The European Union in the Transnational Financial Regulatory Arena: The Case of the Basel Committee on Banking Supervision

Annamaria Viterbo*

ABSTRACT

Starting from the observation of an increased politicisation of the financial regulatory debate, the article analyses how this might impact the relationship between the European Union (EU) and the Basel Committee on Banking Supervision. The article first describes transnational financial networks after the global crisis and the shift from trust in technocratic autonomy to distrust and politicisation. It then turns to examine the legal bases for the participation of EU institutions in the Basel standard-setting process, discussing the challenges posed under EU law. The last part of the research focusses on the European Parliament’s attempts to become an active player in the transnational financial regulatory arena and on the role it might play to enhance the democratic legitimacy of the Basel process.

INTRODUCTION

Since the end of the 1990s, scholars have been devoting increasing attention to transnational networks of regulators, analysing their role in the global financial architecture as well as their legal nature.1

* Associate Professor of International Law at the Department of Law of the University of Torino, Italy and Law Affiliate of the Collegio Carlo Alberto, Torino. This article has been written in the context of the REScEU project (Reconciling Economic and Social Europe, www.resceu.eu), funded by the European Research Council (grant no. 340534) as well as in the context of the BRILLE project, funded by the University of Verona (Bando di Ateneo per la Ricerca di Base 2015). Email: aviterbo@unito.it.

Several authors focussed on the autonomy from political pressure of transnational networks,\(^2\) acknowledging the great relevance gradually acquired by their technocratic decisions.

The global financial crisis, however, marked a trend reversal, prompting increased political scrutiny over the dynamics of transnational financial regulation. The resulting politicisation of financial regulatory issues provided a stronger link to democratic processes, failing, however, to address the shortcomings of networks in terms of legitimacy and accountability.\(^3\)

The fear that domestic rules of representative democracy could be circumvented by networks—with regulatory policies being developed ‘without the *imprimatur* of the elected legislature’\(^4\)—has been recently voiced both in the US and in the EU, where legislative assemblies are demanding a greater involvement in the shaping of financial standards.\(^5\) In particular, the European Parliament (EP) highlighted its concerns that, despite being a co-legislator, its role in the field of banking prudential regulation is being reduced to a mere rubberstamping.

Starting from these premises, the article analyses the relationship between the EU and the Basel Committee on Banking Supervision (BCBS).

Section I describes the evolution towards an increasing politicisation of the debate over financial regulation.

Section II examines the legal basis for the participation of EU institutions in the Basel standard-setting process, discussing the challenges posed under EU law. Surprisingly, despite the current setup being highly problematic, the aspect of the participation of EU institutions in transnational networks was almost completely overlooked in the discussions leading to the establishment of the EU Banking Union. Even recent proposals for a more consistent external representation of the Euro area only mention the issue without putting forward concrete proposals.

Section III focusses on the EP and the role it might play in the transnational financial regulatory arena. It is contended that, in order to move away from a mere standards implementation function, the EP might engage in the consultations conducted by the

---

\(^1\) See Porter, above n 1, at 43.


The European Union in the Transnational Financial Regulatory Arena

BCBS before the final adoption of standards. Furthermore, the participation of the EP in public consultations could enhance the democratic legitimacy of the Basel process without jeopardising its independence.

Section IV concludes by identifying key issues for further research.

I. TRANSNATIONAL FINANCIAL NETWORKS AFTER THE GLOBAL CRISIS: FROM TECHNOCRATIC AUTONOMY TO INCREASING POLITICISATION

Since the 1970s, a growing number of actors have been involved in the shaping of the global financial architecture alongside State organs and intergovernmental groups like the G10. Transnational networks—or ‘international standard-setting bodies’ (SSBs)\(^6\)—gradually emerged, challenging the traditional norm-making monopoly of States both at international and national level. Nowadays, they are firmly embedded in the process of regulating international finance.

Transnational networks do not have international legal personality nor do they adopt legally binding instruments. Instead, they follow a common approach to international financial regulation: they develop soft law standards, promoting their implementation also in countries not directly involved in their formulation.

Participants in the standard-setting process show considerable diversity. In most of the cases, they are senior officials from national regulatory authorities and central banks, not members of the executive, diplomats, or elected representatives.

Networks of national regulatory and supervisory authorities and central banks enjoy a significant degree of autonomy from governments’ direction. Their independence, which domestically is often protected by law, translates into an even higher degree of insulation from the remit of politics in the transnational context.\(^7\)

For instance, writing on the history of the Basel Committee, Charles Goodhart considers remarkable the negligible level of top-down direction the Committee received, especially in the early years of its activities (1975–83): ‘there was virtually no interference from politicians, and relatively little from the G10 governors.’\(^8\) The BCBS was in fact established as a committee of specialists on which the G10 could rely on. While setting priorities, the G10 governors ‘often gave the BCBS considerable freedom to decide its own agenda, and frequently rubber-stamped the papers emerging from it; basically, the governors did not have the time or the desire for textual criticism. They had a general oversight role; the detail was to be hammered out in the BCBS.’\(^9\) Even if the mandate of the BCBS was formally limited to recommending to the governors of

---

\(^6\) ‘Transnational networks of regulators’ and ‘international standard-setting bodies’ can be considered interchangeable definitions. The first definition focuses on the composition and functioning of these actors, while the second focuses on their common approach to international financial regulation and on the legal nature of the acts they adopt.

\(^7\) Following the expansion of networks membership to include emerging economies, this might not be the case anymore. Senior officials coming from countries like China are in fact less insulated from their government’s influence than those coming from G7 countries.


\(^9\) Ibid, at 544–545.
The European Union in the Transnational Financial Regulatory Arena

The G10 convergence towards best practice, consensus achieved in the BCBS was rarely challenged.

Networks’ independence derives from the complex and technical nature of financial market regulation and it is considered both instrumental to the efficient performance of their mandate as well as necessary to prevent political opportunism. ‘Because of the esoteric subject matter, discussions within these networks also take place largely outside the scrutiny of domestic politics, with legislative assemblies and governments rarely directly involved in, or aware of, their work.’

