

No-Man is an Island: UK and EU Banking Regulatory Engagement after “Brexit”

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Abstract

Banking and its issues do not respect jurisdictional boundaries. Whatever form “brexit” eventually takes the most significant aspects of banking regulation are, and will remain, international. This paper considers the UK’s continuing need for cross-border engagement with the EU in the key operational areas of standard setting, supervision, crisis management, anti-money laundering and payments systems. In addition, it looks at how close coordination with the EU can help address the risk of “regulatory capture” and, separately, in improving culture, ethics and governance in banking.

Consequently, it is important that the UK and the other European states, together with other jurisdictions, continue to work to maintain and develop cross-border cooperation. Moreover, the UK, and the other states, will continue to need to conform to the highest global standards. This will extend to cross-border supervision and coordination set against a background of common standard setting.

At some point it is inevitable that there will be another serious banking crisis. The effects are likely to extend across borders. Consequently, even outside the EU, the eurozone and the scope of the European Central Bank, the UK will need to prepare and to engage closely with the EU’s developing financial crisis management arrangements. This will include cross-border recovery and resolution planning.

In addition, many UK based banks participate in global financial markets. These are vast with, for example, turnover in foreign exchange runs at some \$5 trillion a day and these international markets have a considerable influence on the UK’s domestic economy. Many of these trades are cleared with central counterparties (CCPs) which may be located in mainland EU states (e.g. Eurex Clearing and Nasdaq OMX).

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All CCPs present operational and credit risks and the UK will need to continue, post-brexite, to have a close interest in these organisations and to continue to satisfy EU CCP standards.

Further, cross-border liaison will still be necessary to prevent money laundering and sanctions breaking. Cross-border prevention of market abuse and money laundering will continue to be important and the UK, post-brexite, will need to work with a variety of EU bodies such as the Expert Group on Money Laundering and Terrorist Financing, the EU Financial Intelligence Units Platform and the Joint Committee of European Supervisory Authorities.

Similarly, the UK will still need to be involved in the EU's payment systems to ensure continuing access for trade and investment. This will be necessary so that the UK can continue to influence access and transaction costs and the technical and regulatory standard required as the payment systems evolve.

More broadly, whenever financial institutions form a significant part of an economy there is a risk of actual, or perceived, "regulatory capture". This is a particular risk in the UK where, for example, the banking industry employs some five hundred thousand people and pays a significant proportion of total taxes. Consequently, there is an increased need to work closely, whether formally or informally, with other EU regulators to ensure that the standards that are set are those designed to benefit markets and consumers and not simply the result of industry lobbying.

Finally, the financial crisis and subsequent scandals have revealed serious deficiencies in the culture, ethics and governance of banks. Many senior individuals were able to escape any responsibility due to a lack of individual accountability. Again, many of these institutions operated internationally and it is important that the EU and UK continue to work, post-brexite, to ensure that senior individuals in banks are held to account and that financial institutions work to the highest standards of cultural and ethical behaviour.

All of this confirms the need for continuing close UK and EU cooperation in financial services if only to avoid significant problems in the future whatever that might look like.

1. Introduction

"No man is an island entire of itself; every man
is a piece of the continent, a part of the main;
if a clod be washed away by the sea, Europe
is the less, as well as if a promontory were"¹

Following the brexite referendum the UK may seek to remove itself from the EU but in the context of financial services, and specifically, banking this may not be fully

¹ John Donne, *Meditation XVII, Devotions upon Emergent Occasions*, 195 (original published 1624, reprinted as "Donne's Devotions", D.A Talboys, Oxford, 1841).

possible. This paper does not seek to cover all the linkages but instead concentrates on a number of significant aspects where, post-brexite, the UK will continue to need to work closely with EU institutions. Failure to do so may increase significantly the risk of both financial crises and financial crime.

Much of the rule-making in these areas take the form of supra-national “soft” law. As a major participant in global financial markets the UK needs to enact regulations to implement these expectations. Moreover, the UK has an important role in the formation of these “soft” laws. Currently, many of these have been promulgated in the form of EU Directives and Regulations. Again, as a member of the EU the UK has been very influential in this process. However, post-brexite this is unlikely to continue. Nevertheless, the UK will still be expected to implement and enforce these global “soft” laws. This will need to be in lock-step with developments in the EU if financial services in the UK are to have access to EU markets and for there still to be a level of mutual recognition.

In a financial “multipolar world” with “cross-border financial transactions and regulations [it is] imperative to cooperate.”² This is exacerbated by significant macroeconomic imbalances and national regulatory tools are likely to be ineffective unless undertaken in concert with other countries and international authorities. In addition, a failure to cooperate and to introduce and maintain recognised equivalent regulatory systems may result in financial markets being closed to UK based firms. Moreover, the UK’s financial stability defences are only as good as those developed and enhanced by its neighbours. There are analogies in the area of defences against human, animal, arboreal and crop diseases and the need for close international cooperation.

It is possible to view regulation as the outcome of competing financial interests and in this context there may be siren voices arguing against continuing cooperation with EU institutions. Moreover, in order to reinforce their case, they may seek to claim, for example, that EU proposals are contrary to the national interest. They may also state that local regulations need to be protected since there are differences between national conceptual approaches to regulation.³ In some instances this may be correct while in others it may just be “special pleading”. There will be other circumstances where regulation is seen as a form of national competitive advantage. This could be because regulation, and its enforcement, is lax. Alternatively, strict enforcement action may improve the attractiveness of markets.⁴

States compete to attract firms to invest within their borders and to retain those that have already done so. However, it is unclear to what extent regulation and particularly financial services regulation is a significant factor in these corporate deci-

² Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century*, 60 (Cambridge University Press, Cambridge, England, 2015). These national regulatory concepts are described by Brummer as “regulatory philosophy”.

³ *Ibid.*, at 263–264.

⁴ For example, a higher propensity for US regulators to undertake enforcement action deters certain firms from seeking a US listing and thus acts as signaling device to investors and consequently reduces costs by increasing investor trust, John Coffee, *Law and the Market: The Impact of Enforcement* 156 *University of Pennsylvania Law Review* 229, 245–246 (2007).

sions.⁵ The need to minimise Coasian transaction costs, which include regulation, will be important.⁶ Nevertheless, the evidence, based on bank cross-border acquisitions, appears to support the view that the strength and “quality of bank regulation plays an economically important role ...” with strong regulation providing a sound base for cross-border growth and expansion.⁷ However, while there are real risks that “suggest that domestic bank regulation and supervision have important [cross-border] spillover effects,” business regulatory arbitrage is subject to a number of constraints which include, for example, political and perception limits.⁸

Consequently, it is important to recognise that regulation is susceptible to influence by national power groupings and economic interests, usually manifest in the realm of corporate governance.⁹ For example, this can be seen in the relative powers and responsibilities of shareholders, boards and other stakeholders or, in a related area, how reward and risk is allocated. The risk of “regulatory capture” is considered in more detail later.¹⁰

Economic structures will also influence the structure of regulation and how banks and financial markets finance the “real” economy and the state and the role of the latter in these processes.¹¹ This goes to the heart of the purpose of banking and its activities in national and global economies. However, while these issues are beyond the scope of this paper they demonstrate the importance of international cooperation particularly, for the UK, at the supra-national EU level. This is all the more relevant since all the important EU banks have operations in the UK and, by number, they constitute a significant part of the UK banking system.¹²

⁵ There are numerous studies with conflicting results. For example, Houston et al supports the view that banks will move investments to jurisdictions with weaker regulation, Joel Houston, Chen Lin and Yue Ma, *Regulatory Arbitrage and International Bank Flows*, 57 *Journal of Finance* 1845, 1847 (2012).

⁶ Victor Fleischer, *Regulatory Arbitrage*, 89 *Texas Law Review* 227, 231–232 (2010–2011).

⁷ Andrew Karolyi and Alvaro Taboada, *Regulatory Arbitrage and Cross-Border Bank Acquisitions*, 70 *Journal of Finance* 2395, 2438 (2015).

⁸ Steven Ongena, Alexander Popov and Gregory Udell, *When the Cat's Away the Mice will Play: Does Regulation at Home Affect Bank Risk-Taking Abroad?*, 108, *Journal of Financial Economics*, 3, 727, 748 and 252 (June 2013).

⁹ Marc Moore, *Corporate Governance in the Shadow of the State*, 13 (Hart Publishing, Oxford, 2013), which considers “causes and consequences of the allocation of power within large economic organisations”.

¹⁰ For a wider discussion of regulatory theory see Michael Moran, *Theories of Regulation and Changes in Regulation: The Case of Financial Markets* 34 *Political Studies* 185 (1986) and Sukhdev Johal, Michael Moran and Karel Williams, *Power, Politics and the City of London after the Great Financial Crisis* 49 *Government and Opposition* 400, (2014). For a view of the development of regulation from a less deterministic point of view see Julia Black, *Enrolling Actors in the Regulatory Systems: Examples from UK Financial Services Regulation*, Public Law 63 (2003).

