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Introductory statement

ECON public hearing "Banking supervision and resolution: next steps?"
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Good morning, Madam Chairwoman Bowles, and dear Members of the Economic and Monetary Affairs Committee. I would like to thank you for inviting me to participate in this hearing on the banking supervision and the proposals for a Single Supervisory Mechanism.

With your kind permission, I would like to raise four legal points in my introductory statement, which are:

1. The choice of the legal base of Art. 127 para. 6 of the Treaty and the issue of implementing powers which is, in my eyes, the main reason for the choice of this base;
2. The price to pay for this choice, which is a precarious involvement of non-Euro Member States;
3. The principle of democracy as protected by the EU Treaties and Member States' constitutions and the scope of the ECB's independence guarantee; and
4. The issue of alternatives that turns around the question of "Who is afraid of Meroni?"

I. Choice of legal base: The issue of implementing powers (Art. 132 TFEU)

The present proposals for a Single Supervisory Mechanism focus on the European Central Bank and confer supervisory task upon the ECB on the legal basis of Art. 127 para. 6 TFEU. The main reason for the selection of this legal base was, in my eyes, the fact that Primary law confers implementing powers on the ECB in Art. 132 TFEU. As Primary law already provides for the needed implementing powers, the ECB does not need to get any kind of delegated implementing powers which would raise the known issues about the limits of the famous "Meroni" judgment.

II. The price to pay: Precarious involvement of Non-Euro-MS

The price to pay for these unlimited implementing powers is a precarious involvement of Non-Euro-Member States in the Single Supervisory Mechanism. The reason for this lies in Art. 139 of the Treaty that excludes application of certain Treaty provisions to so-called "Member States with a derogation", which are the non-Euro Member States. Art. 139 states that the implementing powers of the ECB in Art. 132, as well as participation in the decision-making bodies of the ECB,

do not apply to non-Euro Member States. A so-called "close cooperation" agreement between a non-Euro Member State and the ECB is supposed to overcome these constraints. The non-Euro Member State undertakes to include the necessary implementing powers for the ECB in its national law. A participation of the non-Euro Member State in ECB's decision-making bodies, however, cannot be reached by this agreement. Decision-making within the European Central Bank is clearly established by the Treaties: The two decision-making bodies of the ECB are the Governing Council and the Executive Board. To provide for any other body within the ECB with decision-making rights would infringe the Treaties and cannot be reached without a Treaty change. Therefore the price to pay for choosing the ECB as core player in the Single Supervisory Mechanism is that non-Euro Member States cannot take part in the decision-making process within the ECB. Even though, the new so-called "Supervisory Board" is supposed to "plan and execute" the ECB's supervisory tasks, it cannot legally oblige the Governing Council to take a decision that it may draft. Granting voting rights to non-Euro Member States in the "Supervisory Board" would therefore, by the way, not infringe the Treaties.

III. Principle of democracy and banking supervision

Let me now turn to the principle of democracy and the Single Supervisory Mechanism. This principle is not only protected by Member States' constitutions (well known as limit to a further European integration set by the German constitution and the German Constitutional Court). It is also protected by the European Treaties. The principle of democracy requires an unbroken chain of democratic legitimation of any executive action. Gaps in this chain have to be justified. An independent European Central Bank exercising specific tasks concerning banking supervision creates such a gap. Banking supervision is a highly political field and supervisory decisions have direct impact on individuals. A lack of democratic accountability is highly problematic with regard to the principle of democracy.

At this point, one has to make clear, that, contrary to what is claimed quite often, the independence guarantee for the European Central Bank does not apply to banking supervision. This follows, first, from the wording of the independence guarantee in Art. 130 of the Treaty, which only applies to "tasks and duties conferred upon [the ECB] by the Treaties and the Statute". However, banking supervisory tasks will be conferred from the Member States' sphere upon the ECB by secondary law. More important than this formal reasoning is the fact that the purpose of Art. 130 is to safeguard the independence of the ECB with regard to the Monetary Policy of the Union. At least in the eyes of German Constitutional law, the interruption of the chain of democratic legitimation can be accepted with regard to Monetary Policy as the stability of a currency can be better achieved if it is deprived of politics. Banking supervision, however, has not much to do with monetary policy in the strict sense. Therefore, the independence clause would not form an obstacle to a direct accountability of the Single Supervisory Mechanism to the European Parliament by means of, for example, direct participation in the Supervisory Board or special rights of investigations. The EU principle of democracy even requires it.

IV. Any other institutional solution: Who is afraid of Meroni?

Let me now conclude with this last remark: For some, the price to pay of a precarious involvement of non-Euro Member States is too high; for others, the independence of the European Central Bank with regard to Monetary Policy should not be endangered by the banking supervision. This brings up the question of a different institutional arrangement and a different legal base. Whenever a discussion on this subject begins, it makes me think of the song "Who is afraid of the Big Bad Wolf?" from Walt Disney's "The Three Little Pigs", but with adjusted lyrics: "Who is afraid of Meroni?".

This decision from 1958 wanted to prevent the "executive", the European Commission, from conferring executive powers upon bodies outside of any political or legal control. Nowadays, after more than fifty years of legal integration, things have changed. First, with the Lisbon Treaty, the action for annulment before the European Court of Justice was extended to "acts of bodies, offices or agencies of the Union", wherefore legal protection is now guaranteed. And, second, with regard to the principle of checks and balances, it is obvious that the "executive" cannot confer more powers than it has itself, which was the case in "Meroni". The legislator, however, has more freedom in its decision to confer executive powers, including discretionary power, as long as an efficient control of these powers is guaranteed. Guidance on how such an efficient control could be done, can be found in Art. 290 of the Treaty on the conferral of powers upon the Commission. Furthermore, in the context of this provision, the ECJ set clear limits to such a conferral: "Provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated."

V. Conclusion

In order to sum up, Madam Chairwoman, dear Members of ECON committee, a Single Supervisory Mechanism must be, first, more democratically accountable than it is proposed in the present proposals and should, second, involve as many EU Member States as possible in order to guarantee the functioning of the internal market. I hereby want to conclude my introductory statement and I am very much looking forward to the upcoming debate of this hearing.