Part of the literature describes bank supervisors and regulators as an epistemic community of highly specialized professionals who share a similar educational background, a common set of principled beliefs, and practical know-how. As such, they are considered to have ‘an authoritative claim on knowledge to impact policy outcomes’. They are provided with tools and skills that should facilitate achieving common positions that do not merely represent the lowest common denominator and that contribute to the stability of financial markets.

This narrative—technocracy as a legitimising factor—is strongly criticized by other prominent scholars, who perceive transnational networks as a challenge to representative democracy. Anne-Marie Slaughter, in particular, warns of ‘unelected regulators

10 Helleiner and Pagliari, above n 3, at 174. This was certainly true before the global financial crisis. In recent years, however, in certain jurisdictions and especially within the EU, the legislator often accepts to be influenced by international standards only after intense debate.


13 This endeavour, though, can be overshadowed by regulatory competition among national authorities trying to assert market power and export national preferences. See Daniel Drezner, All Politics Is Global: Explaining International Regulatory Regimes, (Princeton: Princeton University Press, 2007). The Author focuses on the exercise of power by dominant States as the primary driver of the creation of international financial standards.

[... who share a common functional outlook on the world, but who do not respond to the social, economic, and political concerns of ordinary citizens].

On top of that, ‘global regulatory decisions also escape accountability through international law mechanisms of State consent through treaties because they are often adopted by administrative bodies that operate below or outside the treaty system’. Due to their soft law nature, standards do not require ratification and allow significant flexibility for their transposition at national level.

The erosion of established accountability mechanisms causes inevitable tensions between the democratic scrutiny of public policy—which concerns treaty-making, law-making, and regulatory powers—and regulation by experts, especially when the latter is performed at transnational level and brings about radical changes within domestic systems.

These tensions are not diminished by the fact that the final outcome of the standard-setting process (at least at transnational level) is soft law instruments, which are indeed provided with impressive effectiveness. In fact, in spite of their non-binding nature, soft law standards produce a sense of legal commitment and compliance that is driven by the combined effect of a number of incentives: market sanctions (in particular, the threat of powerful States to restrict market access to firms and transactions from non-complying jurisdictions), institutional discipline (like International Monetary Fund (IMF) and World Bank’s surveillance and conditionality), and reputational costs and benefits (like naming and shaming, peer reviews, and regular monitoring on deviations in implementation). As a result of these dynamics, international financial standards are ‘voluntarily’ incorporated into binding national rules and regulations. This phenomenon has been described as the ‘hardening’ of soft law standards, which become embedded in domestic law, thus acquiring certainty and predictability while losing flexibility.

The global financial crisis brought to the spotlight the role of transnational networks in the regulation of international financial markets. Until then, the production of

regulatory standards had remained sheltered from the reach of national checks and balances or domestic accountability mechanisms. The crisis marked a turning point, prompting a wave of reforms. This resulted in an increased politicisation of the debate over financial regulation, both at intergovernmental and national level.

At intergovernmental level, the G20 largely succeeded in asserting political control over SSBs, becoming the primary agenda-setting body for international financial and economic policy and calling the Financial Stability Board (FSB) to coordinate at international level the work of national financial authorities and international SSBs in order to develop and promote the implementation of effective regulatory, supervisory, and other financial sector policies (Article 1 of the FSB Charter). In certain sectors, the FSB itself is becoming a standard-setter. As a result, Heads of State or Government and finance ministers are now deeply involved in strengthening the global financial system alongside central banks and supervisory agencies. Also, international soft law has become the main tool of the G20 programme to improve global economic stability and coordinate national regulatory reforms.

At national level, the crisis—and the massive bailouts of financial institutions in most G7 countries—put enormous strain on policymakers, triggering heated legislative debates. By questioning the validity of the market rationality theory, regulation emerged as the new trend. A significant portion of the public opinion started to be concerned about financial regulation, advocating the urgent need for reform and action to contrast the predominant role of finance in society. The autonomy of overly technocratic networks, once considered one of their strengths, became the subject of strong criticism.

As pointed out by Helleiner and Pagliari, politicisation is one of the legacies of the crisis, yet its effects are far from being clearly understood. They contend that increased politicisation might hamper transnational consensus or create resistance to the transposition of standards into domestic legal orders; the new scenario may also

20 See Barr (2014), above n 14, at 1001 ff.
23 See for instance the Total Loss Absorbing Capacity (TLAC) standard for global systemically important banks issued by the FSB in November 2015 in consultation with the Basel Committee.
24 It is worth noting that the Plenary, the sole decision-making body of the FSB, consists of deputy finance ministers, central banks governors, heads of national supervisory and regulatory agencies, the chairs of the main SSBs, and committees of central banks experts as well as high-level representatives of international organisations (Article 10 of the FSB Charter).
25 Helleiner and Pagliari, above n 3, at 181 ff. See also Newman and Posner, above n 18, at viii, according to which international soft law is indeed political and that academics have devoted relatively little attention to its political consequences: '[international soft law] reflects political contests and bargains and, once created, produces winners and losers and reconfigures power relations'.
result in increased competition among powerful jurisdictions and eventually lead to regulatory divergence and non-compliance.

More importantly, however, politicisation is introducing a broader range of actors into the transnational financial regulation arena, in addition to incumbent regulators, private sector representatives, and academics. Regulatory networks have become a new ‘locus of contestation [. . . ] unsettling existing pathways to political engagement, restructuring political organizations and interest group landscapes, and generating incentives for the relevant parties to reorient their focus, agendas, and strategies’.26

This is not only true for private sector actors, but also for institutions like the EP which—as we will see—is seeking a greater involvement in ‘shaping’ Basel standards at an early stage, while at the same time preserving its law-making power over banking prudential regulation at EU level.

On a positive note, politicisation might force technocrats to take into consideration the needs of subjects other than the financial sector and to assess more thoroughly the broader economic and social impact of their decisions. The EP might play a significant role in this endeavour. However, before looking into this matter more closely, we need to shed light on the relationship between the EU and the Basel Committee.