¹¹ The role of the state is often not immediately obvious and range from local usury laws to widespread market interventions in for example, the residential mortgage markets. For a broader consideration of this subject see Oonagh McDonald, *Fannie Mae & Freddie Mac*, 1–24 and 115–141, (Bloomsbury, London, 2012),

¹² By number there are some 245 non-UK banks operating in the UK. Of these around ninety are other EU or Swiss banks (37%), twenty-three are US (9%), nine are Japanese (4%), twenty-three are Canadian and Australian (9%), thirteen are from other developed countries (5%) and just under ninety

This paper highlights the need for cooperation in five operational areas. These include the important and growing role of central counterparties, financial conglomerate cross-border supervision, international payments systems, the prevention and detection of financial crime and financial crisis management. The UK has a substantial financial services industry and is dependent on international trade and investment. Consequently, it cannot operate at a distance from other regulators and other similar agencies in the rest of Europe and elsewhere. The UK will continue to have a voice at the global level via organisations such as the Financial Stability Board (FSB) and the International Organisation of Security Commissions (IOSCO). EU institutions and Member States have in the past adopted these global standards and this will continue post-brexit. This will include the UK and, ideally, it should try to maintain a dialogue with the various EU institutions where there are a range of possible interpretations of international guidance. However, following brexit, this right to be consulted and involved in the decision making is likely to be lost. Nevertheless, depending on the results of the negotiations for UK’s exit from the EU, there may be continuing obligation to implement and to enforce EU Directives and Regulations in this, and other, areas. This would, of course, preclude the UK influencing these requirements. In any event, as mentioned earlier, the UK would probably wish to maintain a level of regulatory equivalence with the rest of the EU to ensure the continuing recognition by the EU of both “passporting” rights and the operation of central counterparties.

In addition, this paper considers two other significant areas which are often overlooked by both national and supra-national regulators. First is inherent in the risk of local jurisdictional “capture” of the regulators and supervisors by regulated firms. However, regulatory “capture” is more difficult the more remote the regulatory and supervisory organisations. This is particularly true for bodies such as the EU Commission and Parliament which are not only physically distant but may also be subject to an increased range of countervailing views which may negate domestic industry pressures.

Second, is the need to coordinate the improvement of culture, ethics and individual accountability within financial institutions. It is a matter of global importance that financial firms, and others, operate in accordance with the highest ethical standards and that individuals in charge of areas within these businesses are held accountable for their actions.

The over-arching purpose of close cooperation with the regulatory agencies of other jurisdictions is to demonstrate the UK’s “trustworthiness”. While it is understood that the UK will act in the interest of promoting its own financial services industry nevertheless, it will not do anything which undermines the greater international good. As John Donne recognised, this is not due to any degree of higher altru-

are from the rest of the World (36%), Prudential Regulatory Authority, *Institutions included in the United Kingdom banking sector* <<http://www.bankofengland.co.uk/statistics/Pages/reporters/institutions/default.aspx>> (accessed 12th August 2016).

ism but rather the understanding that we are all inextricably connected and that harm to one may result in harm to all.

For all these reasons, post-brexite, the UK will need to ensure close and continuous liaison with the EU and its agencies. Moreover, these contacts will need to be developed and deepened since any other option presents considerable dangers and difficulties both to the UK and more globally.

2. Central Counter Parties (CCPs)

Following the financial crisis there has been a global move to encourage the development of central counterparties (CCPs) and to restrict the development of bespoke over-the-counter (OTC) financial products. A number of CCPs are currently based within EU mainland states (e.g. Eurex Clearing and Nasdaq OMX) and it is likely, post-brexite, that some CCPs involved in clearing Euro contracts will move from London to the EU.¹³

The collapse of Lehman's and the near failure of AIG and the subsequent international market instability indicated that the large number of OTC contracts "had created a complex and deeply interdependent network of exposures that ultimately contributed to a build-up of systemic risk. The stresses of the crisis exposed these risks: insufficient transparency regarding counterparty exposures; inadequate collateralisation practices; cumbersome operational processes" etc.¹⁴ Consequently, the G20 group of countries issued a declaration, following their meeting in 2009 in Pittsburgh, that "all standardised OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest."¹⁵

CCPs have many advantages but at the same time they present a number of significant risks since they stand behind each and every transaction. They provide a degree of certainty to counterparties but at the same time CCPs are repositories of both concentrated market and credit risks. CCPs are "highly interconnected with market participants and financial markets. Its activities or default may cause negative externalities in extreme circumstances."¹⁶

¹³ European Securities and Markets Authority, *List of Central Counterparties authorised to offer services and activities in the Union*, (May 2016), <https://www.esma.europa.eu/sites/default/files/library/ccps_authorized_under_emir.pdf>, (accessed 15th August 2016).

¹⁴ Financial Stability Board, *OTC Derivatives Reforms Progress: Report from the FSB Chairman for the G20 Leaders' Summit*, (September 2013), <http://www.fsb.org/wp-content/uploads/r_130902a.pdf?page_moved=1> the most recent failure of a CCP was the Hong Kong Futures Exchange which failed following the 1987 crash.

¹⁵ *G20 Leaders Statement: The Pittsburgh Summit*, (Pittsburgh, 24–25th September 2009), <<https://www.treasury.gov/resource-center/international/g7-g20/Pages/g20.aspx>>.

¹⁶ Froukelien Wendt, *Central Counterparties: Addressing Their Too Important to Fail Nature*, IMF Working Paper 15/21, 3, (2015), <<https://www.imf.org/external/pubs/ft/wp/2015/wp1521.pdf>>.

Moreover, CCPs are connected by an additional complex web of engagements with their members and the banking systems. The latter may provide clearing and liquidity arrangements for CCP members and for the CCP itself and additional depository and custodian services. CCP members also assist non-members by allowing access to CCPs. Finally, in a crisis banks may assist “during a default of a clearing member by helping the CCP to liquidate and hedge the defaulter’s positions and by taking over the positions of the defaulter’s clients. This may include providing prices for illiquid contracts.”¹⁷

The dangers inherent in highly concentrated CCPs have been recognised including their ability to “disrupt related markets”.¹⁸ In addition, “potential complications are introduced if CCPs clear transactions originated outside the local market, involve counterparties from different jurisdictions, or deal with collateral located or issued in different countries or denominated in different currencies. Such internationally active CCPs require greater regulatory coordination than purely domestic ones.”¹⁹

This was reinforced in 2012 when the Committee on Payment and Settlement Systems and IOSCO issued the Principles for Financial Market Infrastructures (PFMIs).²⁰ “The latter sets out new international standards for payment, clearing and settlement systems, including central counterparties. [The] new standards are designed to ensure that the infrastructure supporting global financial markets is more robust and thus well placed to withstand financial shocks.”²¹

Consequently, CCPs are seen as systemically significant and supervised by national authorities within the EU and subject to European Securities and Markets Authority (ESMA) rules across the EU. In order to meet individual risks CCPs are subject to a “waterfall” series of loss absorbing schemes if members are unable to honour their contracts. These start with the CCP using its own contingency fund to meet defaults and if this is not sufficient some of the CCP’s own capital will be used before raising a levy on all surviving members and finally using its remaining capital. The success of this process will depend on both the quality of the CCP’s management and operations and the regulation and supervision of the business.

¹⁷ *Ibid.*, at 9.

¹⁸ IMF’s *Global Financial Stability Report*, Ch. 3, *Making Over-the-counter Derivatives Safer: The Role of Central Counterparties in Meeting New Challenges to Stability and Building a Safer System*, World Economic and Financial Surveys, 110, (2010), <<https://www.imf.org/external/pubs/ft/gfsr/2010/01/pdf/text.pdf>>.

¹⁹ *Ibid.*, at 110.

²⁰ Committee on Payment and Settlement Systems (CPSS) and International Organization of Securities Commissions, *Principles for Financial Market Infrastructures* (April 2012), <<http://www.bis.org/cpmi/publ/d101a.pdf>>. This replace the three existing sets of international standards set out in the *Core Principles for Systemically Important Payment Systems* (2001), *Recommendations for Securities Settlement Systems* (2001) and *Recommendations for Central Counterparties* (2004). The CPSS was given a new mandate and renamed the Committee on Payments and Market Infrastructures (CPMI) in September 2014. It is worth noting that the CPMI has no legal authority or structure. It relies on its membership to carry out its mandate, (CPMI’s charter, 2014), <<https://www.bis.org/cpmi/charter.pdf>>.

²¹ BIS, *Principles for Financial Market Infrastructures* (April 2012), <<http://www.bis.org/cpmi/publ/d101.htm>> (accessed 15th August 2016).

In addition, in times of financial stress, CCPs may spread risk across markets as they seek to close out positions subject to counterparty default. This may affect other CCPs and have a destabilising cross-market and cross-border effect. These risks have been recognised and EU states hosting CCPs are required to designate a “national competent authority” (NCA) to authorise and supervise them.²² There are a range of potential cross-jurisdictional issues that could arise. For example, the NCA responsible for a CCP may designate that the bonds issued by a counterparty are an unacceptable security for covering margin calls. Consequently, the NCA, in its desire to protect the solvency of the CCP, may threaten the solvency of, for example, a bank in another jurisdiction. The effect could be pro-cyclical with consequential financial contagion spreading from country to country.

Consequently, the ESMA, requires NCAs to set up CCP supervisory colleges consisting of the NCAs with the closest connections with the CCP (e.g. responsible for the supervision of the clearing members of the CCP that are established in the three Member States with the largest contributions to the default fund of the CCP, supervising central securities depositories to which the CCP is linked etc).²³ The colleges will coordinate work on areas such as stress testing, CCP capital and margining models etc.²⁴ In addition, the ESMA is a member of each college and carries out reviews of each NCA, including, in particular, the operation of the cross-jurisdictional colleges.²⁵ The colleges are required to have written agreements between its members setting out the organisation and operation of the colleges.²⁶ It is important that CCPs have adequate recovery and resolution plans and CCP colleges will have an important role in their development and operation.²⁷

There are eighteen CCPs within the current EU; each with its own college. The purpose of the latter are to better assess risk and to coordinate actions and spread best practice and to facilitate communication.²⁸ It is recognised that “coordination of the respective regulatory authorities is ...essential. [However], this coordination can be

²² Art. 22, Chapter, 2, “*OTC Derivatives, Central Counterparties and Trade Repositories*”, Regulation (EU) No 648/2012 of the European Parliament and of the Council, 4th July 2012, <<http://www.eachccp.eu/wp-content/uploads/2015/11/CELEX-32012R0648-EN-TXT.pdf>>. These regulations are also known as European Market Infrastructure Regulation (EMIR).

