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Sideek Mohamed Seyad[1]

A Legal Analysis of the Global Financial Crisis from an EU Perspective

Introduction

The financial crisis that was ignited in the US subprime market in 2008-2009 has proved to be one of the most tumultuous times on record in the global financial markets. The International Monetary Fund (IMF) has acknowledged it to be the worst crisis to hit the world economy since the Great Depression in 1929-1931. Markets and economies around the world today are so inter-connected that hardly any nation has been immune to the crisis.[2]

The victims range from the ordinary citizen with a small bank deposit to small, medium and large businesses, and include local and regional authorities. There were even some countries, such as Iceland and Latvia, whose economies were on the verge of collapse. Some financial and commercial enterprises have disappeared and others survive either by reducing the work force or by cutting wage costs.

In the context of the European Union (EU), some of its Member States introduced remedial measures to prevent the financial crisis from spreading to other sectors of the economy. Huge cash injections were shot in to the system in order to rescue some of the financial institutions, while others were either nationalised or allowed to perish. On the monetary front, the European Central Bank (ECB) and other national central banks relaxed their monetary policies, pushing down the interest rates to almost zero in order to reactivate the credit market and thereby infuse market confidence.

The aim of this text is to focus on some of the legal and institutional issues relating to the financial crisis from an EU perspective. An extraordinary summit meeting of the Heads of State and Government of the G-20 countries took place in April 2009 in London, where the global financial and economic crisis was discussed. At the end of the summit they agreed to adopt a series of legal and fiscal measures, not only to contain the financial crisis before it infects the rest of the economy but also to prevent or at least reduce the risk of the emergence of another round of the financial crisis. Some of the legal and institutional issues discussed at the G-20 having close relevance to the EU are also briefly addressed in this text. Before making the concluding remarks, the impact of the financial crisis on the future development of the EU will be briefly surveyed. The text ends with an analysis of the measures and proposals that were agreed by the European Council in Brussels on 18/19 June 2009.

G-20 summit on Stability Growth and Jobs

The aim of the London summit of the G-20 in April 2009 was to find a solution to the global financial and economic crisis.[3] Unlike most of its previous meetings, the convening of the G-20 in London at the level of Heads of State or Government is an acknowledgment of the acuteness of the situation.[4] The gathering of this meeting at the highest political level confirms that the global financial crisis cannot be overcome by the isolated efforts of any one nation but requires comprehensive and coordinated action by all major economic powers.

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[1] Associate Professor and Researcher in European Integration Law at Stockholm University

[2] In 2009, almost 90 per cent of the economies around the globe were acknowledged by the international financial institutions, such as the International Monetary Fund (IMF), to be in recession.

[3] The G-20 countries are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, the US and the EU.

[4] The G-20 was originally set up by six countries as the G-6 after the Asian financial crisis in 1999 with the intention of discussing international co-operation among finance ministers and central bankers.

The G-20 includes both major industrial powers, such as the US and Germany, and emerging economic powers, such as China and Brazil.[5] The London meeting was quite representative in terms of economic size and share of the world's population. However, it excluded more than 170 developing countries, which are the most vulnerable to the effects of the global financial crisis.

The G-20 meeting was preceded by rifts and differences among its members on how to deal with the global financial and economic crisis. The US wanted to stimulate the world economy by increased spending, whereas the EU's prescription was to improve financial market regulation.[6] Most of the EU Member States would like to wait and see what will be the effects of the stimulus programmes they have put in place and their next priority is to implement a credible system that would help prevent similar crises developing in the future.[7]

However, there were diverging views on a number of issues even among some of the EU countries represented at the G-20 meeting. The UK's view was in line with the US position in that it emphasised the need for public spending to mitigate the crisis. Germany, on the other hand, not only opposed further stimulus packages but also wanted all financial markets –including hedge funds and rating agencies – to be subjected to stricter supervision and regulation. France refused to accept anything short of harsh measures to regulate the global financial markets and even threatened to boycott the G-20 summit if other countries did not agree to do so. The emerging economies such as Brazil, Russia, India and China had their own agendas, notably to gain extra voting power in international financial institutions such as the IMF.[8]

Outcome of the G-20 summit

In the light of all the differences between the members of the G-20, the overall outcome of the summit may be described as a relative success. Not only did they manage to agree on a series of emergency measures to combat the financial crisis, they also satisfied most of the diverse expectations of the G-20 members.[9]

Financial market reforms

An important decision taken at the meeting was to reform the global banking system. The G-20 agreed in principle to expand the scale and scope of regulation of the financial market. The aim of the proposed reforms is not only to further strengthen the regulation of the traditional financial markets but also to subject various complex financial products to stricter control and supervision.

