Final Report), COM(2007) 556 final, Brussels, 25 June 2007 and full Report, SEC (2007) 1231.

²⁷⁷ For a general discussion, see S Ryan, E Martinez Rivero, and A Nijenhuis, Chapter 11 on Financial Services in J Faull and A Nikpay, *The EC Law of Competition* (2nd edn, Oxford, 2007).

measures.²⁷⁸ Indeed, competition law aspects of financial services have been somewhat suppressed because the policy agenda has been dominated by the objective of liberalization which is crucial in facilitating the integration of financial markets in the EU.

Within the broader area of financial services, competition law concerns have arisen in relation to banking, insurance, and the securities markets. The detailed examination of these concerns falls beyond the scope of this article. Suffice it to make here a few selective remarks regarding the application of the rules of the Treaty on banking and financial markets.

Already in the 1970s, in *Zuchner*,²⁷⁹ the Court rejected the argument that by reason of the special nature of services provided by banks and their vital role in transfers of capital, they should be exempted from the competition rules of the Treaty or they should be considered *simpliciter* as providing services of general economic interest.

The most important case decided so far by the Community courts in banking is the *Lombard Club* case.²⁸⁰ There, the CFI had the opportunity to examine the application of Article 81 on the Austrian banking system. The importance of the judgment lies not so much on the novelty of the pronouncements made by the CFI, since it was a clear case of violation, as in that it brought the message home, making it clear that competition law applies on the banking sector. The Commission had imposed fines on eight Austrian banks for their participation in a long-established cartel. The participating banks operated a system of regular meetings through a complex mechanism of multi-tiered committees. At the apex of the structure stood the so-called Lombard Club, bringing together senior executives of the participating banks who discussed coordination of banking conduct on a wide range of issues, including interest rates and advertising. In addition, there were many other regional, product-based, and sector-based committees within the group and the Commission had found that, within the period between 1994 and 1998, at least 300 meetings had taken place in Vienna alone. In upholding the Commission's findings, the CFI held that there was an agreement in principle between all the banks participating in the cartel to eliminate price competition in relation to a wide range of retail and corporate banking services. The Commission was correct to consider that the committee meetings amounted to a single overall cartel: they were part of an overall plan

²⁷⁸ Commission, Financial Services: Building a Framework for Action, COM (1998) 625 and Commission Communication of 11 May 1999 'Implementing the framework for financial markets: action plan' COM (1999) 232. See the FSAP Evolution Chart at <http://ec.europa.eu/internal_market/finances/docs/actionplan/index/061003_measures_en.pdf>. The chart identifies 45 measures but these do not include all the level 1 and level 2 measures currently adopted by the Community institutions under the Lamfalussy process.

²⁷⁹ Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR I-2021.

²⁸⁰ Joined Cases T-259/02-T-264/02 and T-271/02 *Raiffeisen Zentralbank Osterreich AG and others v Commission (Lombard Club Case)*, Judgment of 14 December 2006. Cf. Joined Cases C-215/96 and C-216/96 *Bagnasco and others v Banca Popolare di Novara* [1999] ECR I-135.

with an identical object and the fact that the documents cited do not explicitly refer to all the banking services covered by the various meetings, or to all the committees, did not affect that conclusion.²⁸¹ In view of the complexity of the network, the Commission enjoyed discretion in determining which of the various concerted practices and committees it considered more significant. The CFI also confirmed that the Commission may take account of the potential cumulative effect of all the committees in order to determine whether the cartel as a whole is capable of affecting trade between Member States. The question therefore whether each of the committees in isolation was capable of affecting trade between Member States was not relevant. Also the capability of the committees to affect interstate trade did not presuppose that any particular concerted practice involved services of a cross-border nature.

Although few cases have reached the courts, the Commission has pursued an increasingly active enforcement policy focusing on two areas, price-fixing agreements and card payment systems.²⁸² In the 2000s, the Commission advocated a more proactive competition policy resulting into two sector inquiries on banking and insurance.²⁸³ In its banking sector inquiry, the Commission pointed out that a number of indicators such as market fragmentation, price rigidity, and lack of customer mobility suggested that competition in the EU retail banking market does not work effectively. It stressed the need for continuous monitoring of the sector and also the need for both competition law and regulatory-based remedies.²⁸⁴ Following the liquidity crisis of September 2008, the Commission's priorities have inevitably been adjusted. The prevailing economic climate favours State intervention, and the Commission's focus has shifted towards ensuring that national rescue packages can be effected with as little disruption as possible to the rules of State aid. It is clear that, at least in the short term, the regulatory paradigm has changed. Liberalization, only until recently hailed as a panacea, is now viewed as a fallen angel, a victim of its own success, with political actors on both sides of the Atlantic recognizing the need for a stronger presence of government on market economy. The long-term effect that this may have on the liberalization agenda remains to be seen.

(ii) Securities Markets

In the field of financial markets, the Commission's avowed policy is that, in principle, competition law applies to securities and capital markets 'in the same way as to any other industrial or services sector'.²⁸⁵ Whilst it recognizes that financial institutions have special responsibilities which are regulated appropriately,

²⁸¹ *Lombard Club* case, op cit, paras 111–121.

²⁸² See Ryan et al, op cit, at 1309.

²⁸³ See above.

²⁸⁴ See Commission Report on Competition Policy 2006, COM (2007) 358 final, Brussels, 25 June 2007, para 38.

²⁸⁵ See the official Commission website: <http://ec.europa.eu/competition/sectors/financial_services/capital_markets.html>.

the Commission considers that this does not place them beyond respecting competition rules.²⁸⁶ The Commission focuses its efforts on two areas. It seeks to enforce the competition rules of the Treaty and also to promote the integration of pro-competitive measures in other legislative initiatives related to the internal market. The Commission has stated that the interdependency between the internal market and competition policies is particularly clear in the financial services sector, where both policies go hand in hand. In general terms, the internal market legislation aims at ensuring a level playing field by making it possible for companies to compete on their own merits without being protected by artificial barriers. On the other hand, the application of competition law ensures that companies will not behave in a manner that hampers the good functioning of the internal market.²⁸⁷

The Commission's approach appears to contrast with that of the US Supreme Court which, in *Credit Suisse Securities (USA) LLC v Billing*,²⁸⁸ held that the federal securities laws implicitly preclude the application of anti-trust law. A group of investors had brought an action against investment banks acting as underwriters alleging that their sales practices in relation to initial public offerings violated anti-trust law. They claimed, in particular, that the investment banks had agreed not to sell newly issued securities unless the buyer also agreed to purchase less attractive securities ('tying'), committed to purchase additional securities in the secondary market at higher prices (known as 'laddering'), and also agreed to pay unusually high commissions on subsequent security purchases from the underwriters. The Supreme Court dismissed the claim on the ground that there was a 'clear repugnancy' between securities law and anti-trust rules, in the sense that the two sets of rules were incompatible with each other. It held that federal securities regulation precluded the application of anti-trust laws on the basis of the following considerations: (a) there existed a regulatory authority in the securities law field in the form of the Securities and Exchange Commission; (b) there was clear evidence that that authority exercised supervision in practice; (c) there was a risk that, if both anti-trust and securities law applied, they would give rise to conflicting requirements; and (d) the possible conflict between securities and anti-trust laws affected practices which fell within the regulatory scope of the former.²⁸⁹

²⁸⁶ Ibid. ²⁸⁷ Ibid. ²⁸⁸ 127 S Ct 2383 (2007).

²⁸⁹ The SC found that to permit anti-trust actions such as that in issue threatens serious securities-related harm. It pointed out that a fine, complex, detailed line separates activity that the SEC permits or encourages from activity that it forbids and that the SEC has the expertise to distinguish what is forbidden from what is allowed. Also, reasonable but contradictory inferences may be drawn from overlapping evidence that shows both unlawful anti-trust activity and lawful securities marketing activity. Further, there is a serious risk that anti-trust courts, with different non-expert judges and different non-expert juries, will produce inconsistent results. The SC also held that any enforcement-related need for an anti-trust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, investors harmed by underwriters' unlawful practices may sue and obtain damages under the securities law. Finally, the fact that the SEC is itself required to take account of competitive considerations when it creates securities-related policy makes it somewhat less necessary to rely on anti-trust actions to address anti-competitive behavior.

The judgment makes it more difficult for investors to reach the Court and, in this respect, fits in with other recent pronouncements of the Supreme Court in securities regulation which benefit defendant corporations rather than activist investors.²⁹⁰ In relation to competition law, the judgment is important because it encourages a shift towards entrusting control of competition policy to specialized agencies which are likely to provide for a different priority setting than the anti-trust regulator itself.²⁹¹ Although the differences between US and EU securities regulation should not be overlooked and the case should be seen on its facts, the reasoning of the SC in *Credit Suisse* would point against, at least the unfettered, application of competition law on ECB action.

