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# Capital Markets Union and Ending Short-Termism: Lessons from the European Commission's Public Consultation

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*The European Commission's initiative to establish a Capital Markets Union is in sharp conflict with the more radical goals of downsizing significantly certain financial activities and firms that have become too-big-to-fail and too-big-to-govern and of ending or at least drastically limiting extreme speculation and short-termism in finance and the real economy in order to increase financial stability. The recent public consultation on the Commission's Green Paper Building a Capital Markets Union gives evidence of how weak such demands are compared to calls for deeper capital markets with more 'shadow banking' and rebuilding (sound) securitisation. The consultation is an example of how framing the problem and the refined better regulation agenda influence post-crisis financial reregulation and help to marginalize more radical ideas demanding a return to a more traditional banking model and transforming finance back to serving the real economy.*

Keywords: capital markets union, short-termism, financial reforms, financial transaction tax

The European Commission (EC) under President Jean-Claude Juncker started in 2014 with a clear agenda of improving the quality of regulation to boost economic growth and job creation for the sluggish European economy.[1] Facing the fallout of the global financial and Eurozone crises, Europe has been experiencing a slower economic recovery than the United States (US).[2] The relaunched idea of a Capital Markets Union (CMU)[3] became a major initiative to deal with the funding aspects of economic recovery and long-term economic growth by making the European capital markets more similar to the US markets. The EC argued that this would make the EU economy more competitive and would help to attract more investment from third countries. Additionally, the EC claimed that the creation of a CMU would serve the 'real economy' of the non-financial sectors and especially be in the interest of small and medium-sized enterprises (SMEs) that traditionally play the strongest role in economic growth and employment.[4] While the Banking Union, adopted in direct response to the Eurozone crisis to address the most severe shortcomings of the currency union, is foremost for the Eurozone member states but open to all other member states, CMU is like the Single Rulebook[5] for all financial actors aimed at the entire European Union (EU).[6] CMU is in particular an attempt to transform medium- and long-term financing from a predominantly bank-based funding system to a capital markets-based system aiming at "improving the access to financing for all businesses across Europe and investment projects, in particular start-ups, SMEs and long-term projects; increasing and diversifying the sources of funding from investors […]; and making the markets work more effectively".[7] Based on the assumption that a capital markets-based financing system is superior to the traditional, although already transformed European bank-based system and on a comparison between the European

system of incomplete financial integration and the much more integrated and developed US capital markets, the EC has argued that diversification of funding and deeper capital markets are necessary to overcome fragmented financial markets in the EU and to ensure the functioning of the internal market.

The EC published in February 2015 the Green Paper *Building a Capital Markets Union*[8] for public consultation. Key areas of a CMU were presented separately in two further consultation documents: one on "a new framework for simple, transparent and standardised securitization"[9] and one on the reform of the Prospectus Directive.[10] In the context of the reformulated Better Regulation agenda under the current Commission, the CMU initiative is an important area where the new approach can be tested. This article analyses some key issues related to CMU in the broader regulatory context and arising from the Green Paper consultation. Section A presents key challenges for establishing CMU in the context of wider debates about the role of finance and financial stability and the EC's approach. Section B then discusses how the EC has framed the public consultation, before the following Section C analyses the consultation contributions. Finally, Section D concludes, drawing lessons from this example, including lessons for post-crisis financial reforms in general and about the EC's new approach to regulation.

## A Economic recovery, short-termism, capital markets, and the real economy

Over recent years, financial sector firms pushed strongly to expand business opportunities and profitable activities in an ever more challenging regulatory and market environment in which they are also seeking to stop, slow down or even reverse financial reforms that could generate regulatory burdens after a period of rapid change. Against the backdrop of this particular business pressure a new deregulatory agenda emerged, based on the claim that the cumulative effect of previous financial reforms would have negative results that need to be corrected. The EC incorporated this view into its reformulated Better Regulation agenda and CMU idea.[11] Commissioner Hill, downplaying fears that this might result in "a big bonfire of existing regulations in the name of growth",[12] emphasized that this "new approach to regulation" would result in "less new legislation in the future and more focus on bedding-in in the reforms of recent years". This includes especially a focus on the "cumulative impact" of post-crisis reforms. Hill summarised this approach as: "Not to question the fundamentals of the approach but to take a look at the combined effect of our legislation and ask ourselves whether we have always achieved the correct balance between stability and growth."[13]