Shadow banking system

The nature and scope of activities of the so-called "shadow banking system" was an important issue on the agenda at the summit. The shadow banking systems had been sharply criticised for their lack of transparency and accountability. They were also identified as a contributing factor to the financial crisis. Within this framework various financial intermediaries (such as hedge funds) provide complex financial services for rich clients in return for expensive fees and commissions but overall they are not subject to sufficient and proper supervision by the market regulators.

The credit rating agencies are another category of financial intermediaries operating within the shadow banking system that also, directly or indirectly, contributed to the financial crisis. The rapid and to some extent unsustainable capital market expansion has been partly attributed to the investors' over-reliance on advice from such credit ratings agencies, particularly in relation to assessments of credit risk. It was agreed at the summit to establish a credible system of supervision of hedge funds and a registration system of credit rating agencies in order to avoid conflicts of interests.

Bonus payments

The problems associated with remuneration policies, which have generated much debate in Sweden following the financial crisis, were also acknowledged at the G-20 meeting as a global problem. The practice of excessive bonus payments encouraged excessive leverages and risk taking and partly contributed to the crisis.[10] There was an understanding reached at the summit to deal with this problem from a global perspective. However, the meeting failed to agree on any specific measures.

Tax havens

The financial crisis brought into sharp focus the financial activities of certain special tax jurisdictions, known as tax havens or paradises. These tax havens are not confined to uninhabited islands or hidden spaces in the middle of an

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5 The G-20 represents 85 per cent of the global gross national product, 80 per cent of world trade and two-thirds of the world population.

6 The Czech Prime Minister, speaking in the European Parliament in his capacity as current holder of the EU Presidency, attacked the US's growing budget deficit and the "Buy America" campaign by saying that "all of these steps, these combinations and permanency are the way to hell".

7 The EU would like await the results of the existing recovery plans of 400 billion in total in 2009-2010, which represents 3.3 per cent of EU's GDP.

8 China is one of the major contributors to the IMF but has only 4 per cent of the votes.

9 A communiqué issued after the summit is published at http://www.londonsummit.gov.uk/en.

10 For example, the activities of rogue traders who brought down Barings Bank in 1995 and the French bank, Société Generale, in 2008 can be attributed to complacency and a market culture that rewards excessive risk-taking.

ocean but operate across the globe and portray themselves as off-shore financial centres. Most of the off-shore financial centres are tiny microstates whose prosperity and survival depends largely on their secretive and complex financial industry. For a considerable period of time, these financial centres have undermined the tax-raising powers of many countries, such as Sweden[11] and the US,[12] and when the financial crisis hit, the countries affected by capital flight began to lose their tolerance towards them.

The US and the EU Member States have exhausted much of their financial resources in the process of rescuing collapsing industries during the financial crisis. They have to look for ways and means to raise revenues to finance expensive economic recovery projects. At this critical moment in time it is not surprising that they would like to recover the billions of dollars and euros hidden, or invested, by their citizens in secret bank accounts in these tax havens.

At the G-20 summit, a strong and clear message was delivered to uncooperative off-shore financial centres; that they should strictly adhere to international standards, not only in tax matters but also in the field of prudential and anti-money laundering activities.[13] In case the relevant financial centres fail to comply, G-20 also decided to authorise the Organization for Economic Cooperation and Development (OECD) to name and shame such countries and, furthermore, to recommend remedial measures to discourage irresponsible activities.[14] The G-20 considered that a variety of sanctions would be conceivable, not excluding the imposition of economic and financial sanctions on such jurisdictions. However, no specific details were disclosed at the summit concerning the nature of these sanctions or how they could be imposed collectively by the G-20. If any collective action is to be taken, the best option would be to adopt a resolution for such purposes in the United Nations (UN) Security Council, since most of the tax havens are members of the UN.