B. Issues of Clearing and Settlement

As part of its efforts to facilitate the integration of national securities markets, the Commission has taken a number of initiatives in relation to clearing and settlement. In 2001, the Lamfalussy Report identified the vital importance of ensuring the smooth functioning of European clearing and settlement systems as a prerequisite for the efficient functioning and integration of national securities markets.²⁹² The Report pointed out the need of consolidation in the clearing and settlement market but took the view that it should be left principally in the hands of the private sector. Public intervention, by contrast, should focus on ensuring compliance with competition law and removing barriers which inhibit consolidation.²⁹³

The problems associated with cross-border clearing and settlement arrangements were thoroughly explored by the Giovannini Group.²⁹⁴ The first Giovannini report,²⁹⁵ delivered in 2001, identified 15 barriers to the integration of EU post-trading systems and concluded that the EU financial market was highly fragmented and, as a result, failed to perform its functions effectively.²⁹⁶ The

²⁹⁰ See *Stoneridge Investment Partners LLC v Scientific Atlanta Inc*, SC Judgment of 15 January 2008; *Tellabs Inc v Makor Issues and Rights Ltd*, SC Judgment of 21 June 2007.

²⁹¹ See R C Picker, 'Twombly, Leegin and the Reshaping of Anti-trust' (2007) Supreme Court Review 161 at 171.

²⁹² See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001, p 17. ²⁹³ *Op cit*, 15–17.

²⁹⁴ The Giovannini Group was formed in 1996 as a group of financial market participants under the chairmanship of Alberto Giovannini, Deputy General Manager of Banca di Roma. Its role was to advise the Commission on financial market issues and, especially, propose solutions to improve market integration in the light of the introduction of EMU.

²⁹⁵ The Giovannini Group, Cross-Border Clearing and Settlement Arrangements in the European Union, Brussels, November 2001, available at <http://ec.europa.eu/internal_market/financial-markets/docs/clearing/first_giovannini_report_en.pdf>.

²⁹⁶ The Report classified the barriers under three categories as follows: barriers related to technical requirements and market practice, barriers related to taxation, and barriers related to legal certainty. Barriers related to technical requirements and market practice include: (1) national differences in information technology and interfaces; (2) national clearing and settlement restrictions that require the use of multiple systems; (3) differences in national rules relating to corporate

second report,²⁹⁷ delivered in 2003, put forward a detailed strategy of the action to be undertaken for the elimination of barriers identified in the first report. It proposed essentially that the establishment of an efficient pan-European clearing and settlement infrastructure in European financial markets was to be made up of two ingredients. First, a concerted system of initiatives designed to replace the 15 barriers identified in the first report with standards and regulations to ensure an efficient and barrier free market. Secondly, adequate regulatory and supervisory structures which would ensure that the benefits of a barrier-free market would be made available to all market participants through low-cost and safe post-trading services.

Following various other developments,²⁹⁸ in May 2006, DG Competition released an Issues Paper on competition in securities trading and post-trading for consultation.²⁹⁹ In the aftermath of the consultation exercise, the Commission

actions, beneficial ownership and custody; (4) absence of intra-day settlement finality; (5) practical impediments to remote access to national clearing and settlement systems; (6) national differences in settlement periods; (7) national differences in operating hours/settlement deadlines; (8) national differences in securities issuance practice; (9) national restrictions on the location of securities; (10) national restrictions on the activity of primary dealers and market makers. Barriers related to taxation include: (11) domestic withholding tax regulations serving to disadvantage foreign intermediaries; (12) transaction taxes collected through a functionality integrated into a local settlement system. Barriers related to legal certainty include: (13) the absence of an EU-wide framework for the treatment of interests in securities; (14) national differences in the legal treatment of bilateral netting for financial transactions; and (15) uneven application of national conflict of law rules. The Report drew a distinction between barriers which could be addressed by the private sector alone and those that could be addressed only on the basis of government intervention. There was a consensus within the Giovannini Group that the EU clearing and settlement landscape could be significantly improved by market-led convergence in technical requirements and market practice across national systems. This would provide for inter-operability between national systems and could deliver considerable benefits within a significantly shorter timeframe than that required for full system mergers. On the other hand, the removal of barriers related to taxation and legal certainty was identified as being the responsibility of the public sector.

²⁹⁷ The Giovannini Group, Second Report on EU Clearing and Settlement Arrangements Brussels, April 2003, available at <http://ec.europa.eu/internal_market/financial-markets/docs/clearing/second_giovannini_report_en.pdf>.

²⁹⁸ In July 2005, the Commission investigated possible predatory pricing by Euronext when it appeared to reduce temporarily its prices in response to new market entry by London Stock Exchange in the trading of Dutch equities. Following a thorough investigation, the Commission established no violation. See Greenaway in the *Competition Policy Newsletter*, 2005 no 3, 69–71 at <http://ec.europa.eu/competition/publications/cpn/cpn2005_3.pdf>. Also, in June 2005 the Commission published a report on 'Securities trading, clearing and settlement in EU 25' detailing the structure and organization of the securities industry in the Member States. The report concluded that vertical arrangements in clearing and settlement were pervasive throughout the EU and that, contrary to banks' preferences, there was little or no choice in the location of clearing and settlement. See <http://europa.eu.int/comm/competition/general_info/securities/report_june_2005_en.pdf>.

²⁹⁹ Commission Working Document, Competition in EU securities trading and post-trading, Issues Paper, Brussels, 24 May 2006 available at <http://ec.europa.eu/competition/sectors/financial_services/securities_trading.pdf>. On 23 May 2006, the Commission also published a draft working document on post-trading activities. The Report concluded that a reduction in post-trading costs has a consistent impact on liquidity and thus on GDP. A more efficient post-trading system, leading to a lowering of transaction costs of between 8 per cent and 17 per cent could result in a higher level of GDP on average between 0/2 per cent and 0.6 per cent, see p 48 of the Report, available at <http://ec.europa.eu/internal_market/financial-markets/docs/clearing/draft/draft_en.pdf>.

decided not to adopt legislation but proceed through non-binding guidelines in the form of a voluntary Code of Conduct.³⁰⁰ It was felt that this choice was more in keeping with related private sector developments and built on existing momentum generated by those initiatives.³⁰¹ The Commission considers that the Code has been a success and that the industry has, so far, lived up to its commitments.³⁰²

C. The *Clearstream* Decision

The Commission had the opportunity to visit anti-trust aspects of the securities clearing and settlement industry in the *Clearstream* decision.³⁰³ The Commission found that Clearstream International SA breached Article 82 of the Treaty by refusing to supply cross-border clearing and settlement services and by charging discriminatory prices to Euroclear Bank SA. Notably, the case originated in an ex officio investigation launched by the Commission rather than any specific complaint received by it. It is pertinent here to examine the decision in some detail as it brings to the fore the interplay between settlement systems and competition law.

Clearstream Banking AG was Germany's only CSD. It was part of the Clearstream group which also included Clearstream Banking Luxembourg SA, one of only two ICSDs operating in Europe. The Clearstream Group was wholly owned by the Deutsche Börse group to which the Frankfurt Stock Exchange also belonged. Euroclear Bank was based in Brussels and was the other

³⁰⁰ For the text of the Code, see <http://ec.europa.eu/internal_market/financial-markets/docs/code/code_en.pdf> and <http://www.fese.eu/_lib/files/European_Code_of_Conduct_for_Clearing_and_Settlement.pdf>. The Code of Conduct is accompanied by terms of reference adopted on July 2008 which outline how infrastructures having signed the Code of Conduct for clearing and settlement will report on (i) their compliance with the service unbundling and accounting separation part of the Code and how external auditors will assess this compliance and (ii) their compliance with the Code in general. For the terms of reference, see <http://ec.europa.eu/internal_market/financial-markets/docs/code/terms_of_reference_en.pdf>. The Code of Conduct is also accompanied by an access and interoperability guideline adopted on 28 June 2007: see <http://ec.europa.eu/internal_market/financial-markets/docs/code/guideline_en.pdf>.

³⁰¹ See the speech by Charlie McCreevy, European Commissioner for Internal Market and Services on Clearing and Settlement: The Way Forward Economic and Monetary Affairs Committee of the European Parliament Brussels, 11 July 2006, SPEECH/06/450, available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/450&type=HTML&aged=0&language=EN&guiLanguage=en>>. In July 2008, the Commission formally mandated CESR to provide technical advice on post trading, in particular (i) to map out Member States' regulatory and supervisory arrangements (set at national, regional, and/or local level) relating to the setting up of links between post-trading infrastructures and (ii) to advise the Commission—in relation to existing link requests made under the aegis of the Code of Conduct—on how best to address any potential differences in such arrangements that the mapping exercise may uncover. See <http://ec.europa.eu/internal_market/financial-markets/docs/clearing/2008_07_28_cesr_mandate.pdf>.

³⁰² See the Third Progress Report to Economic and Financial Affairs Council (ECOFIN) on the implementation of the Code, presented by the Commission in March 2008, <http://ec.europa.eu/internal_market/financial-markets/docs/clearing/ecofin/20080311_ecofin_en.pdf>.

³⁰³ Commission Decision of 2 June 2004, Case COMP/38.096, C (2004) 1958 final.

European ICSD. It had originally been set up under the patronage of Morgan Guarantee Trust Company of New York but, in 2000, the link with Morgan Guarantee terminated and, subsequently, Euroclear merged with a number of European CSDs.