II. THE RELATIONSHIP BETWEEN THE EU AND THE BCBS

A. The view from Basel

The establishment of the Basel Committee was prompted by a string of bank insolvencies across Europe and the US that in the mid-1970s exposed the weaknesses of national banking supervision and the risks coming from international financial markets.27

As a response, at the end of 1974, the central bank governors of the countries of the G10 (plus Luxembourg as an associate member) decided to create the Committee on Banking Regulations and Supisory Practices, later renamed Basel Committee on Banking Supervision. In 1975, the Basel Committee became a permanent subcommittee of the G10, headquartered at the Bank for International Settlements (BIS).28

Nowadays, the BCBS is the most prominent forum for informal cooperation on banking prudential regulation and supervision.

As recently as January 2013, the BCBS’s oversight body—the Group of Central Bank Governors and Heads of Supervision (GHOS)—adopted a new Charter setting out the

26 See Newman and Posner, above n 18, at 156.
28 See the G10 Communiqué of February 1975.
Committee’s objectives and key operating modalities. The Charter represents the code of conduct of the BCBS, which is not a treaty-based international organisation. This is confirmed by Article 3, according to which ‘the BCBS does not possess any formal supranational authority’.

According to Article 4 of the BCBS Charter, membership is directly bestowed upon ‘organizations with direct banking supervisory authority and central banks’. No reference is made to States, as BCBS members are selected on the basis of ‘the importance of national banking sectors to international financial stability’. This requirement explains the uneven participation of EU national authorities. In fact, only the authorities of nine EU countries—Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden, and the United Kingdom—sit in the BCBS. Among them, Sweden and the United Kingdom do not participate in the single currency, nor in the Banking Union.

Currently, the BCBS gathers 45 authorities from 28 jurisdictions. For each jurisdiction, when the central bank is not provided with supervisory powers, it sits in the Committee together with the authority with formal responsibility for the prudential supervision of banking activities. Additionally, the Committee has nine observers, among which the BIS and the IMF. Observers can take the floor, but decisions are adopted by consensus only by BCBS members.

Alongside the authorities of the abovementioned EU Member States, the EU participates in the BCBS through the following institutions and agencies: the European Central Bank (ECB) in both its central banking and supervisory capacity recently acquired under the Single Supervisory Mechanism (SSM), the European Commission, and the European Banking Authority (EBA) (hereinafter collectively referred to as the ‘EU institutions’).

---

29 In the aftermath of the global financial crisis and following the G20 call to widen participation in SSBs, the BCBS expanded its membership. This happened in two batches: the first included authorities coming from Australia, Brazil, China, India, Mexico, South Korea, and Russia; the second included authorities coming from Argentina, Indonesia, Saudi Arabia, South Africa, and Turkey, plus Hong Kong SAR and Singapore.

30 The impact of Brexit on the role played by the UK within the Basel Committee is outside the scope of this research.

31 Only the United States hold four seats in the BCBS: the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation are all members of the BCBS.

32 According to Article 4 of the Charter, ‘other organisations’ may be invited to become BCBS observers only after consulting the Committee. Currently, observer status is granted to the following institutions: the Central Bank of Chile and the Banking and Financial Institutions Supervisory Agency of Chile; the Central Bank of Malaysia; the Central Bank of the United Arab Emirates; the BIS; the Basel Consultative Group; the European Commission and the EBA; the IMF.

33 Under the ‘Single Supervisory Mechanism’, the ECB has been conferred a number of supervisory powers, among which the power to establish international relations with other supervisory authorities (see infra). The term refers to the system of banking supervision in Europe that is composed by the ECB and the national competent authorities of the participating Member States. For the purposes of this study, the acronym ‘SSM’ is being used also to refer to the ECB when the institution is called to exercise supervisory functions under the SSM Regulation.
They have, however, different roles: on the one side, the European Commission and the EBA, which might be seen as representing the EU as a whole, only have observer status; on the other, the ECB and the SSM, which might be considered representing the Euro area and the Banking Union, are full members of the BCBS.

It is worth noting that EU participation in the BCBS has developed in parallel with European financial integration.

In the early years, the European Commission did not take part in BCBS meetings. In fact, the admission to the G10 ‘club’ of national banking supervisors and central bankers of a delegate from the Commission was deemed counterproductive and capable of altering the nature of the discussions. Only in 1987, when the negotiations on the Basel Capital Accord (Basel I) were underway, was the European Commission finally invited to attend BCBS meetings — albeit as an observer — with a view to fostering convergence between Basel standards and EU legislation. Since then, the European Commission has maintained an observer status, participating in sub-committees, working groups, and the GHOS. For more than two decades, the Commission benefitted from being the only EU institution allowed to take part in BCBS meetings. Its privileged position, however, was gradually eroded in the course of further EU integration.

The EBA was established on 1 January 2011 as part of the European System of Financial Supervision and took over the tasks and responsibilities of the Committee of European Banking Supervisors, as well as its observer status in the BCBS. The EBA Chair sits in GHOS meetings, while other representatives participate in the BCBS main sub-groups and working groups.

The ECB was granted observer status shortly after its establishment and contributed to the Basel Committee’s work by participating in working groups and providing

---

34 The discussion dates back to the meetings of the European Groupe de Contact, one of the precursors of the BCBS. Established in 1972, the Groupe de Contact gathered banking supervisory authorities of the then six members of the European Economic Community with a view to promote collaboration and facilitate information exchange. It did not include, however, the European Commission. See Goodhart, above n 8, at 12 ff.; Larisa Dragomir, European Prudential Regulation and Supervision: The Legal Dimension, (London: Routledge, 2010) 254.

35 At that time, the Commission craftly leveraged the perceived legitimacy of Basel standards as technically sound and politically neutral ‘to overcome policy stalemate over EU regulatory harmonization’ (see Newman and Posner, above n 18, at 75).


37 The Committee of European Banking Supervisors was established in 2004 as part of the Lamfalussy process. It was an independent advisory group on banking supervision composed of senior representatives of banking supervisory authorities and central banks of the European Union. In 2006, in order to coordinate its work with other international forums, the CEBS became an observer at the BCBS (see CEBS, Annual Report 2006, https://www.eba.europa.eu/documents/10180/16106/AnnualReport2006_000.pdf (visited 10 January 2019) at 25).

38 On the participation of EBA officials in the internal bodies of the BCBS, see Quaglia, above n 36, at 12.
comments on documents open for consultation. In November 2014, however, with the creation of the European Banking Union, both the ECB and the SSM became full members of the BCBS.