The CMU initiative, however, is also a response to the slow economic recovery following the Great Recession and an attempt to fundamentally change the market structure of the European economy. In fact it is more the latter with a focus on long-term growth and investment as the envisaged changes will only slowly transform markets and therefore do little to address the immediate economic recovery problems. Compared to calls for more government intervention and less austerity, CMU offers an approach of boosting investment that should mostly be driven by markets and only be supported by law when necessary, especially to overcome regulatory barriers. In this situation the 'underdeveloped capital markets' hypothesis found strong support by claiming that bank-based finance systems would generate significant welfare losses over capital markets-based systems. This hypothesis remains contested[14] and is insufficiently linked to a more systematic comparison of growth in different systems

and periods. For the US concerns about a rather problematic economic growth in recent decades have been expressed and the current recovery has been described as 'the worst economic recovery in history'.[15] Without any doubt, changes in finance in general and in capital markets in particular raise serious issues with regard to their overall effects on growth, investment, and job creation and a fundamental shift towards a capital markets-based system would deserve a closer investigation of the long-term overall effects. However, the EC's Green Paper uses the US capital markets as the top-performer benchmark without discussing any negative effects or risks and highlights "potential benefits" of making the EU economy more similar by stating: "Compared with the US, medium-sized companies, […] receive five times more funding from capital markets than they do in the EU. If our venture capital markets were as deep, as much as Euro 90 billion of funds would have been available to finance companies between 2008 and 2013."[16] The overall comparison between the US and EU within the EC's narrative remains rather simplistic and under-complex. Key questions about increased financial instability from poorly regulated capital markets, growth rates, business expectations and austerity, and increasing inequality and how they are linked to a particular financing system that reproduces short-termism and other highly problematic developments in capital markets and in the "real economy" have been neither asked nor answered by supporters of the CMU initiative. One might not be too surprised about the lack of engagement with critical literature[17] discussing how the increased role of finance and capital markets has undermined growth in the 'real economy' and led to a system of "profits without production" and "casino capitalism" with more inequality in societies, although one of the lessons of the global financial crisis has been that ignoring literature outside the mainstream is problematic. However, even more mainstream contributions from key regulators asking about the 'right size' of various parts of the financial system[18] or putting the 'underdeveloped capital markets' hypothesis into question[19] and raising concerns about too much globalization and too much influence of finance[20] or demands for "inclusive growth"[21] have so far found no response from CMU supporters. Also concerns about possible effects of rather significant changes in financial markets on competitive and comparative advantages of member states with a traditionally more bank-based finance system are lacking discussion.[22]

On the other hand, CMU supporters and the EC picked up some key concerns about problematic developments in financial markets, especially they – at least claim to – aim at making finance work for the "real economy" and at ending short-termism in certain areas of economic decision-making. The discussion about effects of CMU on the "real economy", however, is also under-complex and reduced to the claims that funding would improve for all businesses and the system would become more crises resilient. Especially the claim that CMU would foremost be to the advantage of SMEs was quickly challenged.[23]

Short-termism is a term that has been used for quite some time for both the political and the economic sphere. In theories about policy and state failure, short-termism was described as deeply enshrined in Western democracies with institutions generally privileging short-term over longer-term interests be it via the relatively short election cycle and politicians' re-election focus or the influence of strong veto players in decision-making who profit from short-term decisions. In economics and corporate governance, short-termism has become broadly used to describe negative consequences of the shareholder value orientation and a number of very problematic aspects of the increased importance of finance over the "real economy". Especially in the sustainability discourse this critique developed further and expanded to

intergenerational questions: while necessary long-term measures might result in losses for current generations and businesses, it is future generations without political representation that would profit most from a shift. Even for the strongest supporters of the shareholder value theory short-termism has become a key concern in need of radical reform. Alfred Rappaport, as most prominent advocate, has shown that short-termism, reproduced by perverse incentives undermining public companies and capital markets, has reached such a destructive dimension that it endangers the survival of capitalism, economic growth and individual well-being.[24]
With regard to financial integration in Europe, short-termism was already discussed as a problem before the crisis.[25] The EU has recognised short-termism as a serious problem in capital markets[26] and has taken various steps to end short-termism. The European Semester tries to tackle short-term oriented quick fixes by member states; in company law a change is planned with the Shareholder Rights Directive[27] that would reward long-term shareholders in companies with extra voting rights or loyality dividends and other measures have been put forward to discourage excessive short-termism and short-term risk taking in financial markets. The idea to strengthen long-term investments over several years or even decades is also the core idea in the "proposal for a Regulation on European Long-term Investment Funds". However, the overall approach is still not changing the system radically enough and some ideas such as financing public infrastructure via capital markets instead of securing sufficient tax revenue have been criticised. Moreover, booms in High Frequency Trading (HFT) and the creation of *dark pools* as well as a still huge over-the-counter (OTC) derivatives market give ample evidence of a continued and increasing importance of extreme speculation. More radical proposals for banning such activities and problematic products and to introduce a strict product policy have largely been ignored.[28] A Financial Transaction Tax (FTT) that would disadvantage indirectly various activities and products and incentivize long-term over short-term investment and which would be a more moderate proposal was only introduced in limited versions by some EU member states. The EC's attempt to introduce such a tax for the entire EU failed because of the resistance of several member states led by the UK government. The alternative approach of introducing an FTT in the willing states via enhanced cooperation is still not realized and opposition to the EU implementing Directive has increased.[29] The structural reforms of banking, proposed by the previous Commission, have also made slow progress and faced fierce opposition.[30] The issue of proprietary trading related to this reform also did not feature in the EC's Green Paper. In short, a lot of concern about financial stability can be raised from what is not in the Green Paper.