²³ *Ibid.*, Regulation (EU) No 648/2012, Art. 18.

²⁴ *Ibid.*, Arts 15, 17, 49, 51 and 54.

²⁵ ESMA, *Annual Report 2015*, 14–16, (June 2016), <https://www.esma.europa.eu/sites/default/files/library/2016-960_esma_annual_report_2015.pdf>.

²⁶ ESMA, *Guidelines and Recommendations Regarding Written Agreements Between Members of CCP Colleges*, 12–26, (June 2013), <<http://www.eachccp.eu/wp-content/uploads/2015/11/Guidelines-on-written-agreements-between-members-of-CCP-colleges.pdf>>.

²⁷ Paul Tucker, *Central Counterparties in Evolving Capital Markets: Safety, Recovery and Resolution*, 17 *Banque de France Financial Stability Review*, 183–184 (April 2013), <https://www.banque-france.fr/fileadmin/user_upload/banque_de_france/publications/Revue_de_la_stabilite_financiere/2013/rsf-avril-2013/18-TUCKER_Paul.pdf>.

²⁸ See the website of one of the major NCAs: Germany’s Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), <http://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2016/fa_bj_1603_zentrale_gegenparteien_en.html?nn=7858612#doc7874230bodyText3> (accessed 18th July 2016).

extremely difficult to achieve, not least because of substantive differences across legal and regulatory regimes.”²⁹

CCP failures have been rare with the most recent examples being the Hong Kong Futures Guarantee Corporation (1987), the Kuala Lumpur Commodity Clearing House (1983) and the Caisse de Liquidation (Paris) (1974).³⁰ The last of these is the most interesting since the allocation of liabilities and the resolution of the CCP were complicated by a series of court actions. It is entirely possible that similar issues may arise again where the operations of an exchange and its orderly resolution cannot proceed until the respective liabilities of the parties have been determined by the courts. This builds delay and uncertainty into the process and places more responsibility on the CCP colleges of supervisors. Consequently, these bodies have an important role.

The Bank of England is the current NCA for five CCPs and its approach to supervision forms part of the EU regulation and supervisory regime.³¹ The Bank also works with other non-EU jurisdictions. However, the latter operate outside the comprehensive EU European Market Infrastructure Regulation (EMIR) structure discussed earlier in this section.³² Since both EU and non-EU cooperation are important the Bank of England is keen to assess “the effectiveness of the arrangements ... including whether information sharing is sufficient and timely, whether collective decision making mechanisms are effective, and whether co-operation is genuine.”³³

Post-Brexit the UK would be designated as a “third country, (Non-EU)” and need to apply to ESMA for its CCPs to be recognised as operating with regulatory equivalence to the requirements of EMIR.³⁴ Some forty-five third country (non-EU) CCPs have applied for recognition by ESMA under Article 25 of EMIR and an additional nineteen have been recognised.³⁵ Without ESMA recognition UK based CCPs could

²⁹ Craig Pirrong, *The Economics of Central Clearing: Theory and Practice* (International Swaps and Derivatives Association Discussion Paper No. 1, 42, May 2011).

³⁰ Bob Hills, David Rule, Sarah Parkinson and Chris Young, *Central Counterparty Clearing Houses and Financial Stability*, Bank of England Financial Stability Review, 122, 129–130 (June 1999), <<http://www.eachccp.eu/wp-content/uploads/2015/12/CCP.pdf>>.

³¹ Amandeep Rehlon and Dan Nixon, *Central Counterparties: What Are They, Why Do They Matter and How Does the Bank Supervise Them?*, Bank of England Quarterly Bulletin, Q2, 7, (2013) <<http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/2013/qb1302ccpsbs.pdf>>.

³² *Supra*, n 22, EMIR.

³³ Bank of England, *The Bank of England’s Approach to the Supervision of Financial Market Infrastructures*, 8–9 (December 2012), <<http://www.bankofengland.co.uk/publications/Documents/news/2012/nr161.pdf>>. See also The Bank of England, *Supervision of Financial Market Infrastructures – Annual Report*, 16–18 (March 2015), <<http://www.bankofengland.co.uk/publications/Documents/fmi/annualreport2015.pdf>>.

³⁴ Chapter 4 of Title III of Regulation (EU) No 648/2012 (EMIR) and Ch. II of Commission Delegated Regulation (EU) No 153/2013 of 19th December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards on requirements for central counterparties (RTS). See ESMA, *Central Counterparties and Trade Repositories*, ESMA web-site, <<https://www.esma.europa.eu/regulation/post-trading/central-counterparties-ccps>> (accessed 5th September 2016).

³⁵ ESMA, *List of central counterparties (CCPs) established in non-EEA countries which have applied for recognition under Art. 25 of Regulation (EU) No 648/2012 of the European Parliament*

not provide services to EU based counterparties. While it is likely that at the time of making their applications for recognition the UK based CCPs would be able to demonstrate this level of equivalence the recognition and approval process may be lengthy. Unless a transitional period of “deemed recognition” was agreed as part of the Brexit process the interim period might be very adverse for the business prospects of the UK based CCPs.

Consequently, market forces are likely to ensure that the UK continues to comply with EU requirements in the area of CCPs. Moreover, EU legislation provides the measure of best practice for CCPs with international counterparties. Both these factors will be important in ensuring the UK’s compliance with EU CCP legislation.

3. Financial Supervision

During the recent financial crisis there were many examples where cross-border supervision of financial institutions failed. This risk continues and in particular, there is the potential for “national supervisors [to] fulfill a sub-optimal supervisory policy” in failing to take account of “cross-border externalities resulting from integrated European banking markets”.³⁶

The issue of cross-border supervisory failures is recognised both internationally and at a European level. This has led to international “soft” law changes and a new EU financial services regulatory architecture.

At a global level the Basel Committee on Banking Supervision restated its core principles for effective bank supervision in 2012.³⁷ Principle 12, on consolidated supervision, sets out the basic requirement that banking groups need to be supervised on a consolidated basis with the group looked at as a whole with information provided to the consolidated supervisor on all the significant aspects of the business no matter where located. This is a particular issue when a banking group operates across one or more borders.

Principle 13 emphasises the need for close cross-border cooperation between supervisors. It involves operating supervisory colleges, regular and timely information sharing, supervisory coordination and close consultation between supervisors. It is seen, correctly, as important that cross-border supervisors share similar high standards and a shared view and understanding of the risks run by banking groups they

and of the Council (EMIR), <https://www.esma.europa.eu/sites/default/files/library/list_of_applicants_tc_ccps.pdf>, and *List of third-country central counterparties recognised to offer services and activities in the Union* <https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf> (accessed 5th September 2016).

³⁶ Martin Schüler, *Incentive Problems in Banking Supervision – The European Case*, Centre for European Economic Research, Discussion Paper No. 03–62, 5 (2003), <<ftp://ftp.zew.de/pub/zew-docs/dp/dp0362.pdf>>.

³⁷ Basel Committee on Banking Supervision, *Core Principles for Effective Banking Supervision*, 11 and 35–39 (September 2012), <<http://www.bis.org/publ/bcb230.pdf>>.

supervise.³⁸ The supervisors also need to work in tandem on the development and operation of recovery and resolution plans.³⁹ This latter aspect is considered in more detail later in this paper.

Currently, the Prudential Regulatory Authority, as part of the Bank of England, is the UK banks’ prudential supervisor. It is represented on the various supervisory colleges for cross-border European banks along with the European Central Bank and other national supervisors.⁴⁰ Post-brexite it is uncertain how, if at all, these arrangements would continue. Clearly, it is important that they do. The consequences, if they do not, will be greater risk to individual institutions and to financial stability. It could also result in significant economic inefficiency as supervisors places greater requirements on domestic entities in an attempt to make up for increased uncertainty due to reduced levels of cooperations.

Everything depends on there being a large element of trust between supervisors. This is especially pertinent in a system of “meta-regulation” where rules are made requiring, for example, banks to establish sound systems of risk management but it is left to the individual firms to determine how best to achieve this.⁴¹ However, trust between cross-border supervisors may be fragile for a range of reasons including national politics, regulatory cultures, differences in legal systems and different perspectives due to economic and regulatory competition. It is possible that banking groups may influence these views.⁴² These issues may be exacerbated by states’ less or more generous deposit protection schemes.⁴³ In addition, the evidence suggests that “national supervisors have biased incentives when dealing with cross-border banks” depending on what and who is at risk.⁴⁴ Consequently, the building of trust between supervisors is crucial.

Moreover, there has been a tendency to avoid discussing the “nuts and bolts” of supervision and to concentrate on the more high profile areas of regulation, for exam-

³⁸ *Ibid.*, at 38.

³⁹ *Ibid.*, at 38.

⁴⁰ Bank of England, *The Prudential Regulation Authority’s Approach to Banking Supervision*, 28 (March 2016), <<http://www.bankofengland.co.uk/publications/Documents/prapproach/bank-ingappr1603.pdf>>.