As Germany's only CSD, Clearstream Banking was in a very strong position. According to Article 5 of the *Depotgesetz*, all securities held in collective safe custody in Germany, which amount for the overwhelming majority of securities, have to be held in a recognized *Wertpapiersammelbank* (CSD). As a result, more than 90 per cent of German securities were deposited with Clearstream. Its dominance was reinforced by the rules governing stock exchange transaction. Under paragraph 16(2) of the Rules of the Frankfurt Stock Exchange (*Börsenordnung*), the condition of orderly settlement of transactions imposed by the *Börsengesetz* (Exchange Act) was fulfilled if the applicant for admission to trading conducted the settlement of its transactions through Clearstream.

The dispute concerned access by Euroclear to the clearing services offered by Clearstream. To understand the case, it is fundamental to draw a distinction between primary and secondary clearing and settlement.³⁰⁴ Primary clearing and settlement refers to the final transfer of ownership in a security and can only be effected by the issuer CSD, ie the entity with which securities have been deposited in final custody. Under German law, settlement of transactions in securities kept in collective safe-keeping occurs by book entry without any physical movement of the securities. Responsibility for effecting the book entry falls on the issuer CSD. Such primary settlement occurs whenever there is a change in the position of the securities accounts held with the issuer CSD and takes place through a transfer of a fraction of the collective ownership which can only be performed by the issuer CSD.

Secondary clearing and settlement is performed by intermediaries at a downstream level. Intermediaries, such as banks, ICSDs, and other CSDs, hold securities with the issuer CSD in their name and on behalf of their customers, either via segregated accounts, ie separate accounts for each of their customers, or using a so-called 'omnibus' account reflecting all the positions of the intermediary with the issuer CSD.³⁰⁵ If a transaction occurs between customers of the same intermediary, it can be internalized, ie it can be settled within an omnibus account held by an intermediary without entailing any change in its position vis-à-vis the issuer CSD, and there is no need for primary clearing. If it cannot be internalized, then primary clearing which mirrors the secondary clearing within the intermediary's account must take place.³⁰⁶ Since intermediaries are unlikely to be able to internalize all potential trades, it is clear that they must have a contractual relationship with the issuer CSD in order to be able

³⁰⁴ See *Clearstream*, op cit, para 29 et seq.

³⁰⁵ See *Clearstream*, op cit, para 34.

³⁰⁶ op cit, para 35.

to provide clearing and settlement services to their customers. The issuer CSD thus becomes an unavoidable trading partner.

(i) The Relevant Market

The Commission identified the relevant market as being the market in clearing and settlement of transactions relating to securities issued according to German law, in particular in relation to cross-border transactions.³⁰⁷ It drew a distinction between clearing and settlement, on the one hand, and safe-keeping, on the other hand. Whilst all the above services are connected, since clearing and settlement can only take place in securities which are kept in safe custody, custody services remain distinct from transaction-based ones and are not part of the same market.³⁰⁸

In relation to the relevant market, the Commission made three important findings. It held that there is a group of providers of clearing and settlement services for whom indirect access to the issuer CSD is not a substitutable alternative for direct access. Secondly, it held that the provision by the issuer CSD of primary clearing and settlement to banks is in a separate market to the provision of primary clearing and settlement to CSDs and ICSDs. Thirdly, it held that for customers requiring primary clearing and settlement in order to be able to provide efficient services to their customers, secondary clearing was not an economically viable alternative. Each of these findings needs to be explained.

The Commission drew a distinction between direct and indirect access to an issuer CSD. Direct access occurs where a CSD, an ICSD, or a bank obtains contractually a direct link to the communication channels of the issuer CSD through which instructions and information relating to a transaction are exchanged. Indirect access exists where an entity does not have a direct account with the issuer CSD but uses an intermediary which has such an account. Providers of secondary clearing and settlement will choose direct or indirect access to the issuer CSD depending on their requirements as a user, such as the volumes to be processed or the level of service that they offer to their customers. However, for customers requiring direct access, indirect access presents a number of disadvantages which do not make it a viable alternative. In the case of an indirect link, deadlines are poorer, the risk is greater, and the costs are higher, given that the intermediary will charge a mark-up for its involvement. Also, using an intermediary creates potential conflicts of interest. Furthermore, for

³⁰⁷ *Clearstream*, para 136. According to the case law and the Commission's standard practice a relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the customer, by reason of the product's characteristics, their prices, and their intended use: See Case 27/76 *United Brands Co v Commission* [1978] ECR 207; Case T-30/89 *Hilti* [1991] ECR II-1439, on appeal, Case C-53/92P [1994] ECR I-667, and Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C372/5.

³⁰⁸ *Clearstream*, para 137.

CSDs and ICSDs to be able to deliver collateral in TARGET, direct access to the issuer CSD is an ECB requirement.³⁰⁹

The importance of *Clearstream* in this regard is that the Commission used the mode of access to the issuer CSD to determine the relevant market and, following the judgment in *Hugin*,³¹⁰ determined that a specific type of supply, namely direct access, was a separate market.

As regards its second finding, the Commission held that the issuer CSD provided to CSDs and ICSDs different services from those provided to banks. Services to banks were provided on the basis of standard terms and conditions whilst services to CSDs and ICSDs were based on individually negotiated agreements, leading to large price differentials, and required a modified technical infrastructure.³¹¹ By contrast, the Commission did not accept the submission that Clearstream provided additional services to ICSDs which it did not provide to CSDs since Clearstream was unable to explain what these additional services were.³¹²

In relation to its third finding, the Commission confirmed that secondary clearing was no viable substitute for primary clearing. Internalized clearing and settlement within the books of an intermediary can only occur on an incidental basis if both the seller and the buyer happen to be customers of the same intermediary. However, none of the providers of secondary clearing is in a position to settle transactions with all potential counterparties in their own books so that access to the services of the issuer CSD becomes indispensable since it is the only pool in which transactions with all potential counterparties can be settled.³¹³

It followed that both demand-side and supply-side substitutability were non-existent. From the demand side, intermediaries that provided cross-border services on processing of securities could not readily use other suppliers of primary clearing and settlement services and were dependent on Clearstream as the issuer CSD. Nor could CSDs and ICSDs dealing with significant transaction volumes use as a substitute the services available to non-CSD customers or indirect access to the issuer CSD. From the supply side, no other company was in a position to offer in the foreseeable future primary clearing and settlement services.³¹⁴

The Commission determined the relevant geographical market on a national basis.³¹⁵ Securities issued according to German law were in practice kept in final

³⁰⁹ *Clearstream*, para 139 *et seq.*

³¹¹ *Cleatretam*, paras 149 *et seq.*

³¹³ *Clearstream*, *op cit*, para 162 *et seq.*

³¹⁵ According to established case law, the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because conditions of competition are appreciably different: see Case 27/76 *United Brands Co v Commission* [1978] ECR 207; Case T-30/89 *Hilti* [1991] ECR II-1439, on appeal, Case C-53/92P [1994] ECR I-667.

³¹⁰ Case 22/78 *Hugin* [1979] ECR 1869.

³¹² *op cit*, para 133 *et seq.*

³¹⁴ *op cit*, para 200.

custody in Germany whilst securities issued in accordance with the law of other Member States were in practice kept in final custody with the respective issuer CSD. There was, therefore, practically no competition between different national CSDs for the deposit and final custody or safe-keeping of securities.³¹⁶

(ii) *Dominant Position*

The Commission had no difficulty in establishing that Clearstream enjoyed a position of de facto monopoly as a result of a series of legal and factual considerations. The vast majority of securities issued under German law were kept in collective safe custody. Under the law, only a CSD was authorized to keep securities in collective safe custody in Germany and Clearstream was the only CSD in the national territory.³¹⁷ It followed that primary clearing and settlement of securities issued and held in collective safe custody in accordance with German law was only carried out by Clearstream. There was no actual competition and, whilst in theory it would be possible to set up another CSD in Germany, this was unlikely to occur as there were high economic, legal, and technical barriers to entry and no interest by market participants for another entrant.³¹⁸

(iii) *Abuses*

The Commission identified two types of abuse. First, by denying Euroclear direct access to its communication infrastructure, it refused to supply it with primary clearing and settlement services for registered shares. Secondly, it charged Euroclear discriminatory prices compared to the prices that it charged to other customers for the provision of similar services.

Echoing *Commercial Solvents*,³¹⁹ the Commission held that Clearstream was a de facto monopolist and, as such, an unavoidable trading partner of Euroclear.

³¹⁶ *Clearstream*, op cit, para 197. ³¹⁷ See above.

³¹⁸ This is for the following reasons (see *Clearstream*, op cit, para 209 *et seq*): (a) to achieve economic viability, the new entrant would need to become the issuer CSD for a large number of German securities. Since there cannot be two issuer CSDs for the same security, this would mean that Clearstream would no longer be the issuer CSD for the securities for which the new entrant would be the issuer CSD. In practice, however, it would be very difficult to erode Clearstream's dominance. Economic reality showed that the position of an issuer CSD in any Member State has never been challenged by a new CSD. (b) The rules of the German stock exchanges stipulated that the condition of orderly settlement set by the *Borsengesetz* (Exchange Act) was fulfilled, where an applicant for admission to trading conducted the settlement of its exchange transactions through Clearstream. Although the wording of the rules did not explicitly exclude other possibilities for orderly settlement, the fact was that any new entrant would have to obtain recognition by the Frankfurt Exchange and other exchanges. (c) As Deutsche Borse had itself stressed, offering an exchange platform and offering settlement services is functionally connected. Usage in the market suggested that the majority of customers is interested in these services being provided by one source. (d) A potential new entrant would have to set up complex and costly systems, without having an assurance that it could provide orderly or economically viable services. Establishing an alternative CSD would require substantial investment in IT development and human resources running at an estimate of 156 million euro.

