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An Overview of a New Regulatory Regime in EU Financial Market Regulation, 2015

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Abstract The regulation of financial markets in the European Union has over the last fifteen years undergone tremendous changes. Following the financial crises a tsunami of regulation has been seen. This article outlines and discusses the development in the EU regulatory and supervisory regime from the Lamfalussy Report of 2001 to the Larosiére Report of 2009. It is concluded the new system and the regulatory methods applied have laid out a road map for the creation of one Single Rulebook for the regulation of financial markets in the EU. However, the question is has the regulation gone too far?

Summary 1. Introduction. – 2. From Lamfalussy to Larosiére. – 2.1. The Lamfalussy Process. – 2.2. The Lisbon Treaty. – 2.3. The Larosiére Report. – 3. Concluding Remarks.

1 Introduction

The creation of a single financial market in Europe has for more than half a century had high priority on the agenda of the European Union. The first initiative was the Segré Report of 1966[1]. Initially financial markets in Europe were characterised by a national orientation and approach including national barriers directly or indirectly to protect national markets and market participants in each Member State. Facilitated among other things by a technological revolution in the financial services industry investments and trade now a day are global, worldwide and no longer taking national boundaries into account.

In the same period regulating financial market and the market participants has been problematic and a challenge for the European regulators. Existing laws and new regulatory initiatives have a tendency to lack behind the development in the market and having difficulties keeping up with the pace and creativity of the market and among its participants. To

1 *The development of a European capital market. Report of a Group of Experts appointed by the EEC Commission,* November 1966.

overcome or at least to limit the gap between the actual market situation and the regulation regulators have over time applied different law-making methods and instruments.

The first European regulatory initiative regarding financial markets was the Commission's Recommendation for a European Code of Conduct Relating to Transferable Securities of 1977[2].

The next step was a number of directives in the late 70's and early 80's primarily related to listing and prospectus requirements for official listing of securities at stock exchanges. These directives aimed at the creation of a single security market for issuers wanting to raise capital in Europe[3]. Even though these directives were minimum directives requiring national implementation in the Member States a certain level of harmonisation and common rule was purposed and achieved as the directives contained rather detailed rules.

However, it turned out that this regulatory approach became too slow and falling behind the evolution in the market. The Commission's White Paper on the Internal Market of 1985[4] initiated a change in the regulation of financial markets. In the late 80's and the mid 90's new regulatory tools were introduced. The concept of European passport, homeland control and mutual recognition was applied and at the same time the directives became minimum directives leaving room for different standards and rules to be implemented by the Member States. The most predominant examples are the Investment Service Directive[5] and the Capital Adequacy Directive[6] of 1993. This new regulatory approach created room for regulatory competition between the Member States and the different market places and ignited the debate on a race to the bottom/a race to the top.

By the end of the 90's «[T]he European Union's current regulatory framework [was considered] too slow, too rigid, complex and ill-adapted to the pace of global financial market changes. Moreover, almost everyone agrees that existing rules and regulations are implemented differently and that therefore inconsistencies occur in the treatment of the same type of

2 Recommendation 77/534/EEC [1977] OJ L212/37.

3 See e.g. Directive 79/279/EEC coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing, [1979] OJ L66/21 and Directive 80/390/EEC coordinating the Requirements for the Drawing-up, Scrutiny and Distribution and the Listing Particulars to be published for the Admission of Securities to official Stock Exchange Listing, [1980] OJ L100/1.

4 COM(85) 310 final.

5 Directive 93/227/EEC on Investment Services in the Securities Field, [1993] OJ L141/27.

6 Directive 93/6/EEC on the Capital Adequacy of Investment Firms and Credit Institutions, [1993] OJ L141/1.

business, which threatens to violate the pre-requisite of the competitive neutrality of supervision»[7].