**B The EC's public consultation**

The EC's public consultations were cleverly split into the Green Paper and the more technical subjects of sound securitisation and the prospectus, allowing with the Green Paper a more systematic exploration of areas and barriers for achieving a significant progress towards the "building blocks"[31] for a full CMU within a short period and to formulate an Action Plan in 2015 with clear priorities to be implemented by 2019 already and long-term goals beyond. The Green Paper as well as an accompanying Staff Working Document on CMU,[32] published at the same time, framed the debate with the "underdeveloped capital markets" hypothesis and both documents were designed to invite not so much any debate about the theoretical assumptions and the

goals as such but to direct the focus in line with the redesigned Better Regulation agenda on practical proposals to redesign capital markets especially from a business perspective and in line with business needs. The revival of securitisation should now be sound with more transparency, but main issues about possible bailouts of central clearinghouses and overall systemic instability remain unsolved.
The EC also framed the CMU discussion by downplaying how fundamental the envisaged change in market structures would be by interpreting its initiative as nothing more than the realisation of the "free flow of capital" already enshrined in the Treaty of Rome.[33] A discussion about how modern capital markets differ from what anyone back then might have imagined or about how deeper financial integration can be achieved without creating an ever more powerful financial sector and how integration is corresponding with a strategy of downsizing finance at least in its most harmful structures and activities is unsurprisingly missing in both consultation documents. The EC focuses instead on how to drive integration via markets, supported by regulation, for example via a pan-European "29th regime".[34]
Rather disappointingly, the Green Paper discusses short-termism not systematically and mentions the term only once by stating that this would cause restrictions for the "significant amount of new infrastructure investment" needed to maintain the Union's competitiveness.[35] In the context of corporate governance, the EC mentions the revision of the Shareholder Rights Directive. The Commission Staff Working Document accompanying the Green Paper expanded that issue a bit in its section "6.2. Short-termism and regulatory features drive inefficient asset allocation".[36] The EC there describes short-termism as "an apparent problem". Large "institutional investors, such as pension funds, which have long-term liabilities and have the capacity to be 'patient' investors often do not allocate sufficient amount of funds to long-term investment". The EC explains this primarily with their "short-term investment horizon" – which is a highly important feature of modern financial markets and would deserve more investigation – but also with "flaws in the regulatory framework" such as "investment mandates of pension funds in some member states, requiring that over 50% of assets under management is invested in sovereign bonds".[37] The EC has already proposed a directive, which "would stop member states banning occupational pension funds from investing in assets with a long-term profile such as infrastructure, unless the restrictions are justified on prudential grounds".[38] The EC Staff Working Document also mentions the short-term outlook for financial reporting and existing incentive schemes and compensation structures for asset managers and refers to the Kay Review on UK equity markets[39] "for an extended analysis" and to the revision of the Shareholder Rights Directive with regard to "incentivizing a better alignment of the long-term interests of institutional investors, their asset managers and companies through transparency and public consultation".[40] The European Parliament adopted the latter with amendments on 8 July 2015. In short, although there is some reference to short-termism, the issue did not get the overall importance and centrality it would deserve.
The Green Paper and the Staff Working Document are also disappointing with regard to any meaningful discussion of high frequency trading, dark pools or the financial transaction tax. High frequency trading is only mentioned with regard to new technologies but there is no discussion and no concern raised and both documents are silent on dark pools and the FTT. The consultation questionnaire does no justice to the importance of these issues. Given that the EC has supported enhanced cooperation in the area of FTT with a Directive[41] and therefore indicated that the EC would like to see harmonisation in the long run, one could have expected a more pro-active

approach. In the meantime, Commissioner Hill has publicly stated that he is not in support of the FTT and that he regards it as a post-crisis idea that is unsuitable in a more business-friendly environment focusing on jobs, investment and growth.[42] Already much earlier some member states supporting the FTT had complained about insufficient EC support.