⁴¹ Mads Andenas and Iris H-Y Chiu, *The Foundations and Future of Financial Regulation*, 358 (Routledge, Abingdon, 2014).

⁴² See Harald Sandera, Stefanie Kleimeier and Sylvia Heuchemera, *The Resurgence of Cultural Borders During the Financial Crisis: The Changing Geography of Eurozone Cross-Border Depositing*, *Journal of Financial Stability* 12–26 (June 2016). This paper considers the break-down in trust in European financial services after the financial crisis started.

⁴³ Robert Eisenbeis, George Kaufman, *Cross Border Banking: Challenges for Deposit Insurance and Financial Stability in the European Union* in Harald Benink, Charles Goodhart and Rosa Lastra (eds), *Prompt Corrective Action & Cross-Border Supervisory Issues in Europe*, 171, 5, 12–15 (Financial Markets Group) at <https://www.researchgate.net/profile/Clas_Wihlborg/publication/5055472_Prompt_Corrective_Action_Cross-Border_Supervisory_Issues_in_Europe/links/00b49524a66b96a410000000.pdf#page=97>.

⁴⁴ Thorsten Beck, Radomir Todorov and Wolf Wagner, *Supervising Cross-Border Banks: Theory, Evidence and Policy* 28 *Economic Policy Issue* 73, 5, 36 (January 2013).

ple, covering capital and liquidity.⁴⁵ This is of concern since, as briefly mentioned earlier, much of the important supervisory information falls outside the “hard numbers” and will, for example, include informal assessments of operating systems and the quality of senior bank staff.⁴⁶ This information is not normally formally noted and its breadth and depth depends on the knowledge and experience of individual supervisors. The success of supervisory colleges will depend on the extent to which, if at all, this anecdotal information is disseminated between supervisors and the subsequent use made of this intelligence. Consequently, supervisory colleges need to foster a spirit of trust and a collegiate atmosphere. This requires trained, experience staff, and a first rate chairman and secretariat. It is reinforced by frequent, face-to-face meetings and barrier-breaching dinners together.

The structure of the European Single Supervisory Mechanism with the close involvement of the non-Euro states, such as the UK, did provide progress in this area.⁴⁷ In addition, bilateral agreements in the form of memoranda of understandings can take cross-border supervision part of the way forward but, post-brexite, the supervisory task is likely to be more difficult unless stronger links are developed. If it fails the supervision of cross-border banks across Europe, including the UK, will be significantly more difficult and subject to much high risks.

4. Crisis Management Arrangements Including Recovery and Resolution Planning

Bank failures occur very fast and the steps to resolve them need to be undertaken in a matter of hours. This often takes place against a background of unrelenting political, socio-economic and financial stability concerns. The process may be further complicated as the crisis management bodies seek to protect their own reputations and those of their senior executives and boards. In parallel politicians and supervisors may try to minimise the extent of their own responsibilities.

Some financial institutions fail due to bad luck but in most instances the problems are due to poor management. This was evident in the recent financial crisis where, often, problems arose due to significant wrong business decisions and strategies. This was highlighted by the liquidity deficits which rapidly become solvency issues.⁴⁸

⁴⁵ Niamh Moloney, *Supervision in the Wake of the Financial Crisis* in Eddy Wymeersch, Klaus Hopt, and Guido Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis*, para. 4.04 (Oxford University Press, Oxford, 2012).

⁴⁶ Thorsten Beck, *Regulatory Cooperation on Cross-Border Banking: Progress and Challenges after the Crisis* 235 *National Institute Economic Review* 44, 42 (February 2016).

⁴⁷ Council Regulation (EU) No 1024/2013 of 15th October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:287:0063:0089:EN:PDF>>.

⁴⁸ Laurent Clerc and others, *Indirect Contagion: The Policy Problem*, European Systemic Risk Board, Occasional Paper No. 9, 1, 6–11, (January 2016), <https://www.esrb.europa.eu/pub/pdf/occasional/20160126_occasional_paper_9.pdf?901f79d9aad9596f9ab3e4774427c985>.

Consequently, the reduction in the value of the assets of an insolvent bank will result in anyone who has a claim on these assets suffering losses. This is difficult enough when the bank only operates within one jurisdiction. However, this issue is magnified if the failed bank has cross-border operations since it is unlikely that assets and liabilities are perfectly matched in each jurisdiction.⁴⁹ For example, this was highlighted in the collapse of Fortis Bank in the summer of 2008 and the lack of cooperation between the Netherlands and Belgium authorities.⁵⁰ Although the Belgian Banking, Finance and Insurance Commission (CBFA) was in the lead coordinating supervision of the banking group there was an apparent failure to recognise the size of Fortis’ Dutch business following the acquisition of ABN-AMRO more than a year earlier. The subsequent unilateral nationalisation of the Dutch portions of the Fortis group was complicated by continuing legal proceedings in the Belgium courts.⁵¹

As mentioned earlier, the key issue is that at any point in time the assets and liabilities of a cross-border financial group are unlikely to be matched within each jurisdiction. As a result, of domestic political, media and social pressures each state will do its best, quickly, to secure any assets. Information sharing with other regulators is likely to break-down and national legal obligations will come into operation.⁵² Some jurisdictions will act earlier than others depending on their recovery and resolution regimes and their perceptions of the risks posed by the business both globally and within their own control. These actions are normally undertaken very swiftly, within a matter of hours, without much, or any, prior notice. This is a particular issue for the UK with many overseas banks operating in this country and, in parallel, UK banks with businesses across the world.⁵³

In summary, national supervisors and resolution authorities are likely to be in competition with each other. They will have different levels of information about the entity in trouble and possess a range of competencies and resources. In addition, they will be subject to political, public and media pressures and will probably be working with varied legal and accounting systems.⁵⁴ While, superficially, it may be expedient to operate an exclusively nationalistic crisis management regime the adverse consequences may be severe. The result would be a very fragmented financial system. Each business would need to be set up as a self-contained entity in each jurisdiction with its own capital, liquidity, local management and operating systems. This system of

⁴⁹ Thomas Huertas, *Crisis, Cause, Containment and Cure*, 121–122, (Palgrave Macmillan, Basingstoke, 2010).

⁵⁰ Yves Fassin and Derrick Gosselin, *The Collapse of a European Bank in the Financial Crisis: An Analysis from Stakeholder and Ethical Perspectives* 102 *Journal of Business Ethics* 169, 178–180 (2011).

⁵¹ Richard Herring, *The Challenge of Resolving Cross-Border Financial Institutions* 31 *Yale Journal of Regulations* 853, 872–873 (2014).

⁵² *Ibid.*, at 858.

⁵³ See the Bank of England’s list of banks operating in the UK as at 1st July 2016, <<http://www.bankofengland.co.uk/statistics/Pages/reporters/institutions/default.aspx>> (accessed 9th August 2016).

⁵⁴ Stijn Claessens, Richard Herring and Dirk Schoenmaker, *A Safer World Financial System: Improving the Resolution of Systemic Institutions*, Geneva Reports on the World Economy 12, 29–31 (2010), <http://cepr.org/sites/default/files/geneva_reports/GenevaP210.pdf>.

financial autarchy would require each financial services company to maintain control systems which would have to check, “in real-time”, that assets, liabilities and potential obligations were matched within each country. They would probably need to maintain a “buffer” of unencumbered assets in each jurisdiction to ensure that, at any given moment, sufficient assets were available to meet domestic liabilities. In many ways it would mirror the exchange control arrangements that existed prior to the late 1970s in the UK. It would be safe but inefficient and it would not be conducive to enhancing trust between nations.

Consequently, crisis management cooperation is fundamental to financial institution regulation and supervision. Consequently, the Financial Stability Board has issued a number of papers providing guidance on the subject of bank recovery and resolution and has consulted on various important elements.⁵⁵ These documents cover cooperation and information sharing, temporary financial support and continuing operational assistance following a bank resolution. However, the most important guidance is contained in a set of principles.⁵⁶ These include the alignment of cross-border resolution powers and legal recognition of resolution actions in foreign jurisdictions.⁵⁷ The Principles also require national resolution authorities to encourage financial institutions to adopt contractual measures such as temporary limitations on counterparty rights and developing a “bail-in” regime covering the “write-down, cancellation or conversion of debt instruments”.⁵⁸ However, although these Principles provide useful guidance, a large cross-border banking failure is likely to be a political event and everything will depend on levels of trust. If there is a lack of trust every action by a national regulatory agency is likely to be seen as an attempt to steal a march on the other jurisdictions involved.

The EU’s Bank Recovery and Resolution Directive (BRRD) has taken forward work in this area to reduce these real risks within the EU.⁵⁹ The UK was highly influential in developing this Directive and following a PRA consultation and implementation process it came into force in the UK early in 2015.⁶⁰ However, post-bexit the results of this sound work may be forfeited by the UK. Consequently, no-one knows what the future structure of financial services in the UK will look like nor what will be the future relationship with the EU, in this area, going forward. However, it is unlikely that the UK’s current level of influence on the formation of EU banking and

⁵⁵ Financial Stability Board, *New Measures to Promote Resolvability, Including Effective Cross-Border Resolution* (November 2015), <<http://www.fsb.org/2015/11/new-measures-to-promote-resolvability-including-effective-cross-border-resolution/>>.

⁵⁶ Financial Stability Board, *Principles for Cross-border Effectiveness of Resolution Actions*, 11–16 (2015), <<http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>>.

⁵⁷ *Ibid.*, at 11–13.

⁵⁸ *Ibid.*, at 15.

⁵⁹ Directive 2014/59/ EU Bank Recovery and Resolution Directive: establishing a framework for the recovery and resolution of credit institutions and investment firms, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0059&from=en>>.