³¹⁹ Joined Cases 6 and 7/73 *Commercial Solvents* [1974] ECR 223.

Clearstream had behaved in a dilatory manner by refusing to supply Euroclear with services for a period of almost two years whilst access could be, and had been, supplied to other CSDs within a period of four months. Thus, in this case the refusal to supply was closely connected with discrimination although the Commission classified it as a single infringement.³²⁰ The fact that Clearstream eventually granted Euroclear access to its computerized settlement platform did not undo the refusal to supply. It was the unjustified delay in doing so, combined with the unreasonable linking of access to unconnected issues, which amounted to an abusive refusal to supply contrary to Article 82(c) EC.³²¹

By refusing to supply, Clearstream harmed innovation and competition in the provision of cross-border clearing and settlement within the single market. In effect, it prohibited non-issuer CSDs and ICSDs from offering a one-stop shop to their clients without having to have recourse to local agents in the various Member States.³²² Furthermore, the Commission found that Clearstream had abused its dominance by applying a differential tariff for the provision of primary clearing and settlement services to Euroclear from the tariff applied for the same services to certain national CSDs without any objective and cost-based justification. In fact, Euroclear had much larger transaction volumes than those CSDs and their level of automation was higher, thus resulting in lower staff costs per transaction.

Clearstream indicates that the Commission is prepared to take a robust approach in relation to the application of competition law on securities clearing and settlement. A distinct feature of this case is that the Commission proceeded with the adoption of its decision despite the fact that, meanwhile, the violation had ceased. Also, despite finding a violation, it decided not to impose a fine on Clearstream on the grounds that there was no Commission or court case law dealing with the application of competition law in the area and there had been long-ranging debate within many institutions and fora in order to define better the role and obligations of the various actors in the clearing and settlement industry. Whilst the decision not to impose a fine may appear somewhat generous, the Commission's stance suggests that it saw the decision as an opportunity to clarify the law and indicate its future policy in relation to the clearing and settlement of securities transactions. Thus, in relation to securities law, *Clearstream* had the character of a path finding decision, a policy statement that the Commission means business. Perhaps the most important aspect of the case, however, is the narrow market definition adopted by the Commission, in

³²⁰ *Clearstream*, para 216. ³²¹ *op cit*, 249.

³²² The Commission attributed particular importance to the fact that Euroclear was in fact the only ICSD in the EU apart from CBL, which is a sister company to CBF and a subsidiary of CI. The facts and other elements of the case considered in context, made it clear that that CI/CBF intended to exclude Euroclear from the market. See *Clearstream*, *op cit*, para 300.

particular, its finding that for CSDs and ICSDs indirect access to the issuer CSD is not a substitutable alternative for direct access. Whilst the Commission's objective was to trigger the development of a market in interstate settlement services, its findings appear to be a serious intrusion on contractual freedom which can withstand judicial scrutiny only on the basis of an extensive and thorough economic analysis of the market.

D. Competition Law and Target 2-Securities

(i) Overview

As stated above, the ECB is not bound directly by the competition rules of the Treaty but by the general postulate of Article 105(1) to observe the principle of open market economy with free competition. One of the obligations arising from this provision is to comply with the substantive requirements of Articles 81 to 87 EC applicable *mutatis mutandis* and taking account of the ECB's wide discretion to act in the public interest in pursuance of the tasks assigned to it by the Treaty.³²³

The application of competition law on T2S on the basis outlined above does not contradict the public law functions of the ECB and the ESCB. Core aspects of the ECB, such as the fixing of interest rates or action to support the exchange rate of the euro, are exempted from competition law altogether. However, not every action that the ECB, or a public agency on its behalf, may validly undertake is beyond the reach of the competition rules of the Treaty. This analysis is compatible with the approach of the ECJ in defining the concept of an 'undertaking' for the purposes of the application of Articles 81, 82, and 86 EC.

The definition of an 'undertaking' is broad. It encompasses any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.³²⁴ Economic activity is any activity which consists in offering goods and services in a given market.³²⁵ To determine whether an economic activity is carried out, one must have regard to the nature and aim of the activities.³²⁶ Whilst a profit making motive is not essential, the activity must be one which could, at least in principle, be carried out by a private undertaking in order to make a profit.³²⁷

³²³ See above.

³²⁴ See eg Case C-41/90 *Höfnier and Elser* [1991] ECR I-1979, para 21; Joined Cases C-264/01, C-306/01, C-354/01, and C-355/01 *AOK-Bundesverband and others* [2004] ECR I-2493, para 46.

³²⁵ Case C-118/85 *Commission v Italy* [1987] ECR 2599, para 7; *Aéroports de Paris v Commission* [2000] ECR II-3929, para 107.

³²⁶ See Bellamy and Child, *European Community Law of Competition* (6th edn) 94.

³²⁷ See op cit, and Joined Cases C-159/91 and C-160/91 *Pourcet v Pistre* [1993] ECR I-637, per Tesauro AG, para 8.

State or international bodies which act in the performance of public law functions are not undertakings.³²⁸ However, the crucial criterion is not the status of the body but the nature of the activity that it carries out. It may thus be possible for a public body to be an undertaking in relation to some activities but not in relation to others.³²⁹ As the Court held in *Cali & Figli v SEPG*,³³⁰ a distinction is drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market. It thus becomes necessary to establish whether the public body acts in the performance of 'a task in the public interest which forms part of the essential functions of the State'.³³¹ The precise boundaries are not always easy to specify. The Court seeks to draw a balance between, on the one hand, respect for the regulatory and public law autonomy of the Member States and, on the other hand, the need to ensure that the competition rules of the Treaty are not undermined by State action. The difficulties of the judicial inquiry are compounded by the fact that the boundaries of public law are not static. Not only do they differ from State to State but they evolve over time. Within the last 20 years, the boundaries of the State have shrunk as successful economies have tended to keep the State at arm's length from the levers of the economy. The Court adopts in effect a functional, comparative criterion: the issue is often determined by reference to whether the activities in question could be carried on only by a public agency or they are activities which 'have not always been, and are not necessarily, carried on by ... public bodies'.³³² Thus the fact that an

³²⁸ The Treaty rules on competition do not apply to an activity which, by its nature, its aim, and the rules to which it is subject does not belong to the sphere of economic activity, see Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paras 18–19, (concerning the management of the public social security system). Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paras 22 and 23, (concerning anti-pollution surveillance of the maritime environment). In Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43 it was held that an international organization which had been set up to provide air traffic control services and had power to collect route charges from airlines was not caught by Articles 82 and 86 EC. Its activities were not of an economic nature but derived from the power of the contracting States to supervise and control air space, were financed by State contributions, and were carried out in the public interest of furthering air safety.

³²⁹ See eg Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, para 108; Case T-155/04 *SELEX Sistemi Integrati v Commission* [2007] 4 CMLR 372, para 61.

³³⁰ Case C-343/95 *Cali & Figli v SEPG* [1997] ECR I-1547, para 16; Case 118/85 *Commission v Italy* [1987] ECR 2599, para 7. The Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority: C-107/84 *Commission v Germany* [1985] ECR 2655, paras 14–15. On this basis in Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, the CFI held that the provision of airport facilities to airlines by a public corporation in return for a fee freely fixed by the latter and the management of those facilities are economic activities even though they are carried out on publicly owned property. Confirmed on appeal: Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297.

³³¹ *Cali and Figli*, op cit, para 22.

³³² Case C-475/99, [2001] ECR I-8089; Case C-475/99 *Ambulanz Glückner* [2001] ECR I-8089, para 20.

activity may not be offered by any private enterprise at a given moment does not necessarily exclude it from being a commercial activity if, in principle, it can be carried out commercially.³³³ On this basis, the provision of locomotives and access to the railway infrastructure,³³⁴ the management of public telecommunications equipment and its availability to operators for a fee,³³⁵ and the provision of employment procurement by a public body which had the exclusive right to provide such services³³⁶ have been held to be economic activities.³³⁷ By contrast, anti-pollution surveillance and environmental protection services,³³⁸ the collection of special taxes on behalf the State imposed to finance the decommissioning of nuclear plants,³³⁹ and the performance of funeral services where it is by law entrusted to local communes³⁴⁰ have been held not to constitute an economic activity.³⁴¹

On the basis of this analysis, it is arguable that, if a national public body established a settlement platform similar to T2S, it would qualify as an economic activity and would thus be subject to the competition law rules of the Treaty. It should be noted in this context that Articles 81 and 82 are intended to apply first and foremost to anti-competitive conduct by private economic actors. They apply to State measures only by reflection. The case law has derived from the duty of solidarity provided for in Article 10 EC an obligation on public authorities not to maintain in force legislative or regulatory measures which may render ineffective the competition rules of the Treaty. A Member State may not require or favour the adoption of anti-competitive agreements nor may it reinforce their effects.³⁴² Also, a Member State may not deprive its own legislation of its official character by delegating to private parties responsibility for taking decisions affecting the

³³³ T-155/04 *SELEX*, op cit, para 89.

