The new institutional Framework of European Financial Markets: A real improvement or small political step forward?

ESMA’s Legal powers

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I. THE NEW EUROPEAN SYSTEM OF FINANCIAL SUPERVISORS – Context

How does a new financial supervisory structure fit in the present context in Europe?

• Recent financial crisis and new challenges for the stability of the global financial and economic systems: G20 recommendations to assess Systemic Risk

• MiFID Regulation: one of the most important legal reforms applying to Financial Markets of the EU. MiFID has a direct legal impact in the creation of a fragmented market, and therefore creates a competitive environment between Market participants

• Need for a centralized Credit Rating Agencies mechanism
I. THE NEW EUROPEAN SYSTEM OF FINANCIAL SUPERVISORS (...)

A. Steps that led to the creation of ESMA:

- **October 2008**: EC mandates the Larosière Group
- **February 2009**: Larosière Report is submitted to the EC. It is the first and most important international integration of Financial Markets in Europe
- **September 2010**: EC approves legislation creating a new European System of Financial Supervision ("ESFS")
- **January 1, 2011**: ESMA is established legally as an independent EU Authority and becomes fully operational.

a) Remodeling of the structure

- From Committees to EU Authorities
  - CESR becomes ESMA, CEBS becomes EBA, CEIOPS becomes EIOPA
  - Role of the ESRB - note that ESRB has no legal personality
  - MICRO-PRUDENTIAL OVERSIGHT vs. MACRO-PRUDENTIAL RISK ASSESSMENT: a collaboration between the bodies: advice/warnings vs. information exchange
b) Regulation establishing ESFS and ESMA


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c) From CESR to ESMA: roles and responsibilities

**CESR**
- Advisory body to the EC
- Coordinated activities between national securities regulators
- General oversight of the implementation of European Legislation in member states

**ESMA**
- EU Authority with Legal personality
- Accountable to the EP and E council
- All previous tasks/powers of ESMA
- Power to develop rules for Europe’s securities markets
- Power to impose specific restrictions on market participants
- Supervision of CRAs
B. THE LEGAL POWERS AND STRUCTURE OF ESMA

a) ESMA’s governance structure

- Board of Supervisors
  - Responsible of ESMA’s key decisions (a.43)
  - Composed of the heads of national regulators, Chairperson, EC rep, ESRB rep, EBA and EIDPA rep

- Management Board
  - Ensures that ESMA carries its mission (a.47)
  - Composed of Chairperson and 6 members of Board of Supervisors

- The Board of Appeal
  - Joint body of the ESAs
  - Ensure the application of Appeal remedies (a.60)
  - Composed of 6 members/experts

B. THE LEGAL POWERS AND STRUCTURE OF ESMA (...)

b) Tasks and Powers

- Establish common regulatory and supervisory standards (art. 8)
  - Draft Regulatory technical standards
  - Issue guidelines and recommendations based on Art.1(2)
  - Contribute to consistent application of legally binding Union Acts
  - Coordination role

- Actions in emergency situations (art.18)
  - In cases which may affect the orderly functioning and integrity of financial markets – power to facilitate and coordinate actions and adopt individual decisions
  - Identification and measurement of systemic risk in consultation with FMRK

- Settlement of disagreements between competent authorities(art.19,20)
  - In cross border situations
  - Across sectors
  - ESMA has a legally binding mediation role to resolve disputes (art. 21 [4]).
C. SUPERVISION OF CRAs

- Unique role of Credit Rating Agencies (« CRAs »)
- CRAs lack of liability
- New Regulation for CRAs:

C. SUPERVISION OF CRAs (...)

Registration and supervision of CRAs
- CRAs have to apply for registration with ESMA, which will then decide on each of them.
- Possibility of charging fees.

Day-to-day supervision
- Monitor that CRAs comply with Regulation.
- ESMA has supervisory powers, such as requesting relevant information, hearing of persons, examining records and conducting on-site inspections.

Taking appropriate supervisory measures if breach
- Ranging from the issuance of a public notice to the withdrawal of the registration, depending on the seriousness of the breach.
C. SUPERVISION OF CRAs (...)

ESMA’s specific powers towards CRAs:

• **Necessary powers to carry out an effective supervision** over CRAs
• **Require CRAs and all persons involved in rating activities to provide all necessary information**
• **Examine records, data, procedures** (incl. telephone and data)
• **ask for an oral explanation, interview or summon**
• **carry out on-site inspections** at the premises of CRAs
• **Impose a sanction if breach of the CRA Regulation** (ranging from temporary prohibition of issuing ratings, suspension of the use of the credit ratings or withdrawal of registration)
• **Request Commission to impose a fine** if CRA has intentionally or negligently committed a breach of the Regulation.

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D. LEGAL, ECONOMIC AND POLITICAL IMPLICATIONS

a. Potential structural, legal and technological challenges

![Diagram]

Market participants:
- Regulators
- Exchanges/MTFs
- Financial Intermediaries

Asymmetry of technology between participants:

- Financial Intermediaries are technologically ahead of many Market participants as Regulators until now only looked at their respective markets.
- Regulators need to increase their supervisory tools in order to follow the Market.

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D. LEGAL, ECONOMIC AND POLITICAL IMPLICATIONS (...)

Criticisms, challenges and achievements

- ESMA’s Powers
- ESMA’s nomination process
- Challenges of the new CRAs Regulation
- ESBR’s issues of legal certainty and powers

Thank you - Merci