The response from the EU was The Financial Service Action Plan of 1999 (FSAP)[8] followed by the Lamfalussy Report of 2001[9]. Most of the 42 reform measures suggested in the FSAP were adopted by the EU within less than five years including a Market Abuse Directive (MAD I) of 2003[10] and a Directive on Markets in Financial Instruments (MiFID I) of 2004[11], the latter to replace the Investment Service Directive. Further, a new law-making mechanism as suggested in the Lamfalussy Report was employed. The Lamfalussy regulatory model involves a levelling of the law-making. In short, a level 1 with framework principles to be decided by normal EU legislative procedure, a level 2 with detailed rules and technical standards to be set by the Commission to fill in level 1 measures, and a level 3 including cooperation among EU securities regulators to ensure consistent and equivalent transposition of level 1 and 2 legislation and level 4 related to enforcement. To assist the Commission two new committees (EU Securities Committee and EU Regulators Committee) were set up. This levelling of the law-making process should enable the Commission assisted by the two committees to respond quicker and more flexible to developments and changes in the financial market by setting technical standards and detailed rules responding to the actual market situation. This new law-making process in combination with the use of regulations and detailed directives and full harmonisation directives at level 2 caused an increase in the level of harmonisation of the European regulation of financial markets.

The levelling of the law-making process and the level of harmonisation has been even further strengthened by additional initiatives and new regulation post FASP and not least after the financial crisis.

A general response to the financial crisis is found i the Larosiére Report of 2009[12] stating: «[T]he world's monetary authorities and its regulatory and supervisory financial authorities can and must do much better in the future to reduce the chances of events like these happening again». «A profound review of regulatory policy is therefore needed. A consensus… needs to be developed on which financial services regulatory measures

7 Final Report of the Committee of Wise Men on the Regulation of European Securities Markets of 15 February 2001, p. 7.

8 COM(1999) 232 final.

9 Final Report of the Committee of Wise Men on the Regulation of European Securities Markets of 15 February 2001.

10 Directive 2003/6/EC on Insider Dealing and Market Manipulation (Market Abuse), [2003] OJ L96/16.

11 Directive 2004/39 EC [2004] OJ L145/1.

12 Report from The High-level Group on Financial Supervision in the EU, 25 February 2009.

are needed for the protection of customers, the safeguarding of financial stability, and the sustainability of economic growth».

Next to focusing on weaknesses in the national and European supervision of financial markets the Larosiére Report in particular criticised the effectiveness of level 3 of the Lamfalussy process. New committees have been established and they are contrary to the previous committees granted law-making power. The levelling in the law-making process is now reflected in the Lisbon Treaty Article 290 and Article 291 (TFEU). Regarding harmonisation a great number of the recent level 1 measures are now in form of regulations and being supplemented by numerous technical standards at level 2. The goal of the new regulation is to create a Single Rule Book for financial market and financial activity.

Among the cornerstones in the new post FSAP regulation are a new generation of extensive rules on markets for financial instruments and on market abuse replacing MiFID I and MAD I. At level 1 the new regulation includes a regulation on markets in financial instruments (MiFIR)[13], and a directive on markets in financial instruments (MiFID II)[14]. Market abuse is regulated in a market abuse regulation (MAR)[15] and a market abuse directive on criminal sanctions (MAD II)[16]. These regulatory measures were all enacted by the EU in 2014.

The following section II will more detailed discuss the development in the regulatory and supervisory regime from Lamfalussy to Larosiére and some concluding remarks are found in section III.

2 From Lamfalussy to Larosiére

The Lamfalussy process is a legislative process that was introduced in 2001 with a view to making the legislative process in the financial sector more effective. Much water has flowed under the bridge since then. The Lisbon Treaty entered into force in 2009, and the financial crisis prompted the setting up of a new European supervisory system entering into effect in 2011. Both these factors have had an influence on the Lamfalussy process.

13 Regulation (EU) No 600/2014 of the European Parliament and of the Council on Markets in Financial Instruments and amending Regulation (EU) No 648/2012, [2014] OJ L 173/84.

14 Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, [2014] OJ L 173/349.

15 Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, [2014] OJ L173/1.