The financial crisis also threatened international trade due to the disruption of the payment system. The banks stopped lending to each other and were hesitant to finance companies and individuals involved in international trade. In order to resolve the crisis of confidence in the credit market, the G-20 decided to allocate about $250 billion over a period of two years to boost international trade. They agreed to channel those funds through national agencies and multilateral development banks.

Emergence of protectionism

Another negative outcome of the financial crisis was trade protectionism, which was also high on the agenda at the summit. In order to counter protectionism, the G-20 agreed to name and shame countries that would breach the free trade rules. The World Trade Organization (WTO) was given the task of monitoring and reporting publicly on a quarterly basis.

No decision was taken to establish a regulator to police the global financial market. However, an agreement was reached to replace the existing Financial Stability Forum with a new Financial Stability Board and to give it a strengthened mandate. The Board will be set up to work with the IMF to ensure cooperation across borders and to provide an early warning mechanism for the financial system.

The IMF was the biggest beneficiary of the G-20 summit. It was allocated extra financial resources, worth approximately $750 billion, to help countries in need of economic aid. In addition, there was also a pledge of a new overdraft facility or special drawing rights (SDR) of $250 billion to be shared among the 186 members of the IMF. Such allocation of trade credits could make a big difference in the short term for the poorest countries. The G-20 also agreed to provide additional lending to the world's poorest countries by selling part of the IMF reserves. Moreover, there was an agreement to reform the international financial institutions, the World Bank (WB) and the IMF, which are popularly referred to as the twins of the Bretton Woods Agreement. Even though the details of the reforms were not disclosed, there might be a shift in the balance of power from the West to China, Brazil and India, who have gained increased voting rights to reflect their share of contributions to the IMF and the WB respectively.

Impact of the financial crisis on EU in general

The financial crisis was a testing time for the EU and its ability as an international organisation to withstand such a serious turmoil. All EU Member States had been victims of the crisis to varying degrees. It is difficult to say whether the financial crisis will promote further integration and strengthen the unity in the union; or whether it will lay the foundation for a gradual disintegration.

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[11] According to the Swedish tax agency, more than SEK 1500 billion are hidden in off-shore bank accounts to avoid paying tax at home. It claims, further, that the annual capital flight is in the range of approximately SEK 45 billion.

[12] The recent decision of the US Department of Justice to prosecute the Swiss bank UBS for assisting US citizens to hide their income from tax authorities is an indication of that the policy towards uncooperative tax jurisdictions has changed.

[13] According to the Organization for Economic Cooperation and Development (OECD), the value of assets held in off-shore financial centres totals more than $7 trillion.

[14] Shortly after the conclusion of the summit, the OECD published a blacklist of countries deemed uncooperative. It said Costa Rica, Malaysia, the Philippines and Uruguay had not made any commitment to respect international standards. There is also a list of 38 places that have agreed to improve standards but as of yet have failed to do so, such as Gibraltar, Liechtenstein, Andorra and San Marino.

There were indeed signs of dissension within the EU at the initial stages of the financial crisis, sparked by the Member States' panic reaction. Some Member States adopted various haphazard measures to rescue their own banks and financial institutions. These unilateral rescue measures were introduced partly due to the shortcomings in the institutional structure of the EU.

The architecture which the EU has built is too cumbersome. Under the EU legal system, it is difficult to coordinate a common approach in an emergency situation. It has no competence to legislate in some areas, such as taxation, and even though cross-border provision of banking services is liberalised, regulation is to a great extent handled at the national level.

The EU currently does not have a credible and effective mechanism that enables it to respond swiftly to an emergency situation such as the financial crisis. In order to adopt legislation, the Commission has to submit a proposal to the Council of Ministers and the European Parliament. These institutions then have to deliberate for weeks or months – sometimes even years – before a vote is taken. Moreover, in certain policy areas, an agreement has to be reached by the European Council at the Heads of State or Government level. A law-making system of this kind is hardly an optimal solution when the course of events seems to change by the hour. This situation should be contrasted with the legal flexibility found in some countries, which were able to act swiftly in similar situations.[15]

In responding to the crisis, national interests began to override the broader goal of European integration as Member States adopted various measures to protect their own industries.[16] Not only did it threaten the proper functioning of the single market; it also created political rifts between the Member States. There was even a risk of the EU being divided along a North-South or an East-West line. Some EU summits were preceded by mini-summits of Heads of State or Government of the Central and Eastern European (CEE) Member States.