The SSM membership reflects the importance of the Euro area as a single supervisory jurisdiction as well as the fact that the ECB has become the competent authority for banking supervision across the Banking Union. The two seats granted to the ECB mirror the institutional separation between its supervisory and monetary policy functions.

Seen from Basel, the development of cooperation arrangements with EU institutions, which constantly followed EU integration until the creation of the Banking Union, proved to be quite straightforward.

In the process, however, the balance of powers among EU institutions shifted in favour of the more specialized ones. At present, while the ECB in its double capacity plays a pivotal role (with the ECB President also acting as the Chairman of the GHOS), the European Commission and the EBA seem to have lost prominence.

However, for the reasons that will be discussed in the next paragraph and bearing in mind that the EU can only act within the limits of the competences that Member States have conferred upon it, the current configuration of participation in the BCBS appears to be highly problematic under EU law.

B. The view from Brussels

Our analysis starts from the observation that the BCBS does not possess international legal personality, but its nature is that of a transgovernmental network gathering public officials from national administrative authorities. This poses a number of correlated problems.

In fact, while the EU treaties set out the legal framework for the negotiation and ratification of international agreements, far less guidance is provided on the issue of the EU’s participation in international organisations and even less so on its participation in transnational regulatory networks or the negotiation of soft law instruments. The Union’s right to become a member of international organisations can be derived from Article 216 of the Treaty on the Functioning of the European

---

39 In 2012, in order to counter the crisis, the European Commission and the European Council agreed on a set of reforms aimed at harmonizing prudential regulation and supervision of the EU banking sector. The new framework consists of the Single Rulebook and the Banking Union. The Single Rulebook provides a single set of harmonized prudential rules that credit institutions have to abide by in the Single Market and applies to all EU Member States. The Banking Union became a reality in November 2014 when the ECB took over responsibility for the supervision over the most significant banks in the Euro area. Euro area members became automatically members of the Banking Union, while the remaining EU Member States may join the SSM by establishing a regime of close cooperation with the ECB in its capacity as supervisor.

Union (TFEU), which enables it to enter into international treaties. On the other hand, Article 220 TFEU expressly allows the Union to establish forms of cooperation other than membership (like observer status) with international organisations. Since networks are not mentioned, only by interpreting Article 220 TFEU by analogy can we establish the Union’s power to develop appropriate forms of collaboration with bodies like the BCBS or with international fora like the G20.\(^{41}\)

In 2015, the Commission acknowledged the shortcomings of this framework, advocating improved coordination in all international fora and ‘enhanced mechanisms to coordinate positions’ for the FSB and relevant SSBs.\(^{42}\) However, at the time of writing, no follow-up action has been taken yet.\(^{43}\)

Treaty provisions on EU external relations cannot be easily adapted to the case of SSBs.

Article 138 TFEU only concerns the external relations of the Euro area with international organisations (like the IMF) and intergovernmental conferences (like the G20): had it been implemented (proposals by the European Commission were set aside as unfeasible)\(^ {44}\), it would still not be applicable in the BCBS scenario.\(^ {45}\)

Article 218(9) TFEU sets forth a procedure\(^ {46}\) to establish the common position that must be adopted on behalf of the Union ‘in a body set up by an agreement, when

---

\(^{41}\) ‘Le fondement de la participation de l’Union [aux institutions économiques internationales en dehors des organisations internationales] n’est pas une compétence externe pour l’adoption d’actes obligatoires, mais la capacité minimale de l’Union en tant que sujet de droit international, qui implique son interaction avec d’autres sujets sans nécessairement accepter des obligations. En ce sens, la participation [à ces institutions] présente une analogie plus forte avec les actes fondés sur l’article 220 TFUE qu’avec ceux fondés sur l’article 216 TFUE.’ (Emanuel Castellarin, \textit{La participation de l’Union Européenne aux institutions économiques internationales} (Paris: Pedone, 2017) 77).


\(^{44}\) Reference should be made in particular to the 1998 European Commission’s ‘Proposal for a Council decision on the Representation and Position Taking of the Community at International Level in the context of Economic and Monetary Union’ (COM (1998) 637 final, Brussels, 9 November 1998), which would have entrusted the representation of the Community in the context of the EMU to the Council with the Commission, and the ECB. Pursuant to Article 3 of the Proposal, Member States were to take all necessary steps to ensure the tripartite representation of the Community at G7 and G10 Finance Ministers meetings and preparatory groups.

\(^{45}\) On the external relations of the Euro area, see Roberto Cisotta, \textit{L’Unione europea nel sistema delle relazioni economiche e monetarie globali} (Torino: Giappichelli, 2018) 278 ff.

\(^{46}\) This is a simplified procedure whereby the Council, on a proposal from the Commission or the High Representative, adopts by qualified majority a decision on the common position to be adopted on behalf of the Union. The European Parliament has to be promptly informed, but it has no power of consultation or consent. On the voting rule applicable to Article 218(9), see ECJ (Grand Chamber), Case C-244/17 \textit{Commission v. Council} (2018) ECLI:EU:C:2018:662, para 25 ff.
that body is called upon to adopt acts having legal effects. The Court of Justice of the European Union (CJEU) clarified that: (i) there is nothing in the wording of the provision that prevents its application to bodies established by international agreements to which the EU itself is not a party, but only Member States (or some of them) are; (ii) ‘acts having legal effects’ is to be interpreted to include recommendations (or other non-binding instruments) that ‘are capable of decisively influencing the content of the legislation adopted by the EU legislature’. Were the BCBS an international organisation, this broad interpretation of Article 218(9) TFEU would perfectly fit the Basel Committee framework and its standards. This provision, however, only concerns bodies set up by an agreement, in other words established by a treaty, and indeed in the practice of the EU it has never been applied otherwise. This tool, therefore, cannot be considered applicable in the case at hand.

Article 216(1) TFEU, which codifies the ECJ case-law on external implied powers, only applies to the conclusion of international agreements with third countries or international organisations ‘where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.’ This provision has to be read in conjunction with Article 3(2) TFEU, which establishes when the competence of the EU to conclude such an agreement is exclusive.