16 Directive 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse (market abuse directive), [2014] OJ L173/179.

2.1 The Lamfalussy Process

As mentioned the seeds for the Lamfalussy process were sown in 1999 in connection with the Commission's adoption of the Financial Services Action Plan (FSAP)[17]. FSAP listed a large number of areas in which there was found to be a need to bring the legislation up to date. In relation to the implementation of the Plan the Commission pointed out that there would be a need to change and optimise the legislative process for financial sector legislation, and that the co-decision procedure pursuant to Article 251 of the Treaty establishing the European Community (EC Treaty), now the ordinary legislative process in Article 289 of the Treaty on the functioning of the European Union (TFEU), was not suitable for parts of such legislation[18].

In July 2000 a Committee of Wise Men was appointed under the chairmanship of Alexandre Lamfalussy. The Committee was given the task of developing a new and more adaptable and effective legislative process in the area of securities. In February 2001 the Committee issued a report with a proposal for a special procedure for drafting legislation in this area – the Lamfalussy process[19].

a. The Law-making Process

The Lamfalussy process applicable to the legislation of the financial sector in general[20] consists of four levels. The first two concern EU legislation and the second two concern implementation of the EU legislation[21].

Level 1 Framework Legislation

Upon a proposal from the Commission and pursuant to the ordinary legislative process in Article 289 TFEU, the European Parliament and the Council adopt framework directives or regulations which lay down a number of

17 *Communication from the Commission – Implementing the framework for financial markets: action plan*, COM (1999) 232 final.

18 COM (1999) 232 final, p. 13.

19 Final Report of the Committee of Wise Men on the Regulation of European Securities Markets of 15 February 2001.

20 In December 2002 ECOFIN (the European Economic and Financial Affairs Council) decided that the Lamfalussy process should not only as originally apply to securities regulation but also to legislation for other parts of the financial sector.

21 For further details of the Lamfalussy process, see among others N. Moloney, *EU Securities and Financial Markets Regulation*^{3}, 2015, p. 862 with further references.

principles reflecting the political choices on which the specific legislative act is intended to regulate. By only making the main principles subject to the ordinary (and somewhat heavy) legislative process, and not the more technical details, this should speed up the legislative process and make it easier continuously to adjust the regulation to the needs and development in the market.

Level 2 Implementing Measures

These regulatory measures lay down the detailed and technical rules to flesh out the framework legislation at level 1. At this stage of the process the Commission consults the relevant financial regulatory committee(s) – Committee of European Securities Regulators (CESR), Committee of European Banking Supervisors (CEBS) and Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) – which in turn consults market participants and then submit recommendations to the Commission for technical implementing measures. On the basis of this the Commission drafts a proposal for a legislative act which is then submitted to the relevant committee(s) with a view to obtaining approval. Upon approval by the committee(s) the legislative act is adopted by the Commission.

Level 3 Cooperation

At this level the national supervisory authorities cooperate in committees with a view to ensuring common and uniform implementation, application and enforcement of the Union legislation in each Member State. This is done by drawing up common standards, guidelines and recommendations (soft law) on the application and interpretation of level 1 and 2 legislative acts. Cooperation between the national supervisory authorities gives a basis for comparing the individual Member States' legislative and supervisory practice and thus for drawing up best practice.

Level 4 Enforcement

The Commission monitors whether the Member States' legislation complies with Union legislation and takes the necessary measures if this is not the case.

b. The Organisational Structure

The introduction of the Lamfalussy process made a new organisational structure necessary, since the tasks at levels 2 and 3 required the setting up of new financial committees and new financial supervisory committees. For this purpose, Directive 2005/1/EC on the establishment of a new organisational structure for financial services committees was adopted[22] [23].

The European Securities Committee (ESC), the European Banking Committee (EBC) and the European Insurance and Occupational Pensions Committee (EIOPC) were set up for the purposes of level 2[24]. These committees primarily have a regulatory function and, as stated above they must approve the Commission's proposals for implementing measures. However, upon request the committees could advise the Commission on the drawing up of proposals for level 1 legislation and on the mandates of the supervisory authorities at level 2[25]. The committees consisted of high level representatives of the Member States with a representative of the Commission as chairman[26].

In addition to these three committees, the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS) and Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) were also set up[27]. These committees have tasks at two levels. At level 2 contributing to effective Union legislation by giving advice (either on their own initiative or upon request) about technical details in implementing legislation. At level 3 working to establish a consis-

22 Directive 2005/1 of the European Parliament and of the Council amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organizational structure for financial services committees, OJ [2005] L 79/9. The Directive entered into force on 1 April 2005.