The countries that joined the EU after 2004 were hit harder by the financial crisis than the incumbent Member States. Some of them also had to confront a monetary crisis that destabilised their currencies. This was reminiscent of the monetary crisis that hit the EU in 1992 and disrupted the Member States' monetary systems.[17] At that time, one currency after another pegged to the exchange rate mechanism (ERM) fell prey to speculation.[18] A similar scenario developed in certain CEE Member States, for example in Latvia, but to some extent it was resolved by the financial intervention of the EU and the IMF. As a result of the monetary crisis a number of Member States have requested a fast track to EMU membership as a means to avoid a monetary crisis in the future.

The banking system in the CEE Member States was badly affected by the crisis. The banking market, particularly in the Baltic region, is dominated by foreign banks – in particular Swedish banks – that have large exposures to this region.[19] There was even a risk of a collapse of the entire banking system in the Baltic region, had Western banks failed to intervene and provide credit lines to subsidiaries that operated there.

The future stability and unity of the EU would largely depend on the restoration of normalcy in the eastern part of its territory. Some of the CEE Member States are in urgent need of financial assistance to overcome the financial and monetary crisis. The IMF has rescued some of them and others have received financial assistance from the EU to deal with the crisis.

A related issue is the impact of the financial crisis on the Economic and Monetary Union (EMU). There is a fear that the crisis might even lead to the break-up of the EMU. A similar fear was expressed soon after the rejection of the draft Constitutional Treaty by France and the Netherlands in their respective national referenda.[20] Today a serious monetary disintegration of the Euroland would seem unlikely, but it may be too early to rule out such a scenario altogether; especially in light of the current financial crisis, which nobody predicted would be so severe, painful and protracted.

Some of the world's largest and prosperous banks are located within the Eurozone. Most of these banks are sufficiently capitalised and in relatively good health and hence the

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[15] This situation should to be contrasted with the US, where, for example, the most recent rescue package was passed swiftly by Congress and the President.

[16] For example, measures such as the French bail-out plan for its car industry on condition it did not move jobs away from French soil raised fears of protectionism.

[17] Sideek M. Seyad, "Capital Movements and the Currency Crisis in the European Union" (1996) 3 European Financial Services Law 193-200.

[18] Apart from the Deutschmark, the Belgian franc and the Dutch guilder were the other two currencies not subject to downward market pressure as they had closely followed the anti-inflationary policies of the Bundesbank ever since the start of the ERM in 1978.

[19] Swedish banks control nearly two-thirds of the banking market in the Baltic countries. The three leading Swedish banks, Nordea, SEB and Swedbank, together have a loan exposure of SEK 500 billion to this region.

[20] Sideek M. Seyad, "The European Constitutional Crisis and its Consequences on the Euro" (2007) December, Juridisk Tidskrift 148-160.

risk of a collapse of the banking system within the Eurozone is extremely small.[21] On the other hand, in view of the enormous size of some these banks – in terms of their capital and the nature of their client base, ranging from national governments and multinational companies to ordinary deposit holders – it will be not an easy task for Member States to rescue them, should they run into serious liquidity problems. If such a financial risk develops in one or more of the large economies within the Eurozone, destabilisation cannot be completely ruled out.

A pan-European financial regulator

There are several items of legislation adopted in the EU to integrate its financial and banking market. However, the existing legislation did not sufficiently address the supervision of those institutions that provide cross-border financial services. The financial services directives have left much of the supervisory competence to national authorities. The system of home country control prescribed in these directives has proved to be insufficient for the effective supervision of financial institutions that operate across borders.

Under the existing regulatory system, as confirmed by the recent financial crisis, national regulators are ill-equipped to supervise financial institutions that provide cross-border services in other Member States. Since the outbreak of the financial crisis, a gradual but cautious consensus is developing among Member States to move towards a centralised system of supervision of the EU banking system.