50 See Matteo Ortino, ‘EU External Competences and the Participation to the Basel Committee on Banking Supervision’, 28(6) European Business Law Review 911 (2017), at 924 ff. However, an important difference between the ‘legal effects’ of OIV standards and Basel standards lies in the fact that relevant EU law explicitly mandates the Commission to base itself on the oenological practices recommended and published by the OIV (Germany v. Council (OIV), above n 48, para 6 ff.), while no similar provision applies to Basel standards.
51 It is worth underlining that, when the procedure envisaged by Article 218(9) of the TFEU was first introduced by the Treaty of Amsterdam, it only applied to the establishment of positions to be adopted on behalf of the (then) Community in bodies set up by association agreements. See Joni Heliskoski, ‘Annotation of Case 370/07, Commission v. Council’, 48 Common Market Law Review 555 (2011), at 557–58.
52 See ECJ, Case C-22/70 Commission v. Council (European Agreement on Road Transport—ERTA) (1971), EU:C:1971:32.
However, the implied powers doctrine extended to include the negotiation of soft law instruments, the procedure set forth by Article 218 TFEU would apply.\footnote{The application of Article 218 TFEU would have as a consequence the mandatory involvement of the European Parliament when the soft law instrument under negotiation covers fields to which the ordinary or the special legislative procedure apply. See Thomas Verellen, ‘On Conferral, Institutional Balance and Non-binding International Agreements: The Swiss MoU Case’, 1(3) European Papers 1225 (2016), at 1233.} In fact, prudential regulation, which represents the core of BCBS’s activities, is a field of shared competences between the EU and the Member States. In this field, the Single Rulebook provides a single set of harmonized prudential rules for financial institutions throughout the whole EU.\footnote{The Single Rulebook establishes a unified regulatory framework that is mandatory for all financial institutions in the EU, not being just limited to banks operating in Euro area countries. These acts are intended to create a level-playing field in financial services, harmonising capital requirements standards, national deposit guarantee schemes, and bank recovery and resolution procedures. The Single Rulebook includes the Bank Recovery and Resolution Directive (BRRD), the Capital Requirements Directive, the Capital Requirements Regulation, the Deposit Guarantee Schemes Directive, and the Payment Services Directive. It is worth noting that Article 93 of the BRRD explicitly recognises the EU’s competence to conclude agreements with third countries in accordance with Article 218 TFEU.} The EU has henceforth ‘occupied’ this subject area, producing the so-called ‘pre-emptive effect’ that prevents Member States from concluding an international agreement capable of affecting common rules or alter their scope.\footnote{Moreover, inferring from the OIV case (above n 48), it can be contended that the pre-emptive effect also prevents Member States from adopting any act—and therefore even soft law norms—‘having legal effects’ on the content of the EU legislation.}

Nevertheless, in the absence of an express provision on the participation of the EU in SSBS and given that the application of the implied powers doctrine has never been tested in relation to soft law standards, a more pragmatic approach ought to be considered. Proper consideration should in fact be given to the competence of each EU institution to engage in the Basel process.

Before addressing this question, a preliminary observation is required. The fact that membership in the BCBS is formally and directly recognized to central banks and banking supervisors produces a striking asymmetry: while the outcome of the Basel process is defined by supervisors and central bankers, the EU legal order keeps prudential regulation and banking supervision separate. They pertain, in fact, to different types of EU competences and are attributed to two different sets of institutions (which \textit{inter alia} either represent the EU or the monetary/banking union).

On the one side, the competence over banking prudential regulation is shared between the EU and its Member States\footnote{For instance, the legal basis of the Capital Requirements Directive (CRD IV, Directive 2013/36/EU, OJ 2013 L 176/27) is Article 53.1 of the TFEU, while the legal basis of the Capital Requirements Regulation (CRR, Regulation (EU) 575/2013, OJ 2013 L 176/27) is Article 114 of the TFEU.} and EU (level 1) prudential rules—like
the capital requirements regulation and directive that reflect Basel III standards—are adopted by the Council and the EP on the basis of a proposal from the Commission via the ordinary legislative procedure.\(^5\)

On the other side, in 2014, banking supervision became an exclusive competence of the EU for Member States participating in the Banking Union. Since then, significant banks of participating countries are directly supervised by the ECB, while the supervision of less significant banks is delegated to national competent authorities (NCAs) in what the ECJ has described as a decentralized framework, rather than a distribution of competences between the ECB and the national authorities in the performance of the prudential tasks referred to in Article 4(1) of the SSM Regulation.\(^5\)

However, in spite of the creation of the Banking Union, the features of the EU external representation in financial matters have almost been neglected.\(^6\) Being EU participation in international fora and SSBs a very sensitive issue, the co-legislators chose to adopt a minimal approach.

As a result, Article 8 of the SSM Regulation awards the ECB limited attributions ‘to develop contacts and enter into administrative arrangements with supervisory authorities, international organizations, and the administrations of third countries [emphasis added]’,\(^6\) provided that there is no prejudice to the competences of EU institutions and Member States and that those arrangements do not give rise to ‘legal obligations’ for the Union or its Members.\(^6\)

This provision can be interpreted to provide adequate legal grounds for the SSM to participate in the BCBS. One should not be misled by the reference to international

---

58 We are not discussing here the other levels of financial regulation, which include: the European Commission implementation of legislation via regulatory and implementing technical standards drafted by the European Supervisory Authorities (ESAs) as well as via delegated and implementing acts (level 2); non-binding guidelines, recommendations and standards adopted by ESAs to encourage both uniform implementation of level 1 rules and consistent supervisory practices (level 3); monitoring of Member States’ compliance with EU rules and enforcement of EU legislation by the EU Commission, ESAs, and competent authorities (level 4).


61 Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (the so-called ‘SSM Regulation’), OJ 2018 L 287/29, at 63–89.

62 The ECB made use of this power to join Memorandum of Understanding (MoUs) that Euro area NCAs had signed with third country supervisors before the SSM was established. These MoUs are being progressively replaced by ECB’s own MoUs (an ECB template MoU was drafted in 2016) covering information exchange on systematically important institutions, cooperation in ongoing supervision and in emergency situations as well as on-site inspections. See ECB, ‘Annual Report on supervisory activities 2016’, https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2016.en.pdf (visited 10 April 2019) at 43.
organizations. Instead, the focus should be on the first part of the provision, which grants the SSM the power to establish administrative relationships with other supervisory authorities. As a matter of fact, the BCBS is nothing more than a network of supervisory authorities and central banks whose relationships have been institutionalized. Moreover, Basel standards certainly do not give rise to ‘legal obligations’ within the EU legal order.