³³⁴ Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689.

³³⁵ Case 41/83 *Italy v Commission* [1985] ECR 873.

³³⁶ See C-41/90 *Höfner* [1991] ECR I-1979; Case C-55/96 *Job Centre* [1997] ECR I-7119.

³³⁷ Also, in *Ambulanz Glöckner*, op cit, health organizations providing services on the market for emergency and ambulance services were held to carry out economic activities.

³³⁸ Case 343/95 *Cali & Figli v SEPG* [1997] ECR I-154.

³³⁹ Case C-207/01 *Altair Chimica v ENEL* [2003] ECR I-8875.

³⁴⁰ Case 30/87 *Bodson v SA Pompes Funèbres des Régions Libérées* [1988] ECR 2479, para 35.

³⁴¹ Cf Case C-244/94 *Fédération française des Sociétés d'assurance v Ministre de l'Agriculture* [1995] ECR I-4013. In that case, a non-profit making body managing an optional supplementary old age pension fund was found to be an undertaking because it operated according to the principle of capitalization. Benefits depended on the level of contributions paid and the financial results of investments made, and the scheme competed with private life assurance companies. The crucial distinction appears to lie not so much on whether affiliation to a scheme is compulsory or optional as on the method of calculation of benefits and on whether it competes with insurance companies. This is reiterated by the judgment in Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, Judgment of 21 September 1999, paras 81–87.

³⁴² A national measure reinforces a private agreement where it incorporates the terms of the agreement and requires, or at least encourages, compliance with it: Case 267/86 *Van Eycke* [1988] ECR 4769, para 18.

economic sphere.³⁴³ This case law has developed mainly in relation to national regulations which fix prices in specific service sectors. However, the application of Articles 81 and 82 on State action via Article 10 appears to be relatively benign.³⁴⁴ The reason for this is that the Treaty has specific provisions for anti-competitive State action, namely Article 86 and the chapter on State aids. Since the ECB intervenes as a public body, it should therefore be, by analogy, Article 86 that should be the main focus of attention.³⁴⁵

In addition to being bound by the principle of free market economy with free competition under Article 105(2), and thus requirements similar to those imposed by Articles 81, 82, and 86 EC, the ECB, as a Community institution, is also bound to respect the freedom to carry out a trade or profession.³⁴⁶ This freedom has been recognized as a fundamental economic right by the ECJ but, according to the general formula used in the case law, it is not an absolute prerogative and must be viewed in the light of its social function.³⁴⁷ It may be restricted provided that two conditions are met: the restrictions imposed must correspond to objectives of general interest pursued by the Community; and they must not 'constitute a disproportionate and intolerable interference, impairing the very substance of the right'.³⁴⁸ It should be noted that, so far, on no occasion has the ECJ found that the freedom to exercise a professional activity has been violated. Where Community legislation seriously threatens such rights the Court prefers to address the claim on different grounds such as breach of the principle of equality, as for example in *Codorniu*,³⁴⁹ or of the

³⁴³ Case C-2/91 *Meng* [1993] ECR I-5751, para 14; Case C-245/91 *Ohra* [1993] ECR I-5851, para 10; Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, 21 September 1999, para 65.

³⁴⁴ This appears to be the tenor of the case law since Case C-185/91 *Reiff* [1993] ECR I-5801. See also for an earlier example Case C-311/85 *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR I-3801.

³⁴⁵ The very fact of granting monopoly rights may itself be a violation. In Case C-179/90 *Merci* [1991] ECR I-5889, the ECJ held that although the simple fact of creating a dominant position by granting exclusive rights is not incompatible with Article 86, the granting of rights which induce or lead to the undertakings committing abuses is incompatible. In Case C-320/91 *Corbeau* [1993] ECR I-2533, the Court reversed the burden of proof by suggesting that exclusive rights are *prima facie* illegal unless they are objectively justified or fulfil the criteria of Article 86(2). However, the Court seems to have retreated from that position. In Case C-323/93 *Crespelle* [1994] ECR I-5077, it held that a Member State contravenes the Treaty only, if in merely exercising the exclusive right granted to it, the undertaking cannot avoid abusing its dominant position.

³⁴⁶ See Fernandez Martin, *op cit*, fn 25.

³⁴⁷ Case 4/73 *Nold* [1974] ECR 491; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531, para 12. This is the general formula used by the Court in relation to all fundamental rights. See eg in relation to the freedom of expression: Case C-219/91 *Ter Voort* [1992] ECR I-5485, para 38.

³⁴⁸ Case C-280/93 *Germany v Council* [1994] ECR I-4973, para 78; Case 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, para 15; Case C-177/90 *Kühn v Landwirtschaftskammer Weser-Ems* [1992] ECR I-35. For recent confirmation, see eg Joined Cases C-37 and C-38/02 *Di Lenardo Adriano and Dilexport v Ministero del Commercio con l'Estero*, Judgment of 15 July 2004, para 82.

³⁴⁹ Case C-309/89 *Codorniu v Council* [1994] ECR I-1853.

protection of legitimate expectations, as in the milk quota cases.³⁵⁰ It is thus submitted that, in the present context, the invocation of the right to trade does not add anything to the framework of analysis based on the application of competition law. In other words, for our purposes, the obligation of the ECB to respect the freedom to trade does not impose on it more onerous obligations than those imposed by the analogical application of Articles 81, 82, and 86.

There are two aspects which should be examined in this context, namely, the legal framework of T2S and the relationship between T2S and national CSDs.³⁵¹ Both aspects are inter-related and should be examined by reference to Articles 81, 82, and 86(2). It should be noted however that the analysis of Article 81 is closely linked to that of Article 82. To the extent that the T2S may be viewed as an essential infrastructure and the Eurosystem may find itself in a dominant position, it will be under heightened obligations and the agreements entered into with CSDs could not be justified under Article 81(3) unless Article 82 considerations are also taken into account.³⁵² It is thus Article 82, as it applies to public bodies via Article 86, rather than Article 81 which should provide the main focus of enquiry.

(ii) Article 81

It is expected that T2S will be based on an ECB guideline addressed to the national central banks belonging to the Eurosystem and be accompanied by complementary arrangements. It appears that the establishment of T2S will have some impact on the market. Participating CSDs will agree on a common pricing mechanism. They will also, in effect, have no incentive to build or maintain their own settlement platform. It may thus be said that the establishment of T2S will lead directly or indirectly to the fixing of prices or any other trading conditions and also to limiting investment within the meaning of Article 81(1) EC. It is submitted however that it would be possible to justify such anti-competitive effects by analogical application of Article 81(3) EC.³⁵³

³⁵⁰ See Case 120/86 *Mulder I* [1988] ECR 2321; Case C-189/89 *Spagl* [1990] ECR I-4539. See further for a discussion, Tridimas, *The General Principles of EU Law*, 315–316.

³⁵¹ See ECB Legal assessment, op cit, 12.

³⁵² In Case T-51/89 *Tetra-Pak v Commission* [1990] ECR II-309, paras 28–29, the CFI held that the grant of an exemption to an agreement under Article 81(3) does not render inapplicable Article 82. See also Joined Cases C-395 and C-396/96 P *Compagnie Maritime Belge Transports v Commission* [2000] ECR I-1365. If it were otherwise, an exemption under Article 81(3) would in effect also operate concurrently as an exemption to Article 82 which would be inconsistent with the notion of abuse. Also, the principle of hierarchy of legal norms prohibits the grant of an exemption under secondary Community legislation from taking precedence over an Article of the Treaty. This is recognized by a number of block exemptions which expressly state that the benefit of the exemption under their provisions does not preclude the applicability of Article 82. See eg the block exemptions on air transport: Regulations 2671/88, 2672/88, and 2673/88. It follows that, where the granting of an individual exemption is being considered, the Commission must take account of the characteristics of the agreement which would also be relevant in applying Article 82.

³⁵³ ECB Legal Assessment, op cit, 12–13.

Article 81(3) lays down four conditions that must be fulfilled in order for an exemption to be granted. The agreement:

1. must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
2. must allow consumers a fair share of the resulting benefit;
3. must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
4. must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

These conditions must be fulfilled cumulatively.³⁵⁴ As already discussed, T2S presents distinct advantages. By offering DvP settlement in central bank money, it will increase the liquidity of financial markets and promote cross-border trade. It will also offer the most secure and effective form of settlement thus improving market stability.³⁵⁵ T2S will also increase interstate competition. It will offer to CSDs for the first time the possibility of providing settlement services for securities which are issued and held in another CSD not belonging to the same group.³⁵⁶ It can thus be expected to contribute to increasing competition among CSDs. It will make settlement more efficient since it will take place in a single platform rather than in multiple platforms as is currently the case, where the cash leg of a securities transaction is settled in TARGET 2 and the securities leg, in some cases, in two different CSDs. The efficiencies which T2S can be expected to offer should be stressed here. As the First Giovannini Report pointed out,³⁵⁷ *'inefficiencies in clearing and settlement represent the most primitive and thus most important barrier to integrated financial markets in Europe. The removal of these inefficiencies is a necessary condition for the development of a large and efficient financial infrastructure in Europe.'* T2S is fully in conformity with the Giovannini Group recommendations and contributes towards addressing the barriers to trade identified therein.