23 See further among others, N. Moloney, *EU Securities and Financial Markets Regulation*[3], 2015, p. 951.

24 Commission Decision 2001/528/EC establishing the European Securities Committee, [2001] OJ L 191/45; Commission Decision 2004/10/EC establishing the European Banking Committee, OJ [2004] OJ L 3/36; and Commission Decision 2004/9/EC establishing the European Insurance and Occupational Pensions Committee, [2004] OJ L 280/12.

25 *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, 2001, p. 29; Article 2 of Commission Decision 2001/528/EC; Article 2 of Commission Decision 2004/10/EC; and Article 2 of Commission Decision 2004/9/EC.

26 Article 3 of Commission Decision 2001/528/EC; Article 3 of Commission Decision 2004/10/EC; and Article 3 of Commission Decision 2004/9/EC.

27 Commission Decision 2001/527/EC establishing the Committee of European Securities Regulators; Commission Decision 2004/5/EC establishing the Committee of European Banking Supervisors; and Commission Decision 2004/6/EC establishing the Committee of European Insurance and Occupational Pensions Supervisors.

tent view of supervision and supervisory practice in the Union by drawing up guidelines etc., as well as establishing cooperation and exchange of information between the supervisory authorities of the Member States[28]. The committees consist of high level representatives of the competent national supervisory authorities[29]. In contrast to the financial committees, the supervisory committees were independent of the Commission.

2.2 The Lisbon Treaty

When the Lamfalussy process was adopted it based levels 3 and 4 on the general comitology system which meant that the more technical aspects of a legislative act were not determined by the Council or the European Parliament but by the Commission under authority laid down in a basic legislative act with consultation of a number of advisory committees (whence the name ‘comitology’). The authority for using the comitology procedure was in Article 202 of the EC Treaty[30].

The Lisbon Treaty, which entered into force on 1 December 2009, changed the comitology procedure. The Commission now has powers to adopt delegated legislative acts pursuant to Article 290 TFEU or implementing legislative acts pursuant to Article 291 TFEU. Both delegated legislative acts and implementing legislative acts are directly binding on the Member States, but only implementing legislative acts must be adopted by means of comitology, i.e. in cooperation with committees consisting of representatives from the Member States. The procedure for implementing legislative acts is used when uniform conditions for implementing legally binding Union acts are needed[31]. Delegated legislative acts can be used to supplement or amend certain non-essential elements of a legislative act adopted by ordinary legislative process[32].

In basic legislation adopted by the ordinary legislative process (level 1 legislation) the Council and the European Parliament can mandate the Commission to adopt delegated legislative acts as mentioned in Article 290 TFEU. The text of the Treaty does not contain any requirement for the Commission to include third parties in the preparatory work, but in Com-

28 Article 2 of Commission Decision 2001/527/EC; Article 2 of Commission Decision 2004/5/EC; and Article 2 of Commission Decision 2004/6/EC.

29 Article 3 of Commission Decision 2001/527/EC; Article 3 of Commission Decision 2004/5/EC; and Article 3 of Commission Decision 2004/6/EC.

30 For further on comitology, see e.g. see among others N. Moloney, *EU Securities and Financial Markets Regulation*[3], 2015, p. 854.

31 See Article 291(2) TFEU.

32 See Article 290(1) TFEU.

munication on the implementation of Article 290 TFEU, the Commission has stated that it intends systematically to consult experts from the national authorities of all the Member States which will be responsible for implementing the delegated acts once they have been adopted. For this purpose the Commission may form new groups of experts or use existing groups[33]. However, this can take place informally, outside the normal comitology system, i.e. without involving committees. The monitoring of the Commission's issuing of delegated legislative acts primarily takes the form of the possibility of *ex post* sanctions, e.g. the Council or Parliament may revoke the delegation or make objections to the Commission's proposals and thereby preventing their entry into force.