⁶⁰ PRA Consultation Paper | CP13/14, *Implementing the Bank Recovery and Resolution Directive* (July 2014), <<http://www.bankofengland.co.uk/pradocuments/publications/cp/2014/cp1314.pdf>>.

financial services regulation will continue. It is possible that in order to maintain access to EU financial markets some form of “regulatory equivalence” will be necessary and this will entail the UK adopting some or all of the EU’s laws in this area going forward.⁶¹ Nevertheless, whatever rules are adopted the key elements will be continuing regular and frequent engagement with EU institutions, supervisors and national resolution authorities. Everything will depend on establishing and maintaining trust with these organisations if the UK is to operate a successful and coordinated cross-border recovery and resolution process.

5. Anti-Money Laundering and Sanctions Enforcement

The importance of the fight against corruption and terrorism continues to increase and both the UK and EU have important roles in this area.⁶² Just as with financial crises money laundering and sanctions infringement know no borders. National authorities responsible for combating financial crime need to cooperate with each other to be effective. In part this requires all these bodies to work to common rules and standards, to share information and to carry-out joint actions across borders. This mirrors the criminal organisations which specialise in money laundering and evading sanctions.⁶³ As discussed below, while bilateral cross-border agreements are helpful these are immeasurably stronger when groups of regulators and enforcement agencies, working within an international framework, know each other and building on this trust work together as a team.

Global and EU level Common Rules and Standards

As a supra-national organisation the Financial Action Task Force (FATF) produces “soft” law “to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.”⁶⁴ The UK is a member of FATF. In addition, the EU Commission is a member in its own right representing “the interests of Europe as a whole.”⁶⁵ The EU has a key role in translat-

⁶¹ EU Commission, Banking and Finance, *Equivalence with EU Rules and Supervision: Recognition of Foreign Frameworks*, http://ec.europa.eu/finance/general-policy/global/equivalence/index_en.htm, (accessed 9th August 2016).

⁶² Mart Laar, *The Cancer of the Modern World – A European Perspective in Against Corruption: A Collection of Essays*, The Prime Minister’s Office web-site, (May 2016) <<https://www.gov.uk/government/publications/against-corruption-a-collection-of-essays/against-corruption-a-collection-of-essays#mart-laar-the-cancer-of-the-modern-world--a-european-perspective>> (accessed 23rd August 2016).

⁶³ Friedrich Schneider and Ursula Windischbauer, *Money Laundering: Some Facts* 26 *European Journal of Law and Economics* 387, 389–390 (2008).

⁶⁴ Financial Action Task Force, “Who we are” and “What we do” at <<http://www.fatf-gafi.org/about/>>, (accessed 21st July 2016).

⁶⁵ *Ibid.*, FATF web-site.

ing FATF rules “into a concrete and binding legislative framework”.⁶⁶ This it has undertaken in four anti-money laundering Directives from 1990 to 2015.⁶⁷

The EU Commission also plays a part in trying to improve cooperation on anti-money laundering between EU states and with other European agencies such as Europol, the EU’s law enforcement agency. Nevertheless, there is always much more to do in this area to improve cooperation.⁶⁸ All this coincides with the UK’s clear interest in encouraging a greater collegiate approach.

The EU’s aim, in the context of anti-money laundering regulation has been, not only, to put the EU on par, if not ahead of FATF requirements but also to help all EU member states meet the highest standards and to ensure that there are no weak links to be exploited by criminals.⁶⁹ For example, this can be seen in the successful joint efforts by FATF and the EU to persuade Austria in 1999–2000 to remove “its system of anonymous savings passbooks”.⁷⁰

These are worthy objectives and it will be in the UK’s own interests to continue to support them post-brexite. The EU’s approach has been to establish a set of common rules and then to leave enforcement to national authorities since these are normally matters for the criminal law best left to national criminal justice systems.⁷¹ At the same time the EU has balanced human and privacy rights against some of the measures aimed at combating money laundering and terrorism. On occasion, in the UK, these rights have been obscured by some anti-money laundering criminal law proposals.⁷² In contrast the EU Commission and Parliament have represented bastions of liberalism to off-set some state actions.⁷³

⁶⁶ Eleni Tsingou, *Money Laundering* in Daniel Mügge (ed), *Europe and the Governance of Global Finance*, 140, 153 (Oxford University Press, Oxford, 2014).

⁶⁷ The most recent is Directive (EU) 2015/849 of 20th May 2015, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>>.

⁶⁸ Thomas Incalza, *National Anti-Money Laundering Legislation in a Unified Europe: Jyske* 51 *Common Market Law Review* 1829, 1845–1849 (2014).

⁶⁹ Valsamis Mitsilegas and Bill Gilmore, *The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards* 56 *The International and Comparative Law Quarterly* 119, 139–140 (2007).

⁷⁰ Financial Action Task Force on Money Laundering, *Annual Report 1999–2000*, 20–22, <<http://www.fatf-gafi.org/media/fatf/documents/reports/1999%202000%20ENG.pdf>>.

⁷¹ Melissa van den Broek, *The EU’s Preventive AML/CFT Policy: Asymmetrical Harmonization* 14 *Journal of Money Laundering Control* 170, 170–171 (2011).

⁷² For example, *The Law Society of England and Wales’ response to the consultation issued by the Home Office and HM Treasury on the Action Plan for anti-money laundering and counter-terrorist finance legislative proposals*, 14, (June 2016), <<http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/home-office-and-hm-treasury-consultation-on-the-action-plan-for-aml-and-cft-legislative-proposals/>>, “The Society sees little value being added by the imposition of an illicit enrichment offence. [where]... [w]e would have concerns about the human rights implications of a reversal of the burden of proof, which should fall on the prosecution.”

⁷³ European Parliament, *Draft Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing*, (COM(2013)0045) – C7-0032/2013–2013/0025(COD)), (28th February 2014), <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0150+0+DOC+XML+V0//EN>>, “It is important that Member States provide financial intelligence

It is important that the UK continues, post-brexite, to support EU actions implementing FATF requirements. It will assist UK firms and their staff with EU operations in having only one set of regulations rather than having to comply with separate, and different, UK and EU rules establishing legal equivalence. It will help ensure that the UK remains cognizant of human rights expectations in this area and it will give confidence to both EU and non-EU states that the UK continues to meet the highest standards in fighting financial crime and terrorism.

Sharing Intelligence

Supra-national agreements exist to counter money laundering and to share intelligence.⁷⁴ These are important but much of the effective work is undertaken by groups of agencies working together in a spirit of trust. In addition, there are international anti-money laundering groups, such as the Egmont Group of Financial Intelligence Units, which share information. This body has some one hundred and fifty members organisations arranged into eight regional groups. Its purpose is to “follow the suspected proceeds of crime ... across different jurisdictions”.⁷⁵ However, while useful, the Egmont Group’s membership is diffused. The most effective organisations work in smaller groups. To a large extent this format is found within the EU and following brexite, to continue to be effective the UK would need to recreate these arrangements.

Influenced by the UK the latest Money Laundering Directive adopts a more risk base approach in-keeping with the UK style of regulation.⁷⁶ The same Directive also requires that legal entities established in EU member states provide information on beneficial ownership to their local regulators and that this information is made available to regulators in other EU states and certain specified organisations such as banks etc.⁷⁷ These are very useful provisions in the fight against organised crime and it is important that access to this information is not lost as a result of brexite.

Supra-National Enforcement

The enforcement of anti-money laundering regulations is undertaken at a national level. However, where the alleged crime involves a cross-border element there may

units with the necessary resources ... while respecting fundamental rights, including the right to privacy and data protection.”

⁷⁴ Joint Forum: Basel Committee on Banking Supervision (BCBS), International Association of Insurance Supervisors (IAIS) and International Organization of Securities Commissions (IOSCO), *Initiatives to Combat Money Laundering and the Financing of Terrorism* (2003), <<http://www.bis.org/publ/joint05.pdf>>.

⁷⁵ Egmont Group, *Annual Report 2014/5*, xiv, <<http://www.egmontgroup.org/library/annual-reports>>.

⁷⁶ *Supra*, n 67, 4th Money Laundering Directive, Arts 6–8. There is also scope within the EU to improve the process for locating and seizing the proceeds of crime including money laundering, Emmanuel Ioannides, *Fundamental principles of EU law against money laundering*, 27–30, (Ashgate Publishing, Farnham, 2014).

⁷⁷ *Supra* n 67, Art 30.

be merit in coordinated action by two or more countries particularly if the action involves financial institutions operating in a number of states. This is still an area to be developed but it could parallel the EU's work on anti-competitive practices.⁷⁸

There are similar arguments in relation to the imposition of sanctions particularly against organisations and individuals. A considerable body of useful EU case law has been established in this area.⁷⁹ Cooperation and information sharing at an EU level with organisations such as Europol assists in enforcing these sanctions and ensuring that there are, for example, fewer mistakes in mis-identifying individuals.

6. Cross-Border Payment Systems

The payments system is a fundamental part of banking. This does not necessary mean that it needs to be carried out by banks but they do need to have access to it. Moreover, the EU payments "landscape is undergoing a process of continuous transformation".⁸⁰ However, the various payment arrangements continue to provide the mechanism by which the life-blood of the economy flows. Consequently, trust in the resilience of the payments system is fundamental to the stability of the financial system and the economy.⁸¹ Failures do occur and these need to be fully investigated. The most significant recent example was the nine hour failure of the Bank of England's "Real-Time Gross Settlement" system, known as "RTGS", on 20th October 2014.⁸²

The importance of the strength of the payments systems, both domestically and globally was seen during the recent financial crisis when the payments system infrastructure operated without evident malfunction.⁸³ Nevertheless work continues at the global level to improve resilience.⁸⁴

⁷⁸ EU Commission, *Fines for Breaking EU Competition Law*, Fact Sheet, (2011), <http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf>, (accessed 23rd August 2016).