It would therefore appear that, in principle, the conditions of Article 81(3) may be met. The establishment of T2S contributes to improving securities trading and promoting technical or economic progress whilst allowing consumers a fair share of the resulting benefit. The requirement of proportionality as exemplified in the third and fourth conditions of Article 81(3) also appears to be met on the basis of the above considerations. It will be noted in this context that T2S will not be the only settlement platform and CSDs will not be forced to use it. CSDs will continue to have access to central bank money through the TARGET 2 interfaces and, in addition, third parties may continue to offer settlement in commercial bank money.

³⁵⁴ Joined Cases T-528, 542, and 543/93 *Metropole Television v Commission* [1996] ECR II-649.

³⁵⁵ See ECB, legal assessment, op cit, 13.

³⁵⁶ *Ibid.*

³⁵⁷ See the First Giovannini Report, op cit, 2.

By the establishment of T2S, the ECB and the ESCB will offer CSDs the possibility to provide DvP settlement in central bank money. The specific conditions under which access to T2S will be offered to CSDs, eg the specific services provided, price, and mutual rights and obligations, will be implemented through contractual arrangements between the Eurosystem and individual CSDs. In the context of Article 81, such arrangements are best viewed as vertical agreements and for the reasons stated above, they would in principle be eligible to be exempted on the basis of Article 81(3).³⁵⁸

Although the establishment of T2S does not appear to necessitate direct agreements between participating CSDs, which would be horizontal restraints, the existence of a series of identical agreements between, on the one hand, the Eurosystem and, on the other hand, individual CSDs may arguably give rise to the existence of a concerted practice within the meaning of Article 81.³⁵⁹ To the extent that the individual agreements concluded by the Eurosystem or an agency acting on its behalf can be exempted under Article 81(3), the same would also apply in principle to the concerted practice among the CSDs unless it is possible to identify any additional restrictions on competition not justified by the beneficial pro-competitive effects identified above.

(iii) Article 82

In relation to the provision of T2S services, the Eurosystem may find itself in a position comparable to an undertaking in a dominant position within the meaning of Article 82. The T2S platform is likely to be an essential infrastructure since it will be the only one which will offer real time DvP settlement in central bank money. In view of its characteristics, and in the light of the narrow definition favoured by the Commission, such settlement is likely to be considered as a separate relevant market.³⁶⁰ In the event that T2S is not considered to be an essential infrastructure, the question whether it is in a dominant position will depend on whether CSDs representing a sufficiently large share of the settlement market agree to participate.³⁶¹ This can be expected to be the case

³⁵⁸ ECB Legal Assessment, *op cit*, 15.

³⁵⁹ See eg Case 86/82 *Hasselblad v Commission* [1984] ECR 883.

³⁶⁰ The ECB takes the view that T2S is an essential infrastructure: see ECB Legal Assessment, *op cit*, 16. Settlement in commercial bank money is less secure and does not appear to be a viable substitute.

³⁶¹ In its classic definition in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paras 38–39, the ECJ defined dominance as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately consumers. The existence of dominance is derived from a combination of structural and behavioural factors each of which taken separately may not be determinative. A market share of above 40 per cent would be important in assessing dominance depending on its stability over time, the market share of the nearest competitor, and other factors indicating dominance. See *United Brands*, *op cit*, For a full analysis, see Bellamy and Child, *op cit*, 923 *et seq.*

since market participants are closely involved in the setting up process through the consultation exercises carried out by the ECB and the governance structure of T2S, and the successful launching of the platform itself depends on the participation of a substantial number of CSDs. Thus, even if T2S were not to be an essential infrastructure, it might be in a dominant position in the light of its market share.

It may be helpful here to discuss in more detail the concept of essential infrastructure. The ‘essential facilities doctrine’ suggests that the owner of a facility which is essential for the conduct of trade is required, under certain circumstances, to allow access to that facility to other market participants. In *Bronner*³⁶² the Court held that, for a facility to be considered as essential, the following conditions must be fulfilled. First, refusal to allow access to a service must be likely to eliminate all competition on the part of the firm requesting access; secondly, the refusal must be unjustified; and thirdly, the service must in itself be indispensable for carrying on business, ie there must be no actual or potential substitute for the service, access to which is denied. The criterion of indispensability is difficult to satisfy. In *Bronner*, Mediaprint, the defendant in the main proceedings, was a press undertaking which controlled more than 40 per cent of the Austrian daily newspaper market and operated the only nationwide newspaper home delivery scheme. Bronner, the plaintiff, owned a newspaper whose share of the market was less than four per cent. It argued that, by reason of the small circulation of its newspaper, it was unable to set up and operate its own home-delivery service and that Mediaprint’s refusal to allow it access to its service was an abuse of dominance. The Court held that:³⁶³

... in order to demonstrate that the creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed.

For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish ... that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme.

The judgment in *Bronner* demonstrates that the essential facilities doctrine may apply only in exceptional circumstances.³⁶⁴ Overall, the Court’s approach appears more vigorous than that of the Commission which, traditionally, is

³⁶² Case C-7/97 *Bronner GmbH & Co. KG v Mediaprint* [1998] ECR I-7791.

³⁶³ *op cit*, paras 45–46.

³⁶⁴ See also Case T-504/93 *Tiercé Landbroke v Commission* [1997] ECR II-923 and the earlier judgment in Joined Cases C-241 and 242/91P *RTE and ITP v Commission (Magill case)* [1995] ECR I-743. Notably, a narrow interpretation of *Magill* has also been followed by English courts. See *Philips Electronics NV v Ingman Ltd* [1999] FSR 112.

more readily prepared to give priority to freedom of competition. An essential facility may be, for example, a port, an airport, a telecommunications network, or a computer reservation system for airlines. In *European Airways v Sabena*,³⁶⁵ the Commission imposed a fine on Sabena for refusing access to its computer reservation system to European Airways, a low cost airline which competed with Sabena on the London to Brussels route. The Commission found that Sabena intended to recoup any losses arising from competition in air traffic by charging European Airways for access to its reservation system and requiring it to entrust Sabena with the handling of its aircraft.

Notably, in the *SWIFT* case,³⁶⁶ the Commission found that a banking electronic network for the transfer of funds was an essential facility. In March 1997, the Commission initiated proceedings against SWIFT (Society for Worldwide International Financial Telecommunications), a cooperative owned by 2,000 banks which manages an international telecommunications network specializing in the supply of data transmission and processing services to financial institutions around the world. La Poste, a French public undertaking, had complained that it had been refused access to the network. The Commission considered that SWIFT enjoyed a monopoly as the sole operator on the international networks for transferring payment messages and the only network to supply connections for banking establishments anywhere in the world. It therefore constituted a basic infrastructure in its own right. Its refusal to supply La Poste amounted to a de facto exclusion from the market for international transfers. It constituted abuse since SWIFT had laid down unjustified admission criteria relating to the general conditions for the exercise of the financial activities of its members and applied these criteria in the case of La Poste in a discriminatory manner.³⁶⁷

Thus, under the case law, an undertaking which controls an essential infrastructure abuses its dominance where it denies to a competitor access to the infrastructure without good justification, or where it grants access subject to an excessive price, or unfair terms, or under discriminatory conditions and thereby prevents competitors from offering their services effectively.³⁶⁸ As the Commission pointed out in *Clearstream*, a de facto monopolist has a special responsibility not to allow its conduct to stifle the smooth operation of competition within the common market.³⁶⁹ The actual scope of the dominant firm's special responsibility must be considered in relation to the degree of dominance held by that firm and to the special characteristics of the market which may

³⁶⁵ *London European-Sabena* [1988] OJ L272/27; [1989] 4 CMLR 662.

³⁶⁶ See Case No IV/36.120-La Poste/SWIFT + GUF, [1997] OJ C335 discussed in Commission, XXVII Report on Competition Policy—1997 SEC(98) 636, Luxembourg 1998, para 95.

³⁶⁷ The Commission suspended proceedings and did not make a formal finding of violation as SWIFT formally undertook to provide access to its facilities to any financial entity which met the criteria laid down by the European Monetary Institute for admission to domestic payment systems.

³⁶⁸ Joined Cases 6 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223; Case 311/84 CBEM [1985] ECR 3261.

³⁶⁹ See *Clearstream*, op cit, para 300.

affect the competitive situation.³⁷⁰ In its decisional practice, the Commission has found that, even where it is of a short duration, eg two months, a monopolist's refusal to grant access to its network is an abuse.³⁷¹

Whether denial of access is objectively justified will need to be considered on a case by case basis. In the case of T2S, the public service obligations of the Euro-system suggest that the operation of T2S must comply with the following principles:

- (a) Access to T2S must be universal, ie it must be made available to all market participants which fulfil certain, objective criteria (universality of access);³⁷²
- (b) such access must be made on the basis of non-discriminatory conditions to all participants (equality of access);
- (c) the criteria governing access and, more generally, the obligation of the parties and the conditions for the operation of T2S must be transparent (transparency);
- (d) T2S should operate on the basis on a full cost recovery principle basis.

As the ECB itself has pointed out, integration of the settlements infrastructure through the introduction of T2S entails access to the same services for all users and under the same, objective, conditions irrespective of their location.