Even before the financial crisis, the need or desirability for the establishment of a pan-European regulator was implicitly recognised in the Lamfalussy report on the securities market.[22] This report highlights the need to further strengthen cooperation between national regulators for the effective enforcement of EU law. If this objective turns out to be unachievable, the report recommends that the EU should move towards the establishment of a single regulator.

As the financial crisis began to intensify, the Commission mandated a High Level Group chaired by a former central banker to propose recommendations to reform the financial market.[23] This committee was established following the criticism of the Commission's lethargic, belated and ineffective response to the financial crisis. The task force *inter alia* recommended the establishment of a pan-European body – known as the European Systemic Risk Council – to strengthen the supervision of financial institutions. Even though the task force suggested that domestic banks should be supervised by national supervisors, it also acknowledged that this system would not be effective in cases where cross-border institutions were involved.

It is appropriate for the EU to give serious consideration to the establishment of a central authority, such as a Single Regulator, to police its financial market.[24] A centralised system of supervision has become increasingly relevant in light of the current level of integration in the EU financial market. If the stability of the financial market is to be restored, preserved and promoted, the national supervisory bodies should be made subordinate to a pan-European regulator.[25]

The institutional structure and competence allocated to the European System of Central Banks (ESCB) to formulate and implement the centralised monetary policy of the Eurozone may be an appropriate model for a centralised system of financial supervision. The competence of prudential supervision of credit institutions and other financial institutions could be devolved on the ECB within the framework of the existing Treaties.[26] However, if such supervisory powers were to be transferred to an independent institution other than the ECB, it would require amending both the Treaty and a number of national constitutions.[27]

Concluding remarks

The financial markets today are highly liberalised, globalised and interdependent. These factors combined bring enormous economic benefits to the world economy. However, unless markets are properly regulated – as evidenced by the current crisis – they could also completely paralyse the economy. Within a short space of time, we have witnessed the extremes of financial globalisation and learned that there are certainly both costs and benefits to living in a global village.

The G-20 has set out a tangible plan to deal with the financial crisis in a coordinated manner. It is now up to its mem-

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21 There are 45 large cross-border finance groups in the EU, that together account for 70 per cent of bank assets.

22 Sideek M. Seyad, "A Critical Assessment of the Lamfalussy Report on the EU Securities Market" (2002) Business Law International 290-306.

23 The Larosière report, which was presented on 25 February 2009, analyses the causes of the financial crisis and gives recommendations on how to improve the regulatory and supervisory systems both within the EU and from a global perspective.

24 Sideek M. Seyad, "A Single Regulator for the EC Financial Market" (2001) 16 Journal of International Banking Law 203-212.

25 Due to the financial crisis, the UK has relaxed its previous opposition to tighter regulation at the European level.

26 During the financial crisis, the President of the European Central Bank (ECB) informed the European Parliament that, if requested, the ECB is prepared to supervise the EU financial market.

27 For example, the German constitution has to be amended even to give more power to its national banking watchdog.

bers to implement the plans agreed at the London meeting in April 2009. The agreements should be translated into concrete action without undue delay. If they fail to do so, it will not only prolong the current crisis but could also produce even more adverse effects in both the social and political spheres.[28]

In order to implement certain financial market reforms agreed at the G-20 summit, the US has already taken initiatives in this sector. The Congress is, for example, debating a bill that would reform the system of supervision of its banking market. The aim of this bill is to replace the current system, consisting of a range of banking supervisors, with one "super-regulator". The proposal appears to be modelled on the Swedish/UK system of unified supervision carried out by the Financial Services Authority. If the bill is passed, it would facilitate the introduction of a single banking watchdog for the entire US banking market.

Even before the G-20 summit, many off-shore financial centres agreed to relax their banking secrecy rules.[29] It is not sufficient merely to put pressure on such countries to cooperate on tax matters.[30] The G-20 countries should also agree on a tax system that is fair and not punitive in nature. Within the framework of the G-20, a global fiscal system should be developed based on the premise that no country should seek to attract capital by offering unfair tax benefits. They should also agree to avoid imposing heavy tax burdens, not only on mobile factors such as capital, but also on immobile factors such as persons and property. If they fail to agree on a fair and just tax arrangement, existing tax havens will merely be replaced by other avenues of opportunity; not only to hide the money from the home state tax authorities but also to invest financial resources in real estate in secure jurisdictions.