Although the Green Paper is weak in terms of driving the design of capital markets towards more sustainable capital markets with less complex structures, less extreme speculation and more long-term, environmental and socially fair orientation of investors and business more generally, the public consultation online questionnaire[43] offered some scope for raising such interests. Question 1 asked generally about what other than "the five priority areas identified for short term action" the EC should prioritise in the Action Plan. Question 7 asked whether "any action by the EU" is "needed to facilitate the development of standardized transparent and accountable ESG (Environment, Social and Governance) investment, including green bonds, other than supporting the development of guidelines by the market". Question 10 invited suggestions for policy measures that "could incentivize institutional investors to raise and invest larger amounts and in a broader range of assets, in particular long-term projects, SMEs and innovative and high growth start-ups".

The larger number of questions was framed in a way to support the EC's preferred redesign of capital markets. Typical formulations chosen were "what support can be given", "what further measures are needed/could help", "are there barriers" or what best practices would exist. Question 19, for example, asked: "What policy measures could increase retail investment?" and question 19.1 "What else could be done to empower and protect EU citizens accessing capital markets?" without raising first the issue of whether retail investment should be increased or what risks that might create. Question 21 asked how the EU can ensure it is 'internationally competitive and an attractive place in which to invest", an issue where the question could have been raised whether the EU can in some areas lead global reforms towards more sustainable financial markets. With regard to the FTT question 19 as well as question 30 asking about barriers "around taxation that should be looked at as a matter of priority to contribute to more integrated capital markets" were of importance. The final question 32 did not ask if there are any aspects that the EC overlooked, but invited again responses supporting the overall goal: "Are there other issues, not identified in this Green Paper, which in your view require action to achieve a Capital Markets Union?" In short, the consultation questionnaire does not reflect a possibility of an alternative CMU as part of a wider strategy to downsize finance.

## C Lessons from the CMU public consultation

Public consultations on financial reforms (or any business regulation) usually receive the overwhelming number of responses from firms and their business organisations and these actors are also the main addressees with the questions. This was unsurprisingly also the case with the CMU consultation and as usual responses differed in quality, with some giving only answers to a limited number of questions affecting their core interests and others reflecting also on the wider policy implications and using the opportunity to submit further information such as position papers or studies. According to the statistical data the EC published together with the consultation contributions, the CMU public consultation resulted in a total of 425 responses, 374 were published on the Commission website.[44] Those came from 21 private individuals, 306 organisations or companies, and 47 public authorities. The

largest group was industry associations (131), followed by companies (68), NGOs (21), consultancy and law firms (11), think-tanks (10), consumer organisations (6), academic institutions (4), and trade unions (3). Among the public authorities the largest contribution came from governments or ministries (18), followed by regulatory or supervisory authorities, including central banks (11), international or European organisations (10), other public authorities (5), and regional or local authorities (3). The largest number of contributions came from the UK (83), followed by Belgium (63), France (52), Germany (49), the Netherlands (18), and Ireland (10). All other member states and other countries had mostly far below 10 submissions. The largest number of responses came from the banking sector (102), followed by investment management (93), other financial services (67), insurance (61), market infrastructure operations (56), pension provision (43), and the non-financial sector (42).

The statistics show a strong expression of business interests and especially actors from member states with relatively highly developed capital markets responded to shape the future CMU according to their preferences. The limited engagement from actors from Southern and Eastern European member states undermines somewhat the broad claim by Commissioner Hill that the CMU would be "a classic single market project for all 28 Member States" and that there would have been "a real groundswell of support, from right across Europe".[45] However, Hill, in the same speech, insisted that it would be "countries which don't have established financial centres whose businesses and investors could benefit the most, because the CMU should create the conditions for capital to cross borders, to flow to entrepreneurs with high growth potential, no matter where they are located." In his summary, Hill did not mention any tensions between member states or different kind of actors, although it was early in the CMU debate that some observers feared the existing variety of interests might make it very difficult for the EC to balance all the interests.[46]

As one could assume from a "varieties of capitalism" perspective,[47] the responses reflect concerns that countries differ in their experiences with bank and capital markets and have different interests and preferences reflecting domestic economic structures. The Czech National Bank[48] argued that there is "no greater added value" in the CMU project because "the strengthened banking sector will increasingly perform the traditional function of lending to the economy in the near future". The Estonian Ministry of Finance, although largely supportive of CMU, was worried that markets with smaller scale intermediaries could get "swallowed by the larger scale capital markets" and suggested more relaxed regulation for smaller financial firms. French banks missed in the Green Paper clear measures to establish European champions. The French Banking Association complained that the Green Paper underestimates the importance of banks and seems to assume "a sort of zero-sum game in which the role of capital markets is to compensate for banks' reduced lending capacity". The association, highlighting various advantages of a bank-based system and regulatory gaps in the area of shadow banking, also denied any "empirical evidence to suggest that one financial system or type of financial intermediation is better than another at promoting economic growth". The French association also highlighted the importance of bank-based systems by referring to how this system influenced innovation in Germany and generally made a case for competition between bank-based and market-based systems in Europe within a future CMU.

