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OPINION OF THE LEGAL SERVICE¹

From: Legal Service

To: WP on the European Free Trade Association (EFTA)

Subject: Draft Agreement establishing an association between the European Union and the Principality of Andorra and the Republic of San Marino, respectively – Framework Protocol on Financial Services - Assessment of the compliance with the Meroni doctrine

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I. INTRODUCTION

1. On 26 April 2024, the Commission submitted a Proposal for a Council Decision on the signing and provisional application of the Agreement establishing an association between the European Union and the Principality of Andorra and the Republic of San Marino respectively (hereinafter 'the Proposal').² This envisaged agreement (hereinafter the 'Agreement') contains a Framework Protocol on Financial Services (hereinafter 'the Protocol' or 'the Financial Services Protocol').³

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² COM(2024) 191 final; ST 9663/24.

³ COM(2024) 191 final/2, ST 9663/24 ADD 1 REV 1 under the heading '*Framework Protocol 3 on Financial Services*', pp. 109–136.

2. The Protocol confers tasks on EU agencies, which are collectively defined in Article 2(b) of the Protocol to as '*EU supervisory authorities*', comprising the European Banking Authority (EBA),⁴ the European Securities and Markets Authority (ESMA),⁵ the European Insurance and Occupational Pensions Authority (EIOPA)⁶ and the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA).⁷
3. Article 8(2) of the Protocol also confers tasks on the Single Resolution Board (SRB), an EU agency established as part of the Single Resolution Mechanism (SRM).⁸ This EU agency is, however, not included in the collective definition of '*EU supervisory authorities*' set out in Article 2(b) of the Protocol.⁹
4. In the EFTA Working Party, the question was raised whether the tasks conferred on the EU agencies in the Financial Services Protocol are compliant with the so-called Meroni doctrine,¹⁰ a set of principles governing the conferral of powers on agencies under EU law.
5. At the meeting of the EFTA Working Party on 26 November 2024, the representative of the Council Legal Service gave an oral answer to this question and this opinion confirms and expands in writing the legal reasons presented at that meeting.

⁴ EBA is established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15/12/2010, p. 12).

⁵ ESMA is established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15/12/2010, p. 84).

⁶ EIOPA is established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15/12/2010, p. 48).

⁷ AMLA is established by Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism, (OJ L, 2024/1620, 19.6.2024, ELI: <http://data.europa.eu/eli/reg/2024/1620/oj>; hereinafter the '*AMLA Regulation*').

⁸ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (OJ L 225, 30.7.2014, p. 1; hereinafter the '*SRM Regulation*').

⁹ It should be noted that the definition of the concept of '*EU supervisory authorities*' provided for in Article 2(b) of the Protocol is broader than the concept of '*European Supervisory Authority*' (ESA) under EU legislation, which only encompasses EBA, EIOPA and ESMA but not AMLA. See Regulation (EU) 1093/2010 establishing the EBA, Regulation (EU) No 1094/2010 establishing EIOPA and Regulation (EU) No 1095/2010 establishing ESMA, all adopted by the European Parliament and the Council on 24 November 2010 (OJ L 331, 15.12.2010, p. 12).

¹⁰ Doctrine originating from the judgment of 13 June 1958, *Meroni v High Authority*, 9/56, EU:C:1958:7.

II. LEGAL FRAMEWORK: THE PROTOCOL

6. The Protocol aims, notably, at facilitating the progressive extension of the EU internal market for financial services to San Marino and Andorra (hereinafter the ‘Associated States’), ensuring the integrity of the enlarged EU internal market, market transparency, consumer and investor protection, and to address risks related to consumer fraud, money laundering and financial crime, and promoting the prevention of potential risks to financial stability.¹¹
7. Under Article 3(1) of the Protocol, an Associated State shall be granted access to the EU internal market for financial services if certain conditions are fulfilled, among which the complete, full and effective implementation and application of the provisions of EU legislation referred to in the Agreement and the existence and proper functioning of supervisory capacity and arrangements for the financial services sector. Article 6(1) of the Protocol provides that such an access is granted by a decision of the Joint Committee established under Article 76 of the Agreement, upon a recommendation of the Subcommittee on Financial Services established under Article 20 of the Protocol, and following the adoption by the Commission of a positive recommendation that all the necessary conditions of Article 3 of the Protocol are fulfilled.¹² Pursuant to Article 3(2) of the Protocol, to assess whether those conditions are fulfilled, the Commission shall ‘conduct a comprehensive evaluation in accordance with the provisions set out in Part II of [the] Protocol’ – i.e. with Articles 8 to 11 of the Protocol –, including ‘a review of the financial sector of the Associated State, an assessment of the implementation and application of the relevant EU acquis, and an assessment of the supervisory infrastructure of the Associated State’.
8. Articles 8 to 11 of the Protocol detail the evaluation process referred to in Article 3(2). Those articles confer powers on the EU supervisory authorities, as detailed in paragraphs 24 to 28 below.

¹¹ See Article 1 of the Protocol.