An area where it should be fairly easy to reach consensus and adopt certain agreed standards is in relation to the short-term banking bonus culture. All countries must adopt implementing measures to put an end to and prohibit such practices. It is necessary to adopt strict rules on bonuses not only nationally but also at a global level. There are certain initiatives being taken both in the US and within the EU to adopt legal measures to discourage the current compensatory schemes, which reward market operators who promote high risk investment products to both natural and legal persons.[31] For example, in Sweden the Government has authorised its financial supervisory authority to monitor such compensatory payments to executives in the financial sector.

Many actors contributed directly or indirectly, passively or actively, to the creation of the financial bomb. The national governments, their regulatory authorities, retail bankers, investment bankers, central bankers and credit rating agencies all share the blame for the financial crisis. Some of the financial intermediaries may be more guilty than others but all of them have a duty to work as a team to prevent a similar bomb ever being created again.

As far as the EU is concerned, it has to do more than what was agreed at the London summit. Unlike other countries or regions, the EU's financial market has reached an advanced level of integration. It should therefore put in place a better and more credible system of regulation and supervision to strengthen and protect the financial market. If the EU fails to do so, its financial market could be destabilised and this might by extension ruin the stability and proper functioning of the single market.

If the financial and monetary crisis cannot be resolved immediately, particularly in the CEE Member States, it is likely to aggravate social and political unrest in these countries. There is also a fear of a new economic iron curtain in the Union. The EU should seriously consider relaxing to some extent the entry criteria to the Eurozone and there is a legal possibility to do so.[32]

In order to strengthen financial regulation, the EU decided to amend and strengthen the Capital Requirement Directive,[33] Credit Rating Agencies Regulation[34] and Solvency 11 Directive[35], respectively. There are other legal measures which the EU should adopt urgently, such as regulation of the derivative markets, alternative investment funds, etc.

The Brussels summit held on 18/19 June 2009 concluded on a positive note, declaring that the emergency measures adopted by the EU and its Member States, such as state guarantees and recapitalisation operations in support of the

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[28] If the statement by the President of the WB on 23 April 2009 is to be seen as a precedent, i.e., that nine of the G-20 countries had already imposed trade restrictions after the last summit, there is no guarantee that they will fulfil the other obligations they accepted at the London summit.

[29] For example, Switzerland, Monaco, Jersey, Guernsey, the British Virgin Isles, the Cayman Islands, Belgium, Luxembourg, Hong Kong, Singapore, and many other off-shore centres, have recently signed bilateral tax agreements.

[30] This is another area that Sweden is likely to prioritise during its Presidency.

[31] The US has passed a law imposing 90 per cent tax on bonuses paid to executives at banks bailed out by the government and the European Commission has also called for restrictions on executive pay.

[32] Sideek M. Seyad, "Is the Purported Exclusion of Sweden from the Euroland Justified?" (2000) 2 Journal of International Banking Regulation 25.

[33] Consisting of Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions.

[34] Approved by the European Parliament and the Council on 23 April 2009.

[35] A compromise text for the Solvency 11 Framework Directive was adopted by the European Parliament on 22 April 2009.

banking sector, is producing positive results and is successful in preventing financial meltdown. One of the important issues discussed at the summit was to expedite the modernisation of the supervisory system of the EU financial market. There was a firm commitment at the summit to introduce a credible system of cross-border supervision of the financial market.

In order to achieve these objectives, two separate bodies will be established. The first is the European Systematic Risk Board, which will be established to monitor and assess potential threats to financial stability. This Board will also issue risk warnings and recommendations for action and monitor their implementation. The composition of this Board was not precisely set out in the Presidency conclusion. However, it did declare that the members of the General Council of the ECB shall elect its chair. The powers, functions, composition and the level of independence of its members need to be spelt out clearly and urgently.

The other body which the European Council agreed to establish at the summit was the European System of Financial Supervisors. The purpose and mission of this body is to upgrade the quality and consistency of national supervision, strengthen supervision of cross- border groups through the setting up of supervisory colleges, and establish a European single rule book for all financial institutions operating in the single market. The powers and functions of this body were also not clearly spelt out at the Presidency conclusion but it directed the European Commission to bring forward legislative proposals to set up a new supervisory framework for the EU financial market.

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