Various German actors expressed concerns about their traditional funding system based on *Hausbanken* and the three pillars system with strong relationships to their borrowers. The Bavarian association of cooperative banks (Genossenschaftsverband

Bayern eV), for example, stated that the company structure in Europe would generally better suit a bank-based funding system. Changes in capital markets should, according to the association, also reflect differences between stakeholder and shareholder models. The association of guarantee banks (Verband Deutscher Bürgschaftsbanken eV) also warned against any negative effects on the German banking model. The German Banking Industry Committee emphasised the important role of banks generally and that the EC would insufficiently consider "the demand side of the market". Especially the powerful German trade union DGB opposed the CMU project and claimed that the risks would be higher than any benefits. Finance should be reduced to a proper size instead as a CMU would have high costs and only increase shareholder value influence and it would not serve a long-term orientation in investment. The DGB also pointed towards negative experiences with capital markets in Germany, for example with regard to private equity, and warned against deregulation and insufficient regulation of shadow banking. In short, the trade union called for a local and regional banking system. Also highly critical was the response by the less influential German NGO World Economy Ecology & Development (WEED), which questioned "if the commission has sufficiently considered what the reasons for the investment gap are and if capital markets are the best option to pursue the aim of a increased investments and a better long-term productivity" and highlighted the advantages of public local savings banks and cooperative banks. Similarly, World Future Council, another German NGO, argued against CMU and in favor of the bank-based European model.

Concerning the strengths of banks during the crisis, different experiences across countries became apparent: While some German actors observed SMEs profiting from smaller banks and the *Hausbanken* system during the crisis and that "the banking sector fulfilled its duties in terms of corporate financing during the financial crisis",[49] Irish SMEs suffered more and found it difficult to secure finance. The Irish Business and Employers Confederation (ibec) expected a gradual improvement with economic recovery but generally shared the EC's prognosis of a "more restrictive" lending situation for SMEs "compared to the pre-crisis period". The German Banking Committee, however, warned about too much hope in capital markets to make a difference in the Eurozone periphery where the "restrictive access to credit" would "also result from the poor credit quality of many companies as a consequence of the full-scale economic downswing."[50] In short, we see clear tensions between actors who think that the bank-based system still has its advantages and strengths and can fulfil its roles even when required to meet stricter capital requirements or at least when regulatory gaps in the area of shadow banking are closed, and other actors who believe that the post-crisis situation requires stronger capital markets to even return to pre-crisis funding levels. Hence there are powerful actors in the more bank-based systems that push for a capital markets-based system, while only a minority of actors distinguish between different forms of bank-based systems. In Germany the powerful industry association BDI called, for example, for measures against overregulation and expressed hopes that CMU would "compensate errors in banking regulation". A more detailed analysis shows, of course, that the changes to regulation necessary to create a level playing field between different firms are interpreted rather differently.

Most responses were indeed highly supportive of the idea of a CMU and focused on practical problems and barriers of realising it. With regard to long-term investments and sustainability, most actors agreed with the EC that voluntary measures to support environmental, social and governance (ESG) investment are sufficient, whereby some actors including banks recommended incentives such as lower capital requirements

for ESG. Only a limited number of actors addressed explicitly the need for "building sustainability into the foundations of the CMU".[51]

A major conflict between EU policies was identified by a large number of responses, including non-financial firms and pension funds, between realising a CMU and implementing an FTT via enhanced cooperation. Some only stated generally a negative impact from an FTT or expect an "un-level" playing field with extra costs in the jurisdictions supporting enhanced cooperation; others emphasised negative effects for certain groups such as pensioners or end investors or even presented detailed arguments against the tax in its currently discussed form. In any case, a clear majority of responses raised a serious concern about FTT impacts on CMU. The Association for Financial Markets in Europe (AFME) even went so far as to claim that an FTT would "outweigh" any benefits from a CMU.[52] Deutsche Bundesbank, known to be critical about the FTT, suggested "any future implementation of this tax should at least not counteract key goals of the CMU. For instance, the tax should not aggravate illiquidity risks in key markets, and it should not 'penalise' the trading of equity instruments vis-à-vis debt instruments."