Similar considerations apply to the EBA. In fact, Article 33(1) of the EBA Regulation is the model upon which Article 8 of the SSM Regulation was drawn up. In addition, reference should also be made both to Article 1(5)c of the EBA Regulation, which envisages the Authority’s contribution in the strengthening of international supervisory coordination, and to recital n. 44, which specifically refers to the increasing importance of international standards and cooperation with supervisors outside the Union.

As for the ECB, its participation in the BCBS rests on Article 23 and Article 6(1)a and d of the Statute of the European System of Central Banks (ESCB). According to the first provision, the ECB ‘may establish relations with central banks and financial institutions’, while for the second ‘in the field of international cooperation involving the tasks entrusted to the ESCB’ (which now include supervisory powers) the ECB decides how the ESCB will be represented.

As for the capacity of the European Commission to stand as an observer, reference should be made to Article 17(1) of the Treaty on the European Union (TEU), which—following the changes introduced by the Lisbon Treaty—now entrusts the Commission with the power to ‘ensure the Union’s external representation’, leaving the institution room for manoeuvre to choose the most appropriate means to do so.

From the point of view of EU law, the current modalities of participation in the BCBS might pose a challenge to the principles of institutional balance as well as of sincere cooperation in its twofold meaning (horizontally, among institutions and vertically,
between the EU and its Member States). The peculiarities of the Basel process, in fact, do not justify the dismissal of EU structural principles.

First of all, in spite of their different roles, EU institutions should abide by Article 13(2) TEU: ‘Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions, and objectives set out in them. The institutions shall practice mutual sincere cooperation.’

In addition to reflecting the principles of distribution of powers and institutional balance, this provision requires institutions to practice mutual sincere cooperation. Mutual sincere cooperation expresses the idea that each institution should respect and allow full expression to the powers of the other institutions. Furthermore, not only does it require each institution to act without encroaching upon the powers attributed to another, but it also requires them to ‘seek to maximize the degree to which each can fulfill its functions in the EU system’ and assist one another in carrying out the functions established by the Treaties.

The CJEU has increasingly relied upon this principle in cases concerning the exercise of external powers, even if only in relation to the negotiation, interpretation, and implementation of international agreements (and therefore in a different framework than the one envisaged by the Basel process).

Indeed, the duty of sincere cooperation is a founding general principle that should guide EU institutions in all their actions and, therefore, even when they act within transnational networks. It follows that, in negotiating Basel standards, the ECB should properly consider the role of the Commission and of the EBA: their prerogatives cannot be neglected relying on the fact that, within the BCBS, they have merely observer status.

Second, the participation of (some) national authorities and central banks in the BCBS alongside EU institutions might constitute a challenge to the principle of sincere cooperation between the EU and its Member States.

Article 4.3 TEU provides, in fact, for a legal obligation for the EU and the Member States ‘to assist each other in carrying out the tasks which flow from the Treaties’. The duty of sincere cooperation imposes on Member States a general obligation to

---

70 Ibid. See also ECJ (Grand Chamber), Case C-425/13 Commission v. Council (2015) ECLI:EU:C:2015:483, para 69.
facilitate the achievement of the Union’s objectives and, symmetrically, to refrain from introducing any measures that could jeopardize their attainment.

The CJEU clarified that this fundamental principle of EU law also applies to the sphere of external representation and determines the scope of action for Member States.\textsuperscript{72} Indeed, whenever EU institutions establish a concerted external position, duties of cooperation and abstention are imposed on Member States, preventing them from acting unilaterally at international level.\textsuperscript{73} It is true that this construction has been applied by the CJEU only in relation to international agreements, but it is also true that the principles underlying the Court’s reasoning are beyond doubt the expression of a more general framework on the external representation of the EU.

Indeed, the duty of sincere cooperation is a general principle that applies throughout the Treaties.\textsuperscript{74} Therefore, this principle can be construed as also requiring Member States involved in transnational networks to previously coordinate their position with EU institutions.\textsuperscript{75} Failure to cooperate will, in fact, jeopardize the unity of the EU external representation.\textsuperscript{76}


\textsuperscript{75} National authorities of Member States have a duty to cooperate and consult not only with the ECB/SSM, but also with the European Commission, in particular with a view to enable the Commission to perform its role of guardian of the Treaties.

Unfortunately, overcoming Member States’ individual regulatory aims in order to form a cohesive position proved to be complex in many instances, last but not least in the discussions around sovereign exposures.

Moreover, the current scenario enables the nine Member States with a privileged representation in the BCBS to have a direct say in the standard-setting process, rather than having to bargain for their position to prevail within the EU.

III. IMPROVING COORDINATION WHILE ENHANCING DEMOCRATIC LEGITIMACY: WHAT ROLE FOR THE EUROPEAN PARLIAMENT?

At the end of 2017, in an assessment of the functioning of the SSM, the European Commission welcomed the membership status obtained in the BCBS by the ECB and its separate supervisory arm. At the same time, however, the Commission pointed out that, in spite of efforts by the ECB and the SSM, an aligned EU position in Basel still had to be achieved.

At present, based on the analysis of documents and interviews with stakeholders, it can be affirmed that no formal procedure has been established for the definition of common negotiation positions at EU level. Moreover, there is ‘no formal mechanism for EU institutions that participate in BCBS meetings to report back’.

Rather, informal coordination takes place through ‘ad hoc bilateral/multilateral contacts among EU participants in the BCBS [held] for the purposes of exchanging views, reaching a shared understanding on certain issues, or trying to find a common stance/agreement in preparation for a meeting.’

A number of preparatory exchanges usually take place among all European institutions concerned, even if not on a systematic basis. Often, before important meetings, a common understanding is sought by means of a teleconference. Ethics and the internal cohesion of experts usually ensure that common goals are achieved.