As stated, implementing legislative acts pursuant to Article 291 TFEU must still be adopted using comitology. Under the former comitology system, as set out in the Comitology Decision (Decision 1999/468/EC)[34], there were four different procedures which the Commission could use for the adoption of legislative acts: the management procedure, the regulatory procedure, the advisory procedure and the safeguard procedure. Originally the regulatory procedure was the basis for the Lamfalussy process, but following an amendment to the Comitology Decision by Decision 2006/512/EC, the Lamfalussy process came to be based on the safeguard procedure, which meant that the Parliament had a veto right over legislation adopted by the Commission if it did not agree with the content of a legislative act. The Comitology Regulation (No 182/2011)[35] lays down the rules and general principles for mechanisms for control of the Commission's exercise of implementing powers by Member States[36]. There are two procedures for the adoption of implementing legislation: The examination procedure and the advisory procedure[37]. The examination procedure can be used in the case of general measures or measures that are of general scope, or which relate to the common agricultural and common fisheries policies, the environment, security and safety, or protection of the health or safety, of humans, animals or plants or the common commercial policy. In other

33 Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (COM (2009) 673 final).

34 [1999] OJ L184/23.

35 Regulation (EU) No 182/2011, [2011] OJ L 55/13.

36 The Regulation repealed and replaced the Comitology Decision (Decision 1999/468/EC), as amended by Decision 2006/512/EC, [2006] OJ L 200/11.

37 The advisory procedure corresponds largely to the previous advisory procedure, while the examination procedure replaces the management procedure and the regulatory procedure. The safeguard procedure is largely replaced by delegated legislative acts; see Article 290 TFEU.

cases the advisory procedure applies[38]. When the examination procedure is used, the relevant committee votes on the Commission's proposal for implementing legislation, while in the case of the advisory procedure the committee only gives the Commission a non-binding recommendation. The ESC, EBC and EIOPC are examples of such committees.

2.3 The Larosiére Report

A new European supervisory structure entered into force on 1 January 2011. The new structure is based on a number of recommendations made by the Larosiére Group, chaired by Jacques de Larosiére[39]. The groups report on the future of financial supervision in the EU was presented in February 2009[40]. The appointment of the Group was one of the many initiatives which the EU took in the wake of the financial crisis which had revealed the lack of cooperation, coordination, uniformity and trust between the national supervisors, and which did not take account of the fact that many financial undertakings today carry on business across national borders[41].

a. The New Organisational Structure

The new supervisory structure is based on the two pillars of macro-prudential supervision and micro-prudential supervision. Macro-prudential supervision is undertaken by the European Systemic Risk Board (ESRB), which has responsibility for the macro-prudential oversight of the financial system within the Union in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union, i.e. the risks of serious negative consequences for the whole of the financial sector or the financial system as a result of a weakening of parts of the sector or system[42].

38 See Article 2(2) and Article 2(3) of the Comitology Regulation.

39 For details, see among others N. Moloney, *EU Securities and Financial Markets Regulation*[3], 2015, p. 880 with further references.

40 *Report from The High-level Group on Financial Supervision in the EU*, 25 February 2009.

41 Communication from the Commission – European financial supervision, COM(2009) 252 final.

42 The basis for establishing the ESRB is set out in Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, [2010] OJ L 331/1 and Council Regulation (EU) No 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, [2010] OJ L 331/162.

The ESRB is an independent body covering all financial sectors. The Board does not have legal personality and it does not have legally binding powers.

Micro-prudential supervision, i.e. supervision of individual undertakings, is carried out by a new financial supervisory system consisting of national supervisory authorities and three newly established European supervisory authorities (ESAs). One for the securities market (The European Securities and Markets Authority – ESMA), one for banks (The European Banking Authority – EBA), and one insurance and pensions (The European Insurance and Occupational Pensions Authority – EIOPA), all of which have legal personality. The bases for the establishment of the ESAs are in three regulations which are more or less identical[43].

These supervisory authorities replaced three previous committees: ESMA replaced CERS; EBA replaced CEBS; and EIOPA replaced CEIOPS. The ESAs carry out the same functions as the supervisory committees they replace, but they have a number of additional tasks and powers.