Surprisingly, there were only a few supporters of an FTT using this opportunity to make a case for this tax in the context of redesigning capital markets.[53] Not even Finance Watch, a European-wide watchdog for financial reforms, thought about incorporating the FTT into its response. It seems that the EC's approach of not actively addressing this issue at all in its consultation documents worked well in the interest of FTT opponents, while FTT supporters were distracted by other issues or simply missed the opportunity.

Only a few responses addressed HFT and dark pools. Like with the FTT, Finance Watch missed submitting its otherwise well-known position. Also the European Consumer Organisation, BEUC, did not raise any concerns in this regard but focused on strict product governance as a necessary priority for the CMU. The Bavarian association of cooperative banks, which opposed the FTT, demanded simply "no space for dark pools" without further discussion. High frequency trading was raised by the Bank of England as an issue of "an unfair market environment on electronic venues, with questionable benefits to the broader market from trading occurring at ever-faster speeds." The Bank of England also mentioned dark pools and the need for transparency requirements.

All in all, the consultation responses on these highly problematic subjects can be summarised as rather moderate. A more forward looking consultation document aiming at more sustainable capital markets could have achieved more useful comments on short-termism, FTT, HFT and dark pools.

Overall the public consultation did a good job in confirming the EC's general approach and securing the required support for the way forward, while keeping more radical ideas marginalised. Commissioner Hill summarized the Commission's next steps along the line of "three themes as being at the heart of the project: how the CMU can increase funding options for business; how it can create more opportunities for investors; and how it can encourage cross border investments".[54]

## D Conclusion

Two contributors to the public consultation have rightly argued that it would be necessary not just to present the advantages of a CMU but also to address the possible negative consequences: "the potential hazards and drawbacks must receive equal attention".[55] The French Banking Association also criticised that the EC "green paper

does not address the costs and risks of capital markets union" and that CMU "will not come free of charge." The EC has so far not shown any willingness to address such concerns and continues presenting a rather simple idea according to which advantages from the capital markets-based system would always be at play but especially compensate for any weaknesses in the banking system whenever necessary. Lending in the whole economy could never dry up in this model and moreover increasing equity investment would make the European economy more shock resilient. Clear weaknesses of a capital markets-based system are downplayed or ignored. A more nuanced debate that seeks to explain and justify the future of a particular growth model for Europe in the context of benefits and risks would be desirable. None of the three themes identified by Hill raises any problems or possible conflicts between different varieties of European capitalism that are likely to occur more sharply during the next steps of fine-tuning the initiative and making it reality.
However, there is a notable change in the language used now with regard to SMEs. The original claim from supporters that CMU would be foremost in the interests and to the advantage of SMEs did not fly and is now replaced with a new narrative. Commissioner Hill had already earlier, in a debate at the Brookings Institution and confronted with the US experience, confessed that the SME rhetoric was only there "to sell the idea". On the basis of the feedback received to the Green Paper, the Commission now argues: "Bank lending will of course remain central to the European economy and in particular will be the staple source of funding for SMEs. But […] more innovative new businesses with higher returns, but also higher risk, find it hard to get investment from banks. Then there are other gaps where SMEs find it difficult to attract capital as they seek to expand." In short, the EC is now confirming that the CMU is of little benefit for the majority of companies that have originally rightly been identified as key for growth and job creation. One of the goals of CMU supporters is to redirect savings into more profitable investments, which would change the funding structure of banks. As Finance Watch highlighted in its response to the public consultation: "retail savings held in bank deposits do finance the real economy as they provide stable funding for banks that in turn provide loans to non-financial corporations and households. Shifting savings to capital markets would lead to more bank reliance on wholesale funding, more fragile bank funding structures and a higher cost of funding for banks."[56] It would therefore be necessary to focus foremost on the question how CMU might endanger the traditional relationship in a banking system that is so crucial for SMEs and how to design a CMU that makes the European financial system more crises resilient and more sustainable.
The CMU initiative and consultation is an example of a "new approach in regulation" by the EC that is not significantly different to the Better Regulation approach established over the past decades in terms of focusing on business interests to improve the quality of regulation and reduce implementation deficits and providing little space for influence from other group interests. However, with the deregulatory focus and the stronger emphasis on achieving change via market mechanisms it is a rather important turn in financial regulation, putting also more emphasis on growth and investment than on financial stability. In the words of Commissioner Hill, "the greatest threat we face to financial stability is a lack of jobs and growth."[57] This is a risky turn away from some strong lessons from the global financial crisis that have never been accepted by the mainstream and key actors. As a result reforms have remained limited to insufficient measures dealing with problematic structures and activities of modern finance and reforms have failed to develop transformative strategies that could downsize finance. The CMU initiative brings us one step further

away from such a goal. But the implementation will not come without severe conflicts and flows reflecting the diverse interests of European economic systems and actors.