⁷⁹ Piet Eeckhout, *Sanctions Policy in EU External Relations Law*, 500–548 (Oxford University Press, Oxford, 2011). See also Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, Oxford, Oxford studies in European law, 2009).

⁸⁰ Jakub Górká, *Preface* in Jakub Górká (ed), *Transforming Payment Systems in Europe*, xii (Palgrave Macmillan, Basingstoke, 2016).

⁸¹ Ed Kelsey and Simon Rickenbach, *Enhancing the Resilience of the Bank of England's Real-Time Gross Settlement Infrastructure*, Bank of England, Quarterly Bulletin, 316, 316, (2014 Q3) <<http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/2014/qb14q305.pdf>>.

⁸² Bank of England, *Independent Review of Real Time Gross Settlement (RTGS) Outage on 20th October 2014*, (23rd March 2015), <<http://www.bankofengland.co.uk/publications/Documents/news/2015/rtgsdeloitte.pdf>>.

⁸³ Yvon Lucas, *The Impact of the Financial Crisis on Transfer Systems*, Banque de France, Quarterly Selection of Articles, No. 14, 39, 39, (Summer 2009), <https://www.banque-france.fr/fileadmin/user_upload/banque_de_france/Politique_Monetaire/QSA14_Impact.pdf>.

⁸⁴ For example see the Society for Worldwide Interbank Financial Telecommunication, (SWIFT), *Reducing Risk and Increasing Resilience in Real Time Gross Settlement (RTGS) Payment Systems*, White Paper, (2014) <<https://www.swift.com/file/1456/download?token=1WmncUfG>>.

Further, the EU has developed a number of arrangements to ensure an effective and robust Euro payments system. Even though the UK is not a member of the Euro-zone the EU is likely to continue to be the UK’s largest trading partner. Consequently, whether or not the UK continues to be a major clearing area for Euro denominated financial contracts it will still rely on the EU’s payments systems.

For example, coming fully into effect in 2016, the Single Euro Payments Area (“SEPA”) provides a fast and integrated payment system for transferring Euros around the EU and its related members such as Norway and Switzerland.⁸⁵ The development and enhancement of the system is guided by industry practitioners as part of the European Banking Federation Payments Regulatory Expert Group (EBF PREG).⁸⁶

In addition, the EU have developed the Target2 (“Trans-European Automated Real-time Gross Settlement Express Transfer System”). This is an updated system to settle national and cross-border Euro payments at central bank level. Some 350,000 payments with a value of just under €2½ trillion are processed using Target2 each working day, a figure which is broadly equivalent to the size of Germany’s GDP.⁸⁷ The outstanding claims and liabilities of all the national central banks participating in Target2 are transferred to the European Central Bank at the end of the business day, where they are netted out.⁸⁸ The UK decided in 2011 not to participate in the Target2 project but clearly it has a close interest in it and its success.⁸⁹

In summary, while the UK is not a member of the Euro-zone it is still closely involved in the payments systems across the EU and it assists with technical and regulatory advice. Post-brexite the UK will still have trading and investment links with the EU. Consequently, it will need to work, if possible, with its former EU colleagues in ensuring that the technical requirements and guidance for the EU’s payment systems work for the UK as well as for the EU and that the UK is not subject to excessive access and transaction costs.

7. Regulatory Arbitrage and “Capture”

Regulation does not exist in a vacuum. It forms part of the economic structure underpinning the social and political fabric of society. Consequently, it is important to see

⁸⁵ EU Regulation N° 260/2012 (amending Regulation (EC) No 924/2009) as regards the migration to Union-wide credit transfers and direct debits, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0937&from=EN>>. See also European Central Bank, *Payments, Securities and Derivatives and the Role of the Eurosystem*, 187–192 (European Central Bank, Frankfurt, 2010).

⁸⁶ Payments UK web-site, *SEPA Regulation*, <<http://www.paymentsuk.org.uk/policy/european-developments/sepa-regulation>>, (accessed 15th August 2016).

⁸⁷ Bundesbank web-site, <https://www.bundesbank.de/Redaktion/EN/Standardartikel/Tasks/Payment_systems/target2_balance.html> (accessed 15th August 2016).

⁸⁸ *Ibid.*, (“Target2”).

⁸⁹ Financial Times, *UK snubs securities settlement overhaul, Bank of England will not take part in Target2Securities* (FT, 30th November 2011), <<https://www.ft.com/content/b999dc22-eb6c-11e0-9a41-00144feab49a>>.

regulation in its political and economic context.⁹⁰ This has been developed further in that economic decisions, which include the format and application of regulation, needs to be seen within the institutional structure within which they operate. This includes the concept of “politics as economic exchange” with governments and their agencies carrying out a process of political and economic negotiation with voters and other stakeholders.⁹¹

These insights have usually been applied to areas such as fiscal policy. However, they apply equally to regulation. Regulation can impose costs on an industry and these costs may be passed onto consumers. At the same time regulation may benefit both the latter and firms within an industry by increasing consumer confidence and trust and thus both reduce transaction costs and increasing sales.⁹² In addition, regulation may act as a barrier to entry and exit from a business sector and have an effect on competition.⁹³

Consequently, firms within an industry have a keen interest in regulation and, as already mentioned, may indeed, propose more regulations. As a result regulation influences the actions of firms subject to it and is, in turn, moulded by these businesses and other key stakeholders. This leads to a risk of “regulatory capture” if the power of certain stakeholders are too great and “if there is value to be gained through political action, persons will invest resources in efforts to capture this value.”⁹⁴

“Regulatory capture” is a risk which is particularly relevant to the UK since the financial services industry is so financially dominant. The banking industry alone employs approximately five hundred thousand people and contributes over £31 billion (some 5% of total tax revenue) in tax each year.⁹⁵ “Regulatory capture” in this sense is simply a view which sees a congruence of interests between the organs of the state and the industry in question. This single-view may prevail at a nation state level.

⁹⁰ Sam Peltzman, *George Stigler's Contribution to the Economic Analysis Of Regulation* 101 *Journal of Political Economy* 818, 823–824 (October 1993).

⁹¹ Alan Peacock, *The Calculus of Consent and Limits on Government Expenditure Growth in Public Choice Analysis In Historical Perspective*, 85, 105, (Cambridge University Press, Cambridge England, 1997), <http://ebooks.cambridge.org.ezproxy.library.qmul.ac.uk/pdf_viewer.jsf?cid=CBO9780511559532A026&ref=false&pubCode=CUP&urlPrefix=cambridge&productCode=cbo>. See also Knut Wicksell, *A New Principle of Just Taxation* in RA Musgrave and AT Peacock (eds), *Classics in the Theory of Public Finance*, 72 (Macmillan, London, 1958) and Richard Wagner, *The 'Calculus of Consent': A Wicksellian Retrospective* 56 *Public Choice* 153 (1988).

⁹² Bart Nooteboom, Hans Berger and Niels Noorderhaven, *Effects of Trust and Governance on Relational Risk* 40 *The Academy of Management Journal* 308, 310 (April 1997). For example, see Coffee, *supra*, n 4, at 245–246. See also Michael Pollitt, *The Economics of Trust, Norms and Networks* 11 *Business Ethics, A European Review* 119, 120–122 (April 2002) setting out the importance of trust and conformity with social norms in economic growth.

⁹³ Rosa Lastra, *International Financial and Monetary Law*, 116 (Second edition, Oxford University Press, Oxford, 2015).

⁹⁴ James Buchanan, *Public Choice: The Origins And Development of a Research Program*, George Mason University, Center for Study of Public Choice, 6, (2003), <<https://www.gmu.edu/centers/public-choice/pdf%20links/Booklet.pdf>>.

⁹⁵ British Bankers Association, *Banking on British Jobs*, 6, (October 2015), <<https://www.bba.org.uk/publication/bba-reports/>>.

As mentioned, regulatory capture in this context does not suggest any form of corruption but rather the risk that regulators start to see the world from the same perspective as the firms they regulate at the expense of the public interest.⁹⁶ There are two primary issues with regulatory capture: first, that regulation may be too lax and not reflect the public interest and, second, that incumbent firms seek tough regulation, which they are able to sustain, as a barrier to new entrants to the industry (“every industry ...that has enough political power to utilize the state will seek to control entry”).⁹⁷

However, there are counter-balancing factors. While it is possible to see business working only for its own self interest, the financial services industry, for example, is not a homogeneous, monolithic enterprise. It consists of many competing firms of all sizes and interests and this diversity increases when viewed at a supra-national level. In addition, it would be wrong to see all firms as all “red in tooth and claw” fighting against the public interest. The industry does not operate in a vacuum but with competing interests both within it, and outside, encompassed by wider institutions which facilitate “social decisions to be taken through public discussion and social interchange”.⁹⁸

EU institutions have the advantage that they are generally more remote from national politics and subject to wider competing forces. They exist in a form favoured by James Buchanan within a high-level constitution, set-up “behind a veil of uncertainty”.⁹⁹ There are, nevertheless, clearly issues with EU institutional actions to defend the Euro or to establish, for example, a common deposit protection fund where EU-wide economic and political factors predominate.¹⁰⁰ At the same time the European Central Bank continues to accept EU government securities as part of its quantitative

easing programme.¹⁰¹ However, the ECB is not alone in accepting government backed securities. The Bank of Japan government bond holding is extensive and the

⁹⁶ George Stigler, *The Theory of Economic Regulation* 2 *The Bell Journal of Economics and Management Science* 3, 5 (Spring 1971).