The term 'supervisory authority' can to some extent be misleading about the roles of the three authorities. They do not, as their names might indicate, actually directly supervise individual financial undertakings. This task is still performed by the national supervisory authorities[44]. However, ESAs have a superior role in relation to supervision. Thus, according to Article 8 of each of the three regulations, in their areas of responsibility the ESAs must, among other things: 1. Contribute to the establishment of high-quality common regulatory and supervisory standards and practices, contribute to the consistent application of legally binding EU acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of specified legislative acts; 2. Prevent regulatory arbitrage, mediating and settling disagreements between competent authorities, ensuring effective and consistent supervision of financial institutions, ensuring a coherent functioning of colleges of supervisors and taking actions; 3. Stimulate and facilitate the delegation of tasks and responsibilities among competent authorities; and 4. Issue guidelines and recommendations and identify best practices, in order to strengthen consistency in supervisory outcomes.

These tasks primarily concern level 3 of the Lamfalussy process. In addition, the authorities have regulatory tasks linked to level 2 of the Lamfalussy process, as they must contribute to the establishment of high-quality

43 Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), [2010] OJ L 331/12; Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) , [2010] OJ L 331/48; and Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), [2010] OJ L 331/84.

44 There is an exception to this in Regulation (EU) No 513/2011 on credit rating agencies, [2011] OJ L 145/30.

common regulatory and supervisory standards and practices, contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of specified legislative acts.

b. The law-making process – the role of the ESAs

The new supervisory authorities (ESAs) have been given greater and more influential roles in the Lamfalussy process than the three previous committees. While the previous committees only operated at two levels (levels 2 and 3), of which level 2 was only of an advisory nature, the ESAs have tasks at three levels (levels 2, 3 and 4).

Level 2 regulatory tasks and powers

As stated above, following the entry into force of the Lisbon Treaty, legislation at level 2 is adopted either as delegated legislative acts (Article 290 TFEU) or as implementing legislative acts (Article 291 TFEU). The ESAs can be involved in both procedures if there is authority for this in the basic legislative act at level 1[45]. According to Article 10(1) of each of the three ESA regulations, where the European Parliament and the Council delegate power to the Commission to adopt *regulatory technical standards* by means of delegated acts pursuant to Article 290 TFEU, the relevant ESA may develop draft regulatory technical standards[46]. Likewise, under Article 15(1) of each of the ESA regulations, the authorities may develop *implementing technical standards*, by means of implementing acts pursuant to Article 291 TFEU[47].

According to Article 1(3) of each of the three ESA regulations, the supervisory authorities can not only as drafters of technical standards. They can also act as advisers to and make recommendations to the Commission.

The ESAs submit drafts for technical standards to the Commission with a view to their approval and final adoption. The Commission’s approval of the ESAs’ drafts for binding technical standards is necessary in order

45 Delegation to the Commission will state whether the process which the Commission must follow in drawing up level 2 rules will involve the ESAs or not.

46 Regulatory technical standards are standards that are technical and do not imply strategic or political choices, and their content is limited to the basic legislative acts on which they are based; see the ESA regulations, Article 10(1).

47 Implementing technical standards are standards that are technical and do not imply strategic or political choices, and their content is limited to the basic legislative acts on which they are based; see the ESA regulations, Article 15(1).

to comply with the *Meroni* doctrine on the delegation of powers[48]. The Commission is not obliged to accept the proposals of an ESA, and can thus amend or reject them. However, according to the preambles to the ESA regulations, draft legislative acts submitted by the ESAs should be subject to amendment only in very restricted and extraordinary circumstances, for example if draft regulatory technical standards do not respect the principle of proportionality, since the ESAs are the actors in close contact with and knowing best the daily functioning of financial markets[49]. The Commission must decide, within three months of their receipt, whether to endorse or amend draft regulatory technical standards or implementing technical standards. If the Commission does not endorse draft standards, it must give the ESAs six weeks in which to submit new proposals[50].

Further, if so provided in basic legislation (a level 1 legislative act) the Commission must involve the ESAs in drafting the technical standards. Only if an ESA does not submit a draft for technical standards within the period provided for in the basic legislation can the Commission adopt its own technical standards, either in the form of a delegated legislative act or an implementing legislative act without a prior proposal from the relevant ESA[51]. However, even in this situation an ESA must be consulted.