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[1] J-C Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change', Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July 2014.

[2] M Housel 'Two-Speed Recovery: US vs. EU', (2014) *World Affairs*, January/February, http://worldaffairsjournal.org/article/two-speeed-recovery-us-vs-eu, last accessed 30 July 2015.

[3] The CMU idea is old (see C Segré, *The Development of a European Capital Market: Report of a Group of Experts appointed by the EEC Commission* (Brussels, European Economic Community, 1966) and had already a revival under the previous Commissioner for Internal Market and Services, Michel Barnier.

[4] J Hill, 'Capital Markets Union – finance serving the economy', Speech, Brussels, 6 November 2014, http://europa.eu/rapid/press-release_SPEECH-14-1460_en.htm, last accessed 30 July 2015.

[5] The Single Rulebook consists of the regulatory framework for capital requirements (CRD IV), deposit guarantee schemes (Directive 2014/49/EU) and bank recovery and resolution (Directive 2014/59/EU) and builds the foundation of the Banking Union which includes single supervision of the Eurozone's largest banks by the European Central Bank (ECB) and single resolution of the banks falling under ECB supervision.

[6] WG Ringe, 'Capital Markets Union for Europe: a commitment to the Single Market of 28' (2015) 9 *Law and Financial Markets Review* 5.

[7] See http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm.

[8] European Commission, *Green Paper Building a Capital Markets Union*, COM(2015) 63 final, Brussels, 18 February 2015.

[9] European Commission, *Consultation Document: An EU framework for simple, transparent and standardised securitisation*, Brussels, 18 February 2015.

[10] Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, as subsequently amended by Directive 2008/11/EC of 11 March 2008, by Directive 2010/73/EU of 24 November 2010, by Directive 2010/78/EU of 24 November 2010, by Directive 2013/50/EU of 22 October 2013 and by Directive 2014/51/EU of 16 April 2014 (Omnibus II). The prospectus framework also includes the corresponding implementing regulation no 809/2004. For the consultation: European Commission, *Consultation Document: Review of the Prospectus Directive*, Brussels, 18 February 2015.

[11] D Pesendorfer, 'EU Capital Markets Union: Tensions, Conflicts, Flaws', in N Dorn, Controlling Capital: Public and Private Regulation of Financial Markets (Abingdon, Routledge, forthcoming).

[12] J Hill, 'Capital Markets Union – finance serving the economy', *supra* n4.

[13] J Hill, "Refocusing financial integration on growth and jobs", Speech, Brussels, 27 April 2015, http://europa.eu/rapid/press-release_SPEECH-15-4861_en.htm, last accessed 30 July 2015.

[14] This hypothesis remains contested, see Pesendorfer, *supra* n11.