¹² In accordance with Article 6(1) of the Protocol, the access granted to EU internal market for financial services may concern one or more segments of that market. In accordance with Article 11(4) of the Protocol, in case the Commission adopts a negative recommendation, it ‘shall notify the Subcommittee on Financial Services of the guidelines and actions for the Associated State to address the identified deficiencies. The Associated State shall be precluded from submitting a new request for evaluation to obtain market access until one year after the issuance of the guidelines by the European Commission. Upon submitting a new request, the Associated State shall provide evidence of its adherence to the prescribed guidelines and the implementation of the required actions.’

9. In accordance with Articles 12 and 13 of the Protocol, after an Associated State has been granted access to the EU internal market for financial services, the Commission must monitor the continued compliance of that State with the relevant EU acquis and assess the supervisory infrastructure of the said State. Under Article 13(1) of the Protocol, that latter assessment is to be conducted in accordance with Article 10 of the Protocol, that is to say by the EU supervisory authorities. Ultimately, in accordance with Article 13(4) of the Protocol, if the EU supervisory authorities identify deficiencies of the supervisory infrastructure of an Associated State and if that State fails to remedy those deficiencies, the EU has the right to suspend the application of the Protocol in respect of the financial services segment or segments at issue.
10. Articles 14 and 15 of the Protocol grants ‘*general powers*’ and ‘*emergency powers*’ to the EU supervisory authorities, as detailed respectively in paragraphs 32 and 38 to 0 below.

III. LEGAL ANALYSIS

11. In the absence of specific Treaty provisions on the conferral of powers on bodies, offices and agencies under EU law, the legal framework for the conferral of such powers has mainly been set through the case law of the Court of Justice of the EU (CJEU), resulting from the *Meroni* Case.¹³ The *Meroni* doctrine is an expression of the principle of institutional balance enshrined in Article 13(2), first sentence, TEU, a principle which finds its origin in this case.¹⁴

¹³ Judgments of 13 June 1958, *Meroni*, 9/56, EU:C:1958:7, pp. 151 et sqq.; 14 May 1981, *Romano*, 98/80, EU:C:1981:104, paragraph 20; 12 July 2005, *Alliance for Natural Health*, Joined Cases C-154/04 and C-155/04, EU:C:2005:449, paragraph 90; 2 May 2006, *United Kingdom v Parliament and Council (ENISA)*, C-217/04, EU:C:2006:279, paragraphs 42 et sqq.; 22 January 2014, *United Kingdom v Parliament and Council (Short Selling)*, C-270/12, EU:C:2014:18, paragraphs 41 et sqq.; 18 June 2024, *Commission v SRB (Banco Popular)*, C-551/22 P, EU:C:2024:520, paragraphs 69 et sqq; see also judgments of 1 June 2022, *Del Valle Ruiz v Commission and SRB*, T-510/17, EU:T:2022:312, paragraphs 229 et sqq., and *Aeris Invest v Commission and SRB*, T-628/17, EU:T:2022:315, paragraphs 121 et sqq.

¹⁴ Referring to the predecessor of Article 13 TEU the Court held in its judgment of 13 June 1958, *Meroni v High Authority*, 9/56, EU:C:1958:7, p. 152 that, from ‘*that provision there can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of under takings to which it applies.*’ This was subsequently further developed by the Court under the term of institutional balance (see judgments of 17 December 1970, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster*, 25/70, EU:C:1970:115, paragraphs 9 et sq.; 29 October 1980, *Roquette Frères v Council*, 138/79, EU:C:1980:249, paragraph 33; 10 July 1986, *Wybot v Faure*, 149/85, EU:C:1986:310, paragraph 23; 22 May 1990, *Parliament v Council*, C- 70/88, EU:C:1990:217, paragraph 21; 6 May 2008, *Parliament v Council*, C-133/06, EU:C:2008:257, paragraph 57 and 14 April 2015, *Council v Commission*, C-409/13, EU:C:2015:217, paragraphs 64 to 95; see to this end also CLS Opinion 14547/13, paragraph 6, fn 5).

12. The Meroni doctrine has been summarized by the CLS as follows:¹⁵

- (1) no delegation can be presumed and thus an explicit decision to delegate must be taken;
- (2) a delegation of powers is possible even in the absence of a specific basis for it in the Treaty;
- (3) any delegation of powers where the conferred powers are broader than those of the delegating authority is unlawful;
- (4) a delegation involving '*discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual [...] policy*'¹⁶ would imply an illegal transfer of responsibility by substituting the choices of the delegator by those of the delegate and by altering the balance of powers, thus doing away with the guarantee granted by the Treaty to undertakings; and
- (5) powers to carry out assessments under own authority should be subject to precise rules in order to avoid arbitrary results and to make review of those assessments possible: those powers must be clearly defined, and the exercise thereof must be subject to strict review in the light of objective criteria.

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¹⁵ CLS Opinion 14547/13, paragraph 6 concerning the Single Resolution Mechanism. See also CLS Opinion 10449/18, paragraphs 3 to 9, concerning the 2019 review of the European Supervisory Authorities (ESAs).

¹⁶ Judgment of 13 June 1958, *Meroni*, 9/56, EU:C:1958:7, p. 152.

