

The European System of Financial Supervision and the European Securities and Markets Authority

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Overview

- Historical context
 - Financial markets regulation/supervision **until December 2010**
 - The Lamfalussy process
 - The Committee of European Securities Regulators (CESR)
- Financial markets regulation/supervision **from January 2011**
 - The *de Larosiere* report and the EU reform agenda
 - The European System of Financial Supervision (ESFS)
 - The European Securities and Markets Authority (ESMA)

Lamfalussy process

- The Lamfalussy four-level approach, **as originally agreed**:
 - Level 1: adoption of framework principles by way of directives/regulations
 - Level 2: adoption of implementing measures
 - (Under Lisbon Treaty: L2 measures are adopted as delegated or implementing acts (Arts 290/291 TFEU))
 - Level 3: cooperation between national securities authorities (e.g., UK FSA, French AMF, German BaFin) and adoption of soft law measures to ensure consistent application and transposition of EU rules
 - Level 4: enforcement against non-complying Member States

Lamfalussy Level 3 and CESR

- Creation of the Committee of European Securities Regulators (**CESR**) in 2001; to foster cooperation and coordination among national securities authorities
- Situated in Paris
- Members were national securities authorities (e.g. UK FSA, French AMF, Italian Consob, etc.): **competent authorities**
- Adopted non-binding guidelines, recommendations, standards
- Carried out peer reviews
- Had non-binding mediation powers
- Decided by consensus in the shadow of a vote by way of qualified majority

Problems with CESR

- Small committee
- No legally binding powers
- CESR was a collective securities actor
 - CESR's preferences reflect those of its members (i.e. **national** securities authorities)
- Adverse behaviour on the part of its members
 - 'No action'
 - Defection

The financial crisis in the EU

- Banks in distress (Northern Rock, RBS, Fortis, Dexia, etc.)
- Real economies affected (recession)
- After initial hesitations, financial crisis prompts EU leaders to consider overhaul to institutional framework governing market supervision
 - Establishment of the *de Larosiere* group to make proposals

De Larosiere Report

- Makes regulatory/supervisory proposals
- Need to deal with systemic risks to financial stability (macro-prudential proposals)
 - Creation of a European Systemic Risk Board
- Need to review micro-prudential supervision
 - Creation of new European Supervisory Authorities; part of a new European System of Financial Supervision (ESFS)

ESFS

- Main purpose is to ensure that ‘rules applicable to the financial sector are adequately implemented ...’
- Part of ESFS are three new EU bodies, called ‘European Supervisory Authorities’ (ESAs)
 - Replace Level-3 Committees: CESR, CEBS and CEIOPS
- CESR is transformed into a new European Securities and Markets Authority (ESMA)
 - Sister organisations: EBA, EIOPA
- ESAs are collective securities actors: decision-making is in hands of representatives of national securities authorities, acting collectively within ESAs

Powers and scope of competence

- ESMA's Founding Regulation
 - Regulation EU No 1095/2010 [2010] OJ L331/84
- ESMA's '**Framing Acts**'
 - Various legislative acts and subordinate measures
 - Further binding acts which confer tasks on ESMA
- Can also act in the field of activities of market actors for issues not directly covered in above acts, if necessary to ensure effective/consistent application of those acts
- 'Appropriate action' also for clearing/settlement, matters pertaining to derivatives and takeover bids

ESMA composition

- Board of Supervisors (BoS)
 - Voting members and non-voting members
 - Main decision-making organ
 - Decides by simple majority or qualified majority.
- Management Board (MB)
 - Made of ESMA's Chairperson and 6 (voting) members of the BoS for 2 ½ years
 - Commission and Executive Director can attend MB
 - Ensures that ESMA fulfills its mission/tasks (+ has various specific tasks).
 - Decides by majority of members present

ESMA composition (II)

- Executive Director
 - Full time independent professional appointed for 5 years
 - In charge of day-to-day management of ESMA (+ has various specific tasks)
- Chairperson
 - Full time independent professional appointed for 5 years
 - Represents ESMA
 - Prepares BoS work; chairs meetings of BoS and MB
- Board of Appeal
- Joint Committee: to ensure cooperation and cross-sector consistency among ESAs