---

77 For instance, during the discussions on Basel I, instead of aligning with other EU members, the United Kingdom sided with the United States.

78 The regulatory treatment of sovereign exposures is a highly sensitive topic especially in Europe, where governments’ positions are far from uniform. See BCBS, ‘The Regulatory Treatment of Sovereign Exposures, Discussion Paper, December 2017’ (issued for comment in March 2018), https://www.bis.org/bcbs/publ/d425.pdf (visited 10 January 2019). After reviewing the work of the Task Force on Sovereign Exposures set up in 2015, the Committee was not able to reach a consensus to make any changes to the treatment of sovereign exposures and decided not to consult on the ideas presented in the paper cited above, only asking for comments from interested stakeholders.


80 Ibid, at 17. Before the ECB and the SSM joined the Basel Committee, the European Commission had already complained about the limited role of the EU in SSBs at global level and contended that European coordination in international fora such as the Basel Committee needed to be stepped up prior to meetings in order to define precise European negotiation positions (see European Commission, ‘White Paper on Financial Services Policy 2005–2010’, COM (2005) 629 final, Brussels, 5 December 2005, at 14).

81 See Quaglia, above n 36, at 17.

82 Ibid.
In addition, the SSM is increasingly playing the role of coordinator of national authorities involved in the Basel Committee. Although this activity is a direct consequence of the creation of the Banking Union, it is still at an early stage. In fact, even if the scope of the SSM is more akin to that of the BCBS, a unified representation of the Banking Union through the SSM currently does not seem to be politically feasible.83 Besides, there are subject matters that are not treated by the SSM and are still under the competence of national supervisory authorities (like anti-money laundering, consumer protection, corporate governance, and macro-prudential supervision).

Therefore, there is room to improve coordination both among EU institutions and between national authorities and the EU, with the latter being the more problematic.

Cohesiveness is, indeed, an important factor for the EU’s ability to convey its preferences in negotiations concerning international financial standards.84 ‘Distinct Member State regulatory preferences, the extent to which such preferences cohere to an EU approach, and the related and varying ability of the EU to “up-load” its preferences internationally, to “down-load” international standards, and to “cross-load” its preferences to third countries, have been identified as leading to differing degrees of EU influence on international finance governance over time’.85

To avoid fragmentation, the only way forward seems to be the establishment of enhanced coordination mechanisms between the EU and its Member States, as envisioned by the European Commission in the 2015 ‘Roadmap for moving towards a more consistent external representation of the Euro area in international fora’.86 These mechanisms would include a stronger commitment of Member States to respect common positions established at EU level as well as regular discussions on coordination issues, both before and after key international meetings.87 In this context, the Commission would reserve for itself the role of monitoring compliance with the common stance.

However, the European Commission is not the only actor interested in playing a more significant role in the negotiation of financial standards.

---

83 ‘A supervisor from another planet, landing on earth to study our banking union, would probably assume that the SSM had taken over the representation in the relevant cooperation fora, having taken over the operational responsibility of supervision. We are very far from that logical endpoint.’ Ignazio Angeloni, ‘The SSM and International Supervisory Cooperation’, Remarks by Ignazio Angeloni, Member of the Supervisory Board of the European Central Bank, at the Symposium on ‘Building the Financial System of the 21st Century: an Agenda for Europe and the US’, Eltville, 16 April 2015, https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150417.en.html (visited 10 January 2019). See also the European Parliament, ‘Resolution on the EU role in the framework of international financial, monetary and regulatory institutions and bodies’, 2015/2060(INI), P8_TA(2016)0108, 12 April 2016, calling on Member States to accept the representation of the Banking Union in the Basel Committee through the SSM.


86 See European Commission, above n 42, at 9.

87 Ibid.
In recent years, the EP has intensified its political oversight over the EU’s engagement in the international regulatory process, especially after having been attributed new powers in the field of external relations by the Lisbon Treaty.88

In 2016, in its ‘Resolution on the EU role in the framework of international financial, monetary and regulatory institutions and bodies’, the EP contended that ‘national parliaments and the EP should not be reduced to a role of mere rubberstamping, but must be incorporated, actively and comprehensively, into the whole decision-making process’.89 In particular, the EP has been very vocal in underlining, on the one side, the fact that the BCBS is a ‘non-legislative’ standard setter that lacks transparency, accountability, and democratic legitimacy and, on the other side, its role of co-legislator on banking prudential regulation.90

Therefore, to preserve its law-making power in the field, the EP envisioned the possibility of: (i) giving the ECB/SSM a binding mandate for negotiations; (ii) adopting ‘guidance resolutions’, setting out the EP general policy orientation; and (iii) establishing a ‘financial dialogue’ with a view to adopting guidelines on the position the EU should follow in relevant fora.91 Each of these proposals will be discussed in turn.

(i) The adoption of a binding negotiating mandate by the EP would infringe the prerogatives of the Council and the independence of the ECB/SSM.

The Council has recently expressed its position on the negotiation of soft law instruments (‘instruments which are not intended to be legally binding, but which nonetheless contain policy commitments by the EU’) with third countries and international organisations.92

Although these powers have never been formally attributed to the Council, the latter contends that the determination of the Union’s position on these instruments falls within its policy-making functions. In particular, this power would stem from Article 16(1) TEU to be read in conjunction with the Treaty provision granting the Council

the power to act in matters under negotiation.\textsuperscript{93} Had the Council a voice in Basel, the same reasoning would well apply to the negotiation of standards for banking prudential regulation and supervision.

In any event, a binding negotiating mandate, either adopted by the Council or the EP, would breach the ECB/SSM’s political and operational independence. The political independence of the ECB is codified in Article 130 TFEU: neither the ECB, nor any member of its decision-making bodies, are allowed to take (or seek) instructions from EU institutions or bodies, governments of EU Member States, or any other body. At the same time, EU institutions and bodies as well as governments must refrain from attempting to influence members of the ECB decision-making bodies.\textsuperscript{94}

The independence of the ECB’s supervisory arm is safeguarded by Article 19 of the SSM Regulation. Its wording is almost identical to Article 130 TFEU, with the only addition of independence from the influence of the private sector.\textsuperscript{95}

Besides, a binding mandate would limit the scope of negotiation within the BCBS and jeopardize consensus.