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- 2) Powers conferred on the EU supervisory authorities under Articles 8, 10, 11 and 13 of the Protocol concerning the review of the financial sector of the Associated States and the assessment and monitoring of the supervisory infrastructure of that State
24. As mentioned in paragraphs 7 and 8 above, Articles 8, 10 and 11 of the Protocol confer powers on the EU supervisory authorities concerning the review of the financial sector of the Associated States.
25. Article 8(1) of the Protocol provides that '*the relevant EU supervisory authorities*' shall conduct a review of the Associated States under the '*oversight of the Commission*'. Under Article 8(1), point (b) of that Protocol, the EU supervisory authorities shall undertake balance sheet reviews and asset quality reviews for the banking and insurance sectors on the basis of

their methodology in cooperation with the relevant competent authorities of the Associated State. Under Article 8(2) of the Protocol the SRB is responsible for assessing the existence, structure, and quality of deposit guarantee scheme, insurance guarantee scheme and resolution regime in accordance with the relevant EU law, seemingly without any oversight by the Commission.

26. Under Article 10(2) of the Protocol, the EU supervisory authorities, in cooperation with the relevant competent authorities of Member States, shall assess the supervisory infrastructure of the Associated State. To this end, the EU supervisory authorities '*shall establish the assessment criteria and methodology and inform the European Commission and the Associated State accordingly.*'
27. Under Article 11 of the Protocol regarding the outcome of the evaluation, upon completion of the review of the financial sector and of the supervisory infrastructure of the Associated State, the EU supervisory authorities shall issue an opinion to the Commission, providing an assessment of that sector and infrastructure. The Commission, taking into account that opinion, shall issue a recommendation to the Subcommittee on Financial Services concerning the question whether that State should be granted access to the EU internal market on financial services.

28. As mentioned in paragraph 9 above, Article 13 of the Protocol entrusts the EU supervisory authorities with tasks relating to the assessment and monitoring of the supervisory infrastructure of that State, after that State has been granted access to the EU internal market for financial services.

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3) General powers conferred on the EU supervisory authorities under Article 14 of the Protocol

32. As mentioned in paragraph 10 above, Article 14 of the Protocol, which is entitled ‘*EU supervisory authorities – general powers*’, provides that the EU supervisory authorities ‘*shall be endowed vis-à-vis the financial services sector and the competent authorities of the Associated State with all the powers conferred upon them by their founding regulations, the relevant sectoral EU legislation and by the provisions of this Protocol.*’ (paragraph 1). The powers shall include those to take decisions and recommendations addressed to the financial service providers or competent authorities of the Associated State, ‘*as necessary*’ to ensure the proper functioning of the EU internal market, the protection of consumers, investors, and other relevant stakeholders, or the safeguard of the stability and integrity of the EU internal market (paragraph 2). The Associated State shall ensure that the EU supervisory authorities ‘*are able to exercise their powers effectively within its jurisdiction*’. In addition, the competent authorities of the Associated State shall also cooperate with the EU supervisory authorities ‘*in the exercise of their powers*’ and take all the necessary actions to ensure the effective and consistent enforcement of all the decision adopted by EU supervisory authorities (paragraph 3). Finally, where the EU supervisory authorities hold ‘*direct supervisory mandates or direct intervention powers*’, the decisions adopted by them shall be legally binding and directly applicable within the jurisdiction of the Associated State without the need for validation by its competent authorities (paragraph 4).

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4) Emergency powers conferred on the EU supervisory authorities under Article 15 of the Protocol

38. Article 15(1) of the Protocol foresees emergency powers which the EU supervisory authorities are supposed to exercise in the ‘*event of adverse developments in the financial sector of the Associated State*’ in case they (i) may have an impact on the stability or integrity of the financial sector of the EU or one of its Member States, or (ii) be detrimental to consumers, investors or other relevant stakeholders in the EU, or (iii) if there are ‘*emerging risks*’ posed by undertakings based in the associated state with potential cross-border implications. Under that provision, the EU supervisory authorities, ‘*shall have the power*’ vis-à-vis ‘*financial services providers based in the Associated State*’ to (a) ban the underwriting of new business or onboarding of new clients, in case of conduct or prudential concerns; (b) prohibit the free disposal of assets; (c) issue an order subject to penalty.
39. In addition, pursuant to Article 15(2) of the Protocol, the EU supervisory authorities, shall issue a decision addressed to the relevant competent authority of the Associated State to suspend the licence granted to a financial service provider in the event of (i) breach of EU law, (ii) fraudulent activities, or (iii) in case of ‘*serious concerns*’ about the financial situation, business model, compliance with the legislation on anti-money laundering and countering the financing of terrorism, compliance with ‘fit and proper’ requirements or conduct vis-à-vis clients or potential clients of the financial service provider.

40. The powers in Article 15(1) and (2) shall be exercised in accordance with Article 15(3) of the Protocol, only if the EU supervisory authorities have ascertained that the supervisory authorities of the Associated State *'have failed to exercise their powers in a timely and effective manner'*. These decisions are legally binding and directly applicable in the jurisdiction of the Associated State.

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