⁹⁷ Friedrich Heinemann and Martin Schüler, *A Stiglerian View on Banking Supervision* 121 *Public Choice* 99–100 (July 2004).

⁹⁸ Amartya Sen, *On James Buchanan* 80 *Journal of Economic Behavior and Organization* 367, 368 (2011).

⁹⁹ Andre Azevedo Alves, *No Salvation through Constitutions: Jaxay versus Buchanan and Rawls* 20 *Independent Review* 33, 39 (Summer 2015). The “veil of uncertainty” is explained as the result which “follows directly from the fact that the interest of any person or group is much less easily identified in the choice among rules. It is much more difficult for a person to determine which of the several choice options confronted will, indeed, maximize whatever set of values that person desired to maximize.” It parallels John Rawls’ “veil of ignorance”.

¹⁰⁰ Thomas Huertas, *Crisis, Cause, Containment and Cure*, 130–132 (Palgrave Macmillan, Basingstoke, 2010).

¹⁰¹ *ECB’s Asset Purchase Programme*, “The expanded asset purchase programme includes all purchase programmes under which private sector securities and public sector securities are purchased to address the risks of a too prolonged period of low inflation.” ECB web-site, <<https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>> (accessed 6th Sept 2016).

US Federal Reserve's balance sheet consisted largely of government-sponsored enterprise (GSE) debt and mortgage-backed securities (MBS) issued by those GSEs.¹⁰²

A distinction needs to be drawn between "regulation" and "supervision". The former is the process of rule-making while the latter concerns the application of these rules. Supervision, outside the Single Supervisory Mechanism, falls to national authorities where national knowledge of regulated firms, the local markets in which they operate and the political and cultural context have been seen as paramount. Conversely, much banking regulation has been developed at a supra-national level; much of it by "soft" law. However, within the EU regulation has been much more prescriptive with the so-called "single rule book" and detailed guidance.¹⁰³ The regulatory architecture makes it much more difficult to "capture" the EU regulatory and supervision structure. Consequently, it is more difficult for an industry to influence a supra-national body such as the EU Commission or Parliament where a wider range of influences are likely to flourish.¹⁰⁴

A further aspect of "regulatory capture" is the risk that a single national regulator may develop into a "regulatory monoculture".¹⁰⁵ Individual national regulators may have more uniform views compared to a supra-national body which has a more diversified perspective. There is always a risk that a national regulator may develop a view that it alone is right and following a path-dependent approach to regulating build its regulatory arrangements on historical themes which may no longer be relevant nor current best practice as markets change and systems and risks evolve. A lack of diversity and challenge may produce an inwardly looking regulator with an ossified regulatory approach and unseen risks may suddenly emerge to threaten individual banks and the financial system as a whole.¹⁰⁶

¹⁰² Brett Fawley and Christopher Neely, *Four Stories of Quantitative Easing*, Federal Reserve Bank of St. Louis Review, 95(1), 51, 60–66 and 69 (January/February 2013), <<https://research.stlouisfed.org/publications/review/13/01/Fawley.pdf>>.

¹⁰³ EU Council, *Council Conclusions on Strengthening EU Financial Supervision*, Press Release, 3, 9th June 2009, <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/108389.pdf>.

¹⁰⁴ This is a variant of the proposal by Pierre Boyer and Jorge Ponce, *Regulatory Capture and Banking Supervision Reform* 8 Journal of Financial Stability 206 (September 2012). They suggest multiple supervisors for each institution to reduce the likelihood of "capture".

¹⁰⁵ See a discussion of the risks of developing a financial monoculture in a speech by Andrew Haldane in which he said that "the level playing field resulted in everyone playing the same game at the same time, often with the same ball", *Rethinking the Financial Network*, a speech given at the Financial Student Association, Amsterdam, 28th April 2009, <<http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2009/speech386.pdf>>.

¹⁰⁶ *Stress Testing Banks: What Have We Learned?*, remarks by Ben Bernanke at a financial markets conference sponsored by the Federal Reserve Bank of Atlanta, Stone Mountain, Georgia, 13, 8th April 2013, discussing monocultures in supervisory models, <<https://www.federalreserve.gov/newsevents/speech/bernanke20130408a.pdf>>.

At the same time it is also important to ensure a balance between “adversarial regulation” and “negotiated rule-making” since the former may miss the target or have unintended consequences due to a failure to engage with the affected industry.¹⁰⁷

Further, the strength of regulation and the attitude of supervisors are factors in investment decisions by global banks in determining where to establish and develop their businesses.¹⁰⁸ There is a balance to be struck between over-regulation which may deter investment and lax regulation which undermine the credibility of the jurisdiction and the businesses that operate within its boundaries.

An important defence, provided by the EU’s system of regulation, is the construction of “administrative insulation” around the rules’ making process.¹⁰⁹ There are a number of methods which may be used to achieve this including processes which balance lobbying by interest groups, removing the making of regulation from the day-to-day political process and protecting the funding of the rule-makers from political interference.

The current EU approach to making regulations may be time-consuming but it does challenge individual national agendas. National jurisdictions may be wedded to their own arrangements for a variety of reasons including regulatory hubris, a wish to avoid the political and economic costs of change and the desire to seek competitive advantage. The approach adopted by the EU frequently employs comparative research and takes account of views from all the major stakeholders balancing these positions both at the EU Commission and Parliament stages of the legislative process. The views of many countries and organisations are considered and while some of these may only be used to reinforce existing biases it provides an opportunity and process for more diverse reflection. It makes it more difficult for national regulators to be “captured” in the sense that they only see regulation through the perspective of their own established national businesses.

In addition, it is much easier to organise a small, as opposed to a large, group of industry firms to act collectively to change some regulations.¹¹⁰ Propelled by the recent financial crisis the consolidation of financial services firms has continued apace. This industry-wide concentration may find it easier to speak with one voice in order to influence government and regulatory policy. A more fragmented industry across a number of jurisdictions is likely to find this more difficult.

¹⁰⁷ David Thaw, *Enlightened Regulatory Capture* 89 *Washington Law Review* 329, 336 and 340–343 (2014).

¹⁰⁸ David Llewellyn, *Rationale for Financial Regulation*, Financial Services Authority Occasional Paper No. 1, 10–11, (April 1999), <http://www.fep.up.pt/disciplinas/pgaf924/PGAF/Texto_2_David_Llewellyn.pdf>. See also Simeon Djankov, Caralee McLiesh and Rita Ramalho, *Regulation and Growth* 92 *Economics Letters* 395–401 (2006).

¹⁰⁹ Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design* 89 *Texas Law Review* 15, 79 (2010).

¹¹⁰ Mancur Olson, *The Logic of Collective Action* 33–34 (first published in 1965, 2nd ed., Harvard University Press, Cambridge, Massachusetts, 1971), <<http://outsidethetext.com/archive/Olson.pdf>>. This develops an aspect of David Hume’s argument for the need for government, *A Treatise of Human Nature*, Book III, Part II, Section VII, 538 (original edition 1739–1740, reprinted by Oxford University Press, Oxford, 1978).

Consequently, there are considerable advantages, post-brexite, in the UK continuing to adopt and implement EU Directives, Regulations and Technical Guidance. This would go beyond the need to ensure “equivalence” in order to protect EU passporting rights since it would continue to enhance UK regulatory credibility and help to ensure that there was no perception of “regulatory capture”. This would have added weight since the UK, post-brexite, is unlikely to have any influence on EU rule making.

8. Coordination on Improving Culture, Ethics and Individual Accountability

The financial crisis, the subsequent scandals involving benchmark indices and the extensive evasion of anti-money laundering and sanctions requirements revealed significant issues with corporate culture and individual ethics in banks and other financial institutions.¹¹¹ These issues are corrosive and taint even those in the industry who have done no wrong.¹¹² Clearly, these failures are not the preserve of financial services and can be found in other industries but there has been a marked occurrence of them in, for example, banking. There may be a number of reasons for this but there have been significant issues with the adequacy of corporate governance and the recruitment, training and supervision of staff at all levels and the frequent mis-use of mis-aligned incentives. But, at its heart, there has been a serious lack of understanding by banks and their management of their role in, and accountability to, the society in which they operate. The Parliamentary Commission on Banking Standards, in its final report, said that “one of the most dismal features of the banking industry...was the striking limitation on the sense of personal responsibility and accountability of the leaders within the industry for the widespread failings and abuses over which they presided.”¹¹³

Supra-national guidance and subsequent regulation has a number of advantages over national rule-making. It can set common standards to be applied by all jurisdictions and the supra-national body can monitor implementation and report progress, or lack of it, essentially shaming laggard nations. This can help reduce the risk of “regulatory arbitrage” mentioned earlier. Supra-national organisations may provide high-levels of expertise (e.g. the technical areas of payments or anti-money launder-

¹¹¹ “the public have the sense that advantage has been taken of them, that bankers have received huge rewards, that some of those rewards have not been properly earned, and in some cases have been obtained through dishonesty ...” See *Changing Banking for Good: Report of the Parliamentary Commission on Banking Standards*, 15, para. 8, (HL Paper 27-I, HC 175-I, published June 2013), <<https://www.parliament.uk/documents/banking-commission/Banking-final-report-volume-i.pdf>>.