Powers of ESMA

- Three considerations:
 - Learning the lessons from failings in Level-3 committees (CESR, CEBS, CEIOPS)
 - Dealing with **political** limits to delegation of powers to regulatory agencies
 - Dealing with **constitutional** limits to delegation of powers
 - Case 9/56 *Meroni* [1958] ECR 133

Delegation of powers – *Meroni*

- Case 9/56 *Meroni*
 - A delegation of powers cannot involve a ‘discretionary power, implying a wide margin of discretion’
 - Delegation can only involve ‘clearly defined executive powers’ which can be subject to review ‘in the light of objective criteria’.
 - Delegator cannot delegate powers different from its own powers derived from the Treaty

Delegation of powers - *Meroni* (II)

- Delegation of legislative powers
 - Ruled out by *Meroni*. Also by *Romano* (Case 98/80 [1981] ECR 1241)
- Delegation of **binding** individual decision-making powers
 - Needs pre-structuring to ensure that delegation does not involve a ‘wide margin of discretion’

Delegation of powers - ESMA

- How create more powerful collective securities actors whilst making the delegation of powers to ESMA constitutionally and politically acceptable?
- Levels and circuits
 - Meaning
- Circuit-switcher rules
 - Allows ESMA to take individual decisions against competent authorities or market actors
- Level-switcher rules
 - To ensure constitutional compliance or political acceptance of delegation of powers

Powers of ESMA - Overview

- Participates in adoption of binding technical standards (following endorsement by Commission)
- Adopts guidelines and recommendations
- Powers to act with respect to breaches of EU law
- Conciliation and binding dispute settlement powers
- Powers to act in crisis situations
- Certain day-to-day supervisory powers (eg for credit agencies)
- Power to temporarily ban or restrict market activities
- Role in colleges
- **etc.**

Technical standards

- Participates in adoption of binding technical standards
 - Regulatory technical standards (RTS)
 - Adopted as delegated acts
 - Implementing technical standards (ITS)
 - Adopted as implementing acts
- ESMA prepares draft standards
- European Commission endorses draft standards
 - Limits to Commission powers?
- Powers reserved to Council and EP (for RTS)

Proper application of EU rules and supervisory practices

- ESMA issues guidelines and recommendations
 - Aim: foster ‘common, uniform and consistent application’ of EU law + develop ‘consistent, efficient and effective’ supervisory practices
 - Addressed to competent authorities/market actors
- Non-binding measures; but:
 - Addressees meant to make ‘every effort to comply’
 - Procedural obligations meant to make it more difficult to ignore measures

Policing breaches of EU law

- ESMA plays a role in policing the application of its Framing Acts, including the RTS and ITS
 - Where competent authorities (i) do not apply measures or (ii) apply them in a manner which seems to breach EU law, especially by not making sure that a market actor complies with its legal obligations
- ESMA can issue a recommendation (non-binding)
 - Commission can issue a formal opinion
- ESMA can address an individual decision to a market actor if comp. authority fails to comply with Commission opinion
 - Conditions apply; ‘last resort’ power

Conciliation and dispute settlement

- ESMA assists authorities from different M-Ss in resolving disputes
 - ESMA acts as a mediator
- ESMA can settle a dispute if authorities unable to reach agreement in order to ensure compliance with EU law
 - ESMA addresses an individual decision to competent authority
- ESMA can take individual decision against market actor if competent authority fails to comply with ESMA's decision
- Safeguard clause: to protect 'fiscal responsibilities' of M-Ss
- Powers also apply for cross-sectoral disputes and disputes in colleges

Emergency (crisis) situations

- Role in coordinating and facilitating actions of competent authorities (CA) in crisis situations
- Power to address individual decisions to CA
 - In exceptional circumstances where coordinated action is needed to address events that endanger functioning/ integrity of markets or stability of financial system
- Power to address individual decision to market actor
 - Strict conditions
- Decision regarding the existence of a crisis situation
- Safeguard clause to protect ‘fiscal responsibility’ of M-Ss

Conclusion

- ESMA vs CESR
 - Resources
 - Decision-making
 - Powers
 - More powers!
 - ESMA has greater role at L2, L3 and L4 of Lamfalussy process!
 - Accountability
- Will ESMA succeed?

Source:

- P Schammo, *EU Prospectus Law – New Perspectives on Regulatory Competition in Securities Markets* (Cambridge University Press, Cambridge, 2011, forthcoming)

<http://www.frcaq.com/uk/catalogue/catalogue.asp?isbn=9780521517652>