[15] Eg JE Stigltz, *The Roaring Nineties: A New History of the World's most prosperous Decade* (New York: WW Norton & Company, 2003); EP Lazear, 'The Worst Economic Recovery in History', *The Wall Street Journal*, 2 April 2012.
[16] European Commission, *supra* n8, 2.
[17] Eg GR Krippner, "The Financialization of the American Economy" (2005) 3 *Socio-Economic Review* 2, 173-208; S Strange, *Casino Capitalism* (Oxford, Blackwell, 1986); GA Epstein (ed), *Financialization of the World Economy* (Cheltenham, Edward Elgar, 2005).
[18] Eg AG Haldane, 'On Being the Right Size', speech, Institute of Economic Affairs 22nd Annual Series, The 2012 Beesley Lectures at the Institute of Directors, Pall Mall, 25 October 2012, http://www.bankofengland.co.uk/pubilcations/Documents/speeches/2012/speech615.pdf, last accessed 30 July 2015.
[19] Eg Bank of International Settlements, *Quarterly Review March 2015: International Banking and Financial Market Developments* (Basel, Bank for International Settlements, 2015).
[20] H Banziger, 'Did the Globalization of Finance Undermine Financial Stability? Lessons from Economic History', LSE Financial Markets Group Paper Series, Special Paper 211 (London, LSE, 2012); Cecchetti, S. and Kharroubi, E., 'Why does financial sector growth crowd out real economic growth', *BIS Working Papers*, No. 490 (Basel, Bank for International Settlements, 2015); M Obstfeld, 'Trilemmas and trade-offs: living with financial globalisation', BIS Working Papers, No 480 (Basel, Bank for International Settlements, 2015).
[21] Cournède, B., Denk, O. and Hoeller, P., 'Finance and Inclusive Growth', *OECD Economic Policy Paper*, No. 14, (Paris, OECD, 2015).
[22] Pesendorfer, *supra* n11.
[23] Ibid.
[24] A Rappaport, *Saving Capitalism from Short-Termism: How to Build Long-Term Value and Take Back Our Financial Future*, (New York, McGraw-Hill, 2011).
[25] L Quaglia, *Governing Financial Services in the European Union: Banking, Securities and Post-Trading*, (Abingdon, Routledge, 2010), 82.
[26] European Commission, *Green Paper The EU corporate governance framework*, COM(2011) 164 final (Brussels, European Commission, 5 April 2011).
[27] Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, COM(2014) 213 final, Brussels, 9 April 2014.
[28] D Pesendorfer, "Beyond Financialisation? Transformative Strategies for More Sustainable Financial Markets in the European Union" (2014) *European Journal of Law Reform* 16(4), 692-712
[29] See D Pesendorfer, "Financial Taxes and the Sand in the Wheels of Financialization: Legal Challenges for the EU Directive Implementing Enhanced Cooperation in the Area of Financial Transaction Tax" (2013) 2 *European Review of Public Law* 25.
[30] Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions, COM(2014) 43 final, 29 January 2014.
[31] European Commission Green Paper CMU, *supra* n8, 28.
[32] European Commission, *Initial Reflections on the Obstacles to the Development of Deep and Integrated EU Capital Markets*, accompanying the document Green Paper

Building a Capital Markets Union, Commission Staff Working Document SWD(2015) 13, Brussels.
[33] European Commission Green Paper, *supra* n8, 3.
[34] A pan-European, 29th regime would allow businesses to voluntarily choose the European over a national regime.
[35] European Commission, *supra* n8, 14.
[36] European Commission Staff Working Document, *supra* n32.
[37] Ibid., 33.
[38] Ibid., 34. The proposal is the revision of the Directive on the activities and supervision of institutions for occupational retirement provision, COM(2014) 167 final, Brussels, 27 March 2014.
[39] J Kay, *The Kay Review of UK Equity Markets and Long-tem Decision Making*, Final Report, July 2012, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf, last accessed 30 July 2015.
[40] European Commission Staff Working Document, *supra* n32, 34.
[41] Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013 71 final, 14 February 2013.
[42] Brookings Institution, 'European Financial Regulation and Transatlantic Collaboration', (Washington, DC, Brookings Institution, 2015), 14.
[43] The questions are also in the Green Paper, split into the various sections.
[44] http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm.
[45] J Hill, 'Next Steps to Build a Capital Markets Union', speech at the Conference, Brussels, 8 June 2015, http://europa.eu/rapid/press-release_SPEECH-15-5137_en.htm, last accessed 30 July 2015.
[46] Eg Y Mersch, 'Capital Market Union – the "Why" and the "How"', speech at the Joint EIB-IMF High Level Workshop, Brussels, 22 October 2014, http://www.bis.org/review/r141023g.htm, last accessed 30 July 2015.
[47] See Pesendorfer, *supra* n11.
[48] All references to responses are taken from the EC's CMU public consultation website: https://ec.europa.eu/eusurvey/publication/capital-markets-union-2015?language=en, last accessed 30 July 2015.
[49] German Banking Industry Committee – Die Deutsche Kreditwirtschaft, answer to question 1.
[50] Ibid.
[51] Eg UK Sustainable Investment and Finance Association response, question 32.
[52] Persaud set the tiny FTT in an impressive relationship to other transaction costs in finance to demonstrate the ridiculous opposition against this tax; A Persaud, *Reinventing Financial Regulation: A Blueprint for Overcoming Systemic Risk* (New York, Apress, 2015).
[53] World Future Council, the German NGO mentioned as a CMU opponent, argued for a broad-based FTT. Several other responses, including French consultancy/law firm Proxinvest SAS, Expert Corporate Governance Service (ECGS), BFFA and DSW proposed that the FTT should be reviewed to meet the stated goal of targeting financial institutions instead of the "real economy". ATHEXGroup, a Greek response from the market infrastructure area, recommended a tax design that would "not allow for tax arbitrage as this would undermine capital market funding options and would hamper the goals of the Capital Markets Union".
[54] Hill, *supra* n45.

[55] Response by Finansforbundet, Danish trade union, see also Nordic Financial Union, answers to question 32.
[56] Response by Finance Watch, question 19.
[57] Hill, Refocusing *supra* n13.