¹¹² “Financial trouble in one institution can quickly spread to others. Reputational damage is also contagious, especially at a time when banks in general are held in such low public esteem. The problems of a particular bank ... can still flow across to others in the system.” Sir Richard Lambert, *Banking Standards Review*, 6 (May 2014), <http://1984london.com/_banking-standards/pdf/banking-standards-review.pdf>.

¹¹³ *Changing Banking for Good*, *supra* nn 111, 16, para. 14.

ing), help jurisdictions subject to political inertia and, what Brummer describes as, “legislative shirking”.¹¹⁴ Legislation within the EU can also reinforce these common standards with effective sanctions. In addition, local jurisdictions may be competent to legislate and to supervise businesses established within their territories but lack the ability to regulate global markets. This is area where supra-national policy-making may be more successful. There may be similar issues with large global companies or systemically important financial institutions. Finally, as mentioned earlier, it is more difficult for firms to influence supra-national organisations.

The Financial Stability Board has issued guidance in this area and the need for boards and senior executives to take responsibility.¹¹⁵ This is reflected, in part, in Pillar II of the EU’s Capital Requirements Directive IV.¹¹⁶ Individual EU states have gone further and taken specific action to improve senior executive and staff accountability.¹¹⁷ The EU Commission has, for example, taken action against ten cross-border banks operating in the Euro and Yen interest rate derivative markets and issued fines of almost €1.5 billion in total.¹¹⁸ It is clear that the EU Commission has the ability and will to address cross-border failures.

In addition, as the Bank of England’s Fair and Effective Markets Review points out recent important EU Regulations will improve conduct “in UK and other European fixed income, currency and commodities markets with the introduction of the Market Abuse Regulation (MAR) in 2016, and the revised Markets in Financial Instruments Directive and new Markets in Financial Instruments Regulation (MiFID2) in 2017.”¹¹⁹ For example, there will be a new high level principle requiring investment firms to “act honestly, fairly and professionally and communicate in a way which is

¹¹⁴ Supra n 2, 24–26.

¹¹⁵ Financial Stability Board, *Guidance on Supervisory Interaction with Financial Institutions on Risk Culture*, 3–4 (April 2014), <http://www.fsb.org/wp-content/uploads/140407.pdf?page_moved=1>.

¹¹⁶ Prudential Regulatory Authority, Policy Statement PS17/15, *Assessing Capital Adequacy under Pillar 2*, (issued in July 2015 and updated in August 2015). This builds on the Capital Requirements Directive IV’s Pillar 2A methodology which includes, as part of the internal capital adequacy assessment process (ICAAP), an assessment of “the governance arrangements of the firm, its corporate culture and values, and the ability of members of the management body to perform their duties.” (Prudential Regulatory Authority, *Supervisory Statement | SS5/13: The ICAAP and the Supervisory Review and Evaluation Process (SREP)*, 4, para. 3.2, (December 2013). The new framework came into force on 1st January 2016, <<http://www.bankofengland.co.uk/pr/Documents/publications/cp/2015/pillar2/cp115.pdf>>.

¹¹⁷ For example see the Prudential Regulatory Authority/Bank of England’s and Financial Conduct Authority’s *Senior Management and Certified Persons Regime, Policy Statement, PS3/15, Strengthening Individual Accountability in Banking And Insurance*, (March 2015), <<http://www.bankofengland.co.uk/pr/Documents/publications/ps/2015/ps315.pdf>>.

¹¹⁸ EU Commission web-site, *EU Commission fines banks € 1.49 billion for participating in cartels in the interest rate derivatives industry*, Press Release, (4th December 2013), <http://europa.eu/rapid/press-release_IP-13-1208_en.htm10> (accessed 23rd August 2016).

¹¹⁹ Bank of England, *Fair and Effective Markets Review, Final Report*, 49 (June 2015), <<http://www.bankofengland.co.uk/markets/Documents/femrjun15.pdf>>.

fair, clear and not misleading, taking into account the nature of the eligible counterparty and its business”.¹²⁰

Work on developing international standards aimed at improving culture and ethics in financial services is still at a very early stage. Some EU states, such as the Netherlands, are well ahead in this area.¹²¹ The European Central Bank, as part of its development of its “Single Supervisory Mechanism” (SSM) has also started to assess the culture of the largest banks subject to the SSM.¹²² UK regulators have engaged with the Dutch central bank on its approach to assessing bank culture and have initiated their own actions.¹²³ However, it is difficult to know how cooperation and development will continue in this area, at an EU level, after Brexit. Nevertheless, it is important that this cross-border work is not lost and that it is developed further for the benefit of customers, businesses and the integrity of financial markets as a whole.

However, with cross-border financial services there is more that could and should be done at a pan-European level. For example, the review undertaken as part of the Bank of England’s Fair and Effective Markets Review found that “further action [needs] to be taken to prevent the ‘recycling’ of individuals with poor conduct records between firms: the so-called ‘rolling bad apples’”.¹²⁴ This may be a particular issue when individuals move across borders and firms find it difficult to obtain transparent references on these applicants from previous employers. The latter may be operating to different standards and legislation and may be exposed to different risks in providing references. These issues can only be addressed by cooperation between regulators working to common objectives, standards, procedures and regulations. The current EU structures provide a mechanism for undertaking this. There could be common standards including an obligation on an employer to provide a timely reference and that all references must be fair and accurate. There are a number of issues that would need to be resolved such as the effects of employees resigning before a disciplinary process is completed; how references should address an employer’s suspicion of employee wrongdoing which has not resolved through the disciplinary process; adverse information about a former employee which only come to light after they have left and joined a new firm and the role of financial supervisors in this process.

¹²⁰ Art. 30, Directive 2014/65/EU of 15th May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0065>>.

¹²¹ De Nederlandsche Bank (DNB), *Behaviour and Culture in the Dutch Financial Sector* (September 2015), <http://www.dnb.nl/en/binaries/DNB%20brochure%20gedrag%20en%20cultuur%202015%20ENG_tcm47-326577.pdf?2016080511>.

¹²² *The relevance of the supervision of behaviour and culture to the SSM*, speech by Julie Dickson, Member of the Supervisory Board of the European Central Bank, at the conference “Looking Forward: Effective Supervision of Behaviour and Culture at Financial Institutions”, organised by De Nederlandsche Bank, Amsterdam, 24th September 2015, <<https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150924.en.html>>.

¹²³ Prudential Regulatory Authority, *Statement of Policy: The Use of PRA Powers to Address Serious Failings in the Culture of Firms*, (June 2014), <<http://www.bankofengland.co.uk/pradocuments/publications/policy/2014/powersculture.pdf>>.

¹²⁴ *Supra*, n 119, Fair and Effective Markets Review, at 62.

Many of these aspects fall within the realm of national private law. Moreover, within different EU legal systems some of these issues may present both legal, reputational and commercial risks.

There is a significant public interest in this area which is worthy of consideration at an EU-wide level. Ideally, the UK should be part of this discussion since it has much to gain, or lose, depending on the outcome. If, however, the UK is not a EU member some alternative form of cooperation will need to be devised otherwise UK based firms and their customers and markets may be exposed to risks from “rogue” individuals.¹²⁵

9. Conclusion

Much has been done both nationally and globally to reduce risks to the financial system after the recent financial crisis. Nevertheless, the threats to financial stability remain acute. These risks may be mitigated by a range of measures including sound economic policies and by robust regulation and supervision. However, as noted these policies cannot be undertaken in a “national vacuum”.

John Donne, with whom this article starts, quotes from Ecclesiastes in an earlier part of his Devotions recommending that people work together in cooperation “for if they fall, the one will lift up his fellow: but woe to him that is alone when he falleth; for he hath not another to help him up.”¹²⁶ Similarly, it is not possible to operate successfully in financial services without working closely with other financial service agencies in other jurisdictions. This cooperation needs to go beyond regulatory committee meetings and the exchange of papers etc. The objective is to build trust and common purpose. Doing so is more likely to transcend petty national interests and the striving for short-term advantage. There is both a pragmatic and a moral objective: if a nation tries to succeed alone and stumbles it is less likely to be assisted by others. However, if it is seen as being trustworthy it will have stored up a wealth of moral “capital” upon which it can draw in times of trouble.

The predominance of the financial connections between the UK and rest of the EU strengthens the view that here, at least, there needs to be a redoubling of effort to work

¹²⁵ For example, there could be an EU, or even a global, register of senior financial services staff including data supplied by employers and accessible, with the consent of the person applying for employment, by firms seeking to recruit the individual. This has been suggested at a national level, *Enhancing financial stability by improving culture in the financial services industry*, Remarks by William Dudley, President and Chief Executive Office of the Federal Reserve Bank of New York, 20th October 2014 at the workshop on reforming culture and behavior in the financial services industry, at the Federal Reserve Bank of New York, New York City, <<https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html>>. See also remarks made by Elizabeth Corley in *Annex III: High-level summary of June industry roundtable on governance frameworks* in FSB, *Measures to Reduce Misconduct Risk, Second Progress Report*, 24, (1st September 2016), <<http://www.fsb.org/wp-content/uploads/Measures-to-reduce-misconduct-risk-Second-Progress-Report.pdf>>.

¹²⁶ Ecclesiastes 4:10, King James Version, in Donne, *Expostulation V*, 49, *supra*, n 1.

closely with the various EU institutions and agencies. This will help enhance trust and ensure that the UK continues to be seen as a trustworthy partner whether it be in the many operational areas mentioned earlier or by reducing the risk of “regulatory capture” and in developing the broader themes of improving ethical conduct and accountability among financial services firms.