(iv) Services of General Economic Interest (SGEI)

Article 86(2) EC provides for a limited exception from the application of the rules of the Treaty on grounds of public interest objectives. The exception applies especially, but not exclusively, to the rules of competition law.³⁷³ An undertaking may take advantage of that exception provided that the following conditions are fulfilled:

³⁷⁰ See Case T-83/91 *Tetra Pak International S.A v Commission* [1994] ECR II-755, paras 114, 115, and 155, as confirmed on appeal: Case C-333/94 P *Tetra Pak* [1996] ECR I-5951.

³⁷¹ See eg the London European/Sabena, Decision of 4 November 1988, [1988] OJ L317/47; and Clearstream, op cit.

³⁷² The intention of the ECB is to make T2S services available to all securities settlement systems covered by Directive 98/26 on settlement finality in payment and securities settlement systems, [1998] OJ L166/45; See ECB Legal Assessment, op cit, 16. This limitation to access should be considered as objectively justifiable. Only settlement systems which qualify for the level of protection offered by the Directive may be said to satisfy the requirements for adequate legal protection of finality transfer orders and the risk of insolvency. Note that in March 2008 the Commission put forward a proposal for the amendment of the Directive. The main purpose of the proposal is to bring the Directive into line with the latest market and regulatory developments by extending its protection to night time settlement and to settlement between linked systems and by broadening the scope of the protection to include new types of assets (ie credit claims eligible for the collateralization of central bank credit operations) in order to facilitate their use throughout the Community.

³⁷³ Although Article 86(2) is particularly relevant in relation to the competition rules, it is a general escape clause which permits derogations from all rules of the Treaty pertaining to the internal market, including the four freedoms: see, eg in relation to the freedom to provide services, Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop* [1998] ECR I-3949, para 59.

- (a) It is an undertaking entrusted with the operation of services of general economic interest (SGEI) or having the character of a revenue-producing monopoly;
- (b) the application of competition rules obstructs the performance, in law or in fact, of the particular tasks assigned to it;
- (c) the exemption of the undertaking from the rules of the Treaty does not affect the development of trade to such an extent as would be contrary to the interests of the Community.

The concept of a service of 'general economic interest' is to be defined by Community law rather than by national law and is, clearly, a dynamic one. It is influenced by political and economic considerations and, not least, by technological development. The Court has regarded as such services, among others, water distribution,³⁷⁴ basic postal services,³⁷⁵ services in the field of telecommunications,³⁷⁶ television broadcasts,³⁷⁷ maintenance of waterway navigability,³⁷⁸ port mooring services,³⁷⁹ the management of waste,³⁸⁰ the operation of the national public electricity supply,³⁸¹ and the provision of supplementary pension schemes.³⁸²

The Commission defines services of general economic interest as 'market services which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion'³⁸³ but this definition is, in fact, less helpful than it appears. The European Advisory Group on Competition Policy (EAGCP) has defined SGEIs as economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention.³⁸⁴ Universality is here of the essence. A service which is only available to certain undertakings cannot be regarded as an SGEI.³⁸⁵ The body in question must have undertaken '*universal service obligations*', namely obligations to provide its services at an affordable cost and guaranteed quality to all. This is not to say however that the service must benefit the whole of the population. It suffices that it benefits a sector of the economy.³⁸⁶

³⁷⁴ Case 96/82 *IAZ v Commission* [1983] ECR 3369.

³⁷⁵ Case C-320/91 *Corbeau* [1993] ECR I-2533.

³⁷⁶ Case 41/83 *Italy v Commission* [1985] ECR 873.

³⁷⁷ Case 155/73 *Sacchi* [1974] ECR 409.

³⁷⁸ Case 10/71 *Luxembourg v Muller* [1971] ECR 723. ³⁷⁹ *Corsica Ferries*, op cit.

³⁸⁰ C-209/98 *Copenhagen* [2000] ECR I-3743.

³⁸¹ *Almelo case*, op cit, Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699.

³⁸² See Case C-67/96 *Albany* [1999] ECR I-5751; and more recently Joined Cases C-264/01 etc *AOK Bundesverband* [2004] ECR I-2493, per Jacobs AG at para 87 of the Opinion.

³⁸³ See Commission Communication on Services of General Interest in Europe of 19 January 2001, [2001] OJ C17/4 updating the earlier communication of 11 September 1996, [1996] OJ C281/3.

³⁸⁴ See Services of General Economic Interest Opinion Prepared by the State Aid Group of EAGCP, 29 June 2006, available from <<http://ec.europa.eu/dgs/competition/economist/eagcp.html>>.

³⁸⁵ See Bellamy and Child, *European Community Law of Competition* (6th edn) 1064.

³⁸⁶ Bellamy and Child, op cit, at 1065.

In *Zuchner*, the ECJ rejected the argument that banks should be considered as organizations entrusted with the performance of SGEIs.³⁸⁷ This pronouncement, however, must be seen in the light of the facts of the case. It is not correct to suggest that banks are entrusted with such services in general but it might be otherwise if a specific credit institution has expressly been entrusted by a national measure with the performance of certain tasks. In any event, it is clear that central banks are in a distinctly different position. It is also clear that Member States enjoy discretion in defining services in the general economic interest and it is not a requirement for legitimate recourse to Article 86(2) that there has to be a complete market failure. In the light of the attributes of T2S, it is submitted that it has the characteristics of an SGEI. T2S may be described as a service of general economic interest in view of its effect on market liquidity, efficiency, and stability and its contribution to avoiding disruptions in the clearing process.³⁸⁸

This does not mean that the competition rules of the Treaty do not apply. Article 86(2) has been interpreted strictly. It sanctions a restriction on competition only in so far as it is indispensable in the sense that the beneficiary undertaking would be unable to fulfil a task of general economic interest in the absence of such restriction.³⁸⁹ In interpreting Article 86(2), the case law applies a strict test of proportionality, the effect of which is to favour liberalization and open up to market forces activities traditionally reserved to public authorities. The judicial interpretation of this provision has been anything but static reflecting, in part, evolving concepts of European supranational governance and also, in part, the evolution of economic and political thinking as regards the relationship between public services and market economy. The application of Article 86(2) requires a market analysis. The burden of proving that the application of the competition rules of the Treaty obstructs the operation of services of general economic nature rests with the undertaking in issue. The mere fact that the performance of its functions is hindered or becomes more difficult by exposure to competition is not sufficient to exclude the rules of the Treaty. A lot depends on the nature of the service in issue.

In our case, the classification of T2S as a service of general economic interest serves to stress that any anti-competitive effects that may arise could be justified

³⁸⁷ See above.

³⁸⁸ See D Russo, T L Hart, and A Schönenberger, *The Evolution of Clearing and Central Counterparty Services for Exchange Traded Derivatives in the United States and Europe: A Comparison*, ECB Occasional Papers Series, September 2002. The authors point out that disruptions in the clearing process have both systemic and non-systemic implications. Systemically, 'they might prevent market participants from receiving timely funds that they had intended to use to make other payments. As a result, the risk of bottlenecks in the payment systems would be very large and could substantially affect financial markets.' Non-systemic implications may occur on '(i) the financial condition of individual regulated firms, (ii) the protection of individual customers using and holding derivatives positions through the clearing and settlement infrastructure and (iii) the functioning of the market for its intended purposes, i.e. price discovery and risk transfer'.

³⁸⁹ Case 155/73 *Sacchi* [1974] ECR 409; *Hofner*, op cit, para 24; Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, para 135.

provided that the requirements of universality of access, equality, transparency, and full cost recovery are satisfied.

An undertaking may take advantage of the exception of Article 86(2) only where it has been entrusted with the operation of an SGEI. Such entrustment requires a specific and express act of public law such as a law, a regulation, or a decision by a public authority.³⁹⁰ In other words, the grant of the concession must be governed by public law³⁹¹ and the particular tasks assigned to the undertaking in question must be specifically circumscribed therein. In *Commission v France*, the Court also held that the obligations imposed on undertakings entrusted with an SGEI must be linked to the subject-matter of the SGEI and designed to make a direct contribution to satisfying that interest.³⁹²

The requirement of specific endowment by a public act is made clear in the *Eurocheques* decision,³⁹³ which also illustrates the Commission's approach to Article 81(3) in the field of clearing. The Commission rejected the argument that the system for the clearing of eurocheques was a service of general economic interest within the meaning of Article 86(2) both on procedural and substantive grounds. On the procedural front, the Commission stated that the eurocheque system had been set up on the initiative of private financial institutions. Neither those institutions nor the bodies established by them to govern the clearing system were at any time entrusted with the operation of an SGEI by a measure adopted by a public authority. The fact that the eurocheque system operated with the express approval of competent authorities and, in some countries, there was an express legal act in favour of the system did not suffice. On the substance, the Commission took the view that, even if the eurocheque system had been entrusted by public authorities with the provision of an international means of payment, the application of the competition rules of the Treaty would in no way obstruct fulfilment of that hypothetical special assignment.³⁹⁴ It did not however elaborate further on this aspect.