(ii) The adoption of ‘guidance resolutions’ of a political nature, indicating the EP’s position on negotiations in progress, seems more feasible. These resolutions, similar to the one adopted in 2016 on the finalisation of Basel III,\textsuperscript{96} provide the EP with an additional tool to make its standpoint known at a preliminary stage (i.e. before the transposition of Basel standards into EU law).

(iii) Another viable option might be the setting up of a ‘financial dialogue’ mirroring the ‘monetary dialogue’ between the EP and the ECB.\textsuperscript{97}

It has been contended, in fact, that the strengthened role of the ECB/SSM deriving from the Banking Union should go hand-in-hand with enhanced accountability. This can be achieved by building upon the 2013 Interinstitutional Agreement between the EP and the ECB on the exercise of democratic accountability and oversight over the ECB’s supervisory tasks.\textsuperscript{98}

\textsuperscript{93} For what concerns the negotiation of standards for the prudential regulation and supervision of banks, reference can be made to Article 114 TFEU (the legal basis upon which the Capital Requirements Regulation was adopted) or Article 53(1) TFEU (the legal basis upon which the Capital Requirements Directive IV was adopted).

\textsuperscript{94} See also Article 282.3 TFEU and Article 7 of the ESCB Statute.

\textsuperscript{95} See also Recital 75 of the SSM Regulation.


The interinstitutional agreement already envisions the participation of the Chair of the Supervisory Board in EP ordinary public hearings, ad hoc exchanges of views and confidential meetings that may cover all aspects of the activity and functioning of the SSM. The scope of such meetings can be broadened to include issues being debated by the ECB/SSM in Basel, adopting when necessary appropriate safeguards to protect confidentiality and prevent the risk of disclosure of sensitive information.99

In 2015, reacting favourably to the EP’s request to strengthen cooperation on banking matters, the President of the ECB declared his willingness to stand ready to inform the EP about the ECB positions in SSBs and international financial fora.100 Since then, however, progress in this area has been very modest. For instance, the ECB Annual Reports on supervisory activities for the years 2017 and 2018 contain no information regarding the substantive positions taken within the BCBS.101

The inclusion of BCBS items in the financial dialogue would facilitate the EP’s involvement, but this would not make its voice heard in Basel. To this end, regular direct relations between the EP and the BCBS might be established following the first two public exchanges of views between the EP’s Committee on Economic and Monetary Affairs and the BCBS Secretary General that were held in 2016 and 2017 to discuss regulatory reforms in progress.102

Finally, it is worth noting that, in the attempt to address legitimacy and transparency concerns, since the late 1990s the BCBS has engaged in one of the most procedurally sophisticated notice and comment process.103 So far, it appears that BCBS public consultations have been mostly dominated by banking industry lobbies, private financial actors, supervisors, and experts.104 This participatory mechanism, however, also...
enables civil society groups to provide their direct input to BCBS’s activities. Their involvement in the consultation process could be certainly improved, with a view to contrasting capture by private sector and industry lobbies.\textsuperscript{105} By engaging more often in public consultations, the BCBS could enhance the legitimacy of its standard-setting process, thus compensating for the absence of democratic checks and balances.

In turn, the EP could take the opportunity to comment on BCBS consultative documents on a regular basis, enhancing its linkages with the transnational level. This tool would provide the EP with the chance of directly conveying its position to the BCBS, thus contributing in an indirect way to the standard-setting process without affecting the BCBS’s ability to achieve consensus. Moreover, the EP might help the BCBS better assess the broader positive and negative impacts of new financial standards on the economy and society in general.\textsuperscript{106}

On a final note, BCBS’s public consultations should be distinguished from the ones usually undertaken \textit{ex post} by national authorities on measures—draft laws or regulations—aimed at the implementation of standards in domestic legal systems.\textsuperscript{107} Notably, national authorities have seldom invited interested parties to comment on the position to adopt in Basel in the course of negotiations.\textsuperscript{108}

\section*{IV. CONCLUSIONS}

In the aftermath of the financial crisis, politicisation and an increased distrust in technical knowledge have diminished technocracy as a basis of authority.\textsuperscript{109}

We contend that, by virtue of their highly specialized knowledge, regulators ought to be considered better equipped than politicians to conceive technically sound standards.

\textsuperscript{105} To date, in fact, it has been pointed out that ‘the real benefits of notice and comment appear quite limited given that it has been mostly used as a lobbying tool by banks rather than as a mechanism for conveying the demands and concerns of a broad set of stakeholders. Stark asymmetries in information, financial resources, and technical expertise between transitionally organized private sector associations and civil society actors often hamper active participation by the latter in the consultation process’ (see Peihani, above n 19, at 154).


\textsuperscript{107} Data on national public consultations can be obtained from the BCBS’s progress reports on adoption of the Basel regulatory framework. See, also, European Commission, ‘Consultation Document: Exploratory Consultation on the Finalisation of Basel III’, 16 March 2018, available at https://ec.europa.eu/info/sites/info/files/2018-basel-3-finalisation-consultation-document_en.pdf (visited 10 April 2019). The European Commission’s consultation was aimed at gathering evidence on the potential impacts of Basel III reforms on the EU banking sector and the wider economy as well as on the implementation challenges which would arise for institutions established in the EU. The Commission received 56 responses, mostly from financial industry associations.


\textsuperscript{109} See Newman and Posner, Elliot, above n 19, at 160.
There are, however, ways to increase the credibility of technocratic authorities like transnational SSBs, notably by enhancing their transparency, accountability, and democratic legitimacy. The aim should not be limited to the adoption of well-conceived financial standards, but also of measures that meet social values and broader public policy goals, while preventing the predominance of a narrow set of interests or the hegemony of the financial paradigm.

To this end, the production of financial standards should be opened up to involve non-technical players in policy-making matters. Taking advantage of notice and comments procedures and consultations, a wider range of stakeholders, including civil society, could have access to the financial regulatory arena without affecting transnational networks’ independency.

Finding the right balance between reliance on technical expertise and democratic legitimacy in international financial regulation will be the challenge for the years to come. The EP, which is seeking to bolster its position in the design of Basel standards, might play a role in this endeavour.