The Commission found that the arrangements of the eurocheque system which came into force in May 1981 entailed a restriction on competition within the meaning of Article 81(1). Under those arrangements, banks belonging to the eurocheque organization agreed on uniform conditions for the payment and clearing of eurocheques made out abroad in local currency specifying, among others, the maximum amount of a cheque, the conditions for its acceptance by the payee bank, and the commission to be charged by the clearing centre of the payee bank. The Commission held that those arrangements, which had as their object the fixing of the price of a service, represented restrictive practices explicitly caught by the general prohibition contained in Article 82(1) EC.

³⁹⁰ See Case C-159/94 *Commission v France* [1997] ECR I-5815, paras 65–66; Case 127/73 *BRT v SABAM and NV Fonior* [1974] ECR 313, para 20; Case 66/86 *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803, para 55.

³⁹¹ Case C-393/92 *Almelo and Others v Energiebedrijf IJsselmij* [1994] ECR I-1477, para 47.

³⁹² *Commission v France*, op cit, para 68.

³⁹³ Commission Decision 85/77, [1985] OJ L35/43.

³⁹⁴ See paras 29–30.

The Commission however took the view that the conditions for exemption specified in Article 81(3) were met because the restrictive arrangements provided for an improved interstate payment system, benefited users, and were indispensable to the proper functioning of the system. In particular, the eurocheque system contributed to improving payment facilities within the common market since cheques were guaranteed, could be drawn outside the country of the issuing bank, and cashed in local currency at banks established in several Member States. These uniform eurocheques were paid in full by the payee bank without deduction of any commission which makes them more acceptable to the trading sector. The Commission placed particular importance on the fact that centralized clearing made it easier for the payee banks to obtain reimbursement of foreign eurocheques.³⁹⁵

The users of eurocheques obtained a fair share of the resulting benefit. Consumers could draw cash from credit institutions in other Member States and also use them to pay the trading sector directly. They enjoyed a period of interest free credit and could in principle obtain a better exchange rate. Also, the commercial activities of traders were stimulated by the possibility of direct payment by eurocheques. They benefited from the guarantee by the drawee bank and had the assurance that uniform eurocheques would be reimbursed to them in full by banks in their country.

The Commission found that the restrictions on competition were indispensable to the proper functioning of the eurocheque system. By accepting cheques issued by banks situated abroad, the payee banks provided a service to persons who were not their customers. When such a service is provided collectively by all the banks in one country to the customers of banks in other countries, it is indispensable that the conditions for accepting and clearing the cheques concerned must be determined in common between the issuing and the accepting institutions. The uniform determination of the remuneration for this service was inherent in, and ancillary to, the cooperation between the banks and their national clearing centres and between the clearing centres. Variations in commissions from one bank to another would imply bilateral negotiations between the 15,000 banks which were parties to the scheme so that each accepting bank could agree with each issuing bank the remuneration it wished to receive. Any centralized clearing would thus be made impossible and the cost of processing eurocheques would substantially increase.³⁹⁶ Similarly, the uniform fixing of the maximum guaranteed amount in a given country was indispensable to effect clearing. The system would be unworkable if every person accepting a uniform eurocheque—in the banking sector and particularly in the non-banking sector—had to make sure each time that the specific maximum amount guaranteed by the issuing institution concerned had not been exceeded.

³⁹⁵ *op cit*, para 37 of the Commission Decision.

³⁹⁶ *op cit*, para 39.

The Commission however imposed two caveats. First, it pointed out that its decision did not cover any national agreements between banks or decisions by national banking associations to fix the level of commission that individual issuing institutions in the country concerned should charge to their customers. Such national agreements or decisions would eliminate residual competition between institutions issuing uniform eurocheques and could not in any circumstances be regarded as indispensable. Secondly, to ensure transparency and freedom of choice for consumers, it was necessary that customers be precisely informed of the procedure for, and cost of, using eurocheques abroad.

VII. Conclusion

The conclusions of this study may be summarized as follows. The smooth operation of clearing and settlement systems is of vital importance to the integration and efficient functioning of securities markets. As the First Giovannini Report pointed out, inefficiencies in clearing and settlement represent the most important obstacle to integration. The introduction of T2S is designed to bring about several positive results. It can be expected to lead to a more efficient post-trading environment, generate more cross-border activity, increase liquidity, and enhance market stability. The intervention of the ECB in the post-trading sector through the introduction of T2S is to be welcomed. It is fully in conformity with the Giovannini recommendations and the Commission's avowed policies whilst keeping legislative intervention to the minimum. The institutional structure of T2S may conceivably take several forms, including the establishment of an independent agency at EC level or the setting up of an EEIG. It is submitted that the best solution would be to establish an EC agency. It will be more in keeping with the public law nature of the ECB's intervention, be less dependent on national law, ensure greater control by the Eurosystem, and reduce legal complications. A legal basis for such an agency can be found in Article 22 of the ECSB Statute.

The growth of independent administrative agencies at EC level has been one of the most remarkable developments in Community public law. In its judgment in *Meroni*, the Court set out a number of constraints on the authority of the Community institutions to delegate their powers which have been reiterated in subsequent case law. The *Meroni* principle has proved one of the most enduring in Community law. For a case decided even before the primacy and direct effect of Community law were established, it has shown an unusual degree of resilience.

The *Meroni* constraints apply equally to the ECB. It is submitted that, as a general rule, the power of the ECB to set up agencies should be subjected to the same conditions and limitations as those applicable to other Community institutions. It seems possible that an agency established to run T2S can conform to

the *Meroni* criteria without prejudicing the functionality, tasks, and objectives of T2S which, after all, is only intended to be a technical platform.

In the field of financial services, the policy agenda was dominated, at least until the financial crisis of autumn 2008, by the objective of liberalization. The Community institutions have directed their efforts in implementing the Financial Services Action Plan through the Lamfalussy process. The Commission has focused its attention on the application of competition law relatively recently but takes the view that the competition rules of the Treaty apply to securities markets in the same way as in any other sector. Notably, although clearing and settlement is identified as a key area for the development of an integrated securities market, the Commission has opted for a minimalist approach proceeding through the adoption of a voluntary code of conduct rather than legislation. The *Clearstream* decision indicates that, in the field of clearing and settlement, the Commission takes competition law concerns seriously. The most important aspect of the case is the narrow definition of the relevant market: the Commission held that indirect access to the issuer CSD is not a substitutable alternative for direct access, thus encouraging the competitive position of non-issuer CSDs and ICSDs.

Whilst some functions of the ECB, such as the fixing of interest rates, clearly fall beyond the scope of competition law, not every action that the ECB, or a public agency on its behalf, may validly undertake is beyond the reach of the competition rules of the Treaty. It is submitted however that the ECB is not bound directly by those rules but by the general postulate of Article 105(1) to observe the principle of open market economy with free competition. One of the obligations arising from this provision is to comply with the substantive requirements of Articles 81 to 87 EC applicable *mutatis mutandis* and taking account of the ECB's wide discretion to act in the public interest in pursuance of the tasks assigned to it by the Treaty. Any anticompetitive effects of T2S should be examined on this basis.

According to this view, the substantive norms of Articles 81 to 87 must guide action undertaken by the ECB but the latter is not subject to the Commission's enforcement powers. This view appears to be more in conformity with the principle of institutional balance. It should be noted, however, that both the ECB and the Commission are bound by the duty of sincere cooperation laid down in Article 10 EC and, arguably, that duty imposes an obligation on the ECB to consult the Commission where the former's intervention into the market to pursue public policy objectives might have anti-competitive effects.

In general, it may be said that ECB action which restricts free trade is lawful where it satisfies cumulatively the following requirements: (a) it must be justified in the general Community interest. The definition of the Community interest must be guided by the tasks and objectives of the ESCB and, ultimately, the Community. It should be recognized in this context that the ECB enjoys discretion in defining what is appropriate action in pursuance of the objectives

assigned to it by the Treaty; (b) it must be proportionate, ie must not restrict market freedom beyond what is necessary to achieve its objectives; (c) it must be intended to promote competition; (d) it must satisfy the requirements of equality, objectivity, and transparency.

It is possible that the establishment of T2S will have some anti-competitive effects. Participating CSDs will agree on a common pricing mechanism and also, in effect, have no incentive to build or maintain their own settlement platforms. In relation to the provision of T2S, the Eurosystem may find itself in a position comparable to an undertaking in a dominant position within the meaning of Article 82. The T2S platform is likely to be an essential infrastructure since it will be the only one which will offer real time DvP settlement in central bank money. In view of its characteristics, and in the light of the narrow definition favoured by the Commission, such settlement is likely to be considered as a separate relevant market.

It is submitted, however, that T2S may be described as a service of general economic interest in view of its effect on market, liquidity, efficiency, and stability and its contribution to avoiding disruptions in the clearing process. In the light of its advantages and contribution to market integration, efficiency, and stability, it would appear that any restrictions on competition may be justified provided that T2S complies with the following principles: (a) access to T2S must be universal, ie it must be made available to all market participants which fulfil certain objective criteria (universality of access); (b) such access must be made on the basis of non-discriminatory conditions to all participants (equality of access); (c) the criteria governing access and, more generally, the obligation of the parties and the conditions for the operation of T2S must be transparent (transparency); (d) T2S should operate on the basis on a full cost recovery principle basis.

All in all, the introduction of T2S appears a welcome initiative which can be accommodated with the existing EC Treaty structure.