Compared with the previous committees (CERS, CEBS and CEIOPS), the ESAs have been given considerably more influence at level 2 of the Lamfalussy process. While the previous committees only had advisory powers, the ESAs have competence to draw up proposals for level 2 legislative acts. Even though the ESAs do not have direct regulatory competence, this possibility of them selves laying down and formulating the content of the technical standards, together with the Commission's limited scope for amending such standards, gives the ESAs considerable influence.

48 See the decision by Court of Justice in Case 9/56, according to which delegation must be limited to implementing powers clearly defined and entirely supervised by the delegating institution on the basis of specific and objective criteria. On the other hand, discretionary powers cannot be delegated by the Union's institutions. Thus the creation of legislative acts pursuant to Articles 290 and 291 TFEU cannot be delegated to the ESAs, and they thus only have competence to make proposals for regulation which are then adopted in their final form by the Commission. Further on the Meroni doctrine and its significance for the regulatory powers of the supervisory authorities and the also in that respect important Short Selling case C-270/12 UK v Council and Parliament, see e.g. N. Moloney, *EU Securities and Financial Markets Regulation*[3], 2015, p. 880 with further references.

49 See recital 23 of Regulation (EU) No 1093/2010; recital 23 of Regulation (EU) No 1094/2010; and recital 22 of Regulation (EU) No 1095/2010.

50 See Article 10(1) and Article 15(1) of the ESA regulations.

51 See Article 10(3) and Article 15(3) of the ESA regulations.

Level 3 supervisory tasks and powers

With a view to establishing consistent, efficient and effective supervisory practices within the Union, and to ensuring the common, uniform and consistent application of EU law, the ESAs have powers to issue guidelines and recommendations addressed to competent (national) authorities or financial institutions. As in the case of the precious committees' guidelines and recommendations, the ESAs' level 3 guidelines and recommendations are only non-binding soft law. However, the competent authorities and financial institutions must make every effort to comply with those guidelines and recommendations[52], and national compliance is further backed by a comply-or-explain principle and a naming-and-shaming procedure.

The national competent authorities are subject to the comply-or-explain principle, which means that within two months after an ESA has issued a guideline or recommendation, each competent authority must confirm whether it complies or intends to comply with that guideline or recommendation. If a competent authority does not comply or does not intend to comply, it must inform the supervisory authority, stating its reasons. The ESA then publish that a competent authority does not comply or intend to comply with the guideline or recommendation (naming-and-shaming)[53].

Finally, the previously the committees' guidelines and recommendations were formulated by consensus while the ESAs' guidelines and recommendations are adopted by a qualified majority[54], making the ESAs more effective and progressive level 3 actors.

Level 4 enforcement tasks and powers

In contrast to the previous committees, the ESAs have also been given powers at level 4. The supervisory authorities have the possibility of intervening if a competent (national) authority has not applied legislative acts within the areas in which it has authority, or if it has applied them in a way which appears to be a breach of Union law, including regulatory technical standards and implementing technical standards, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts.

Upon a request or on its own initiative, a supervisory authority may investigate an alleged breach or non-application of EU law. An ESA supervisory authority may address a recommendation to the competent authority

52 See Article 16 of the ESA regulations.

53 See Article 16(3) of the ESA regulations.

54 See Article 44(1) of the ESA regulations.

concerned setting out the action necessary to comply with EU law. If the competent authority has not complied with Union law as mentioned in the recommendation, the Commission may issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law. If a competent authority does not comply with the Commission's formal opinion, and if it is necessary to remedy such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the ESA may adopt an individual decision addressed to a financial institution. In this decision the ESA may require the financial institution to take the necessary action to comply with its obligations under EU law including the cessation of any practice. If the financial institution does not comply with a decision of an ESA, the national competent authority will have to take action against it.

In their annual reports the ESAs must state which national competent authorities have not complied with the formal opinions of the Commission, and which financial institutions have not complied with the ESAs' decisions. This use of naming-and-shaming at level 4 must be assumed to have a disciplinary effect on the competent authorities and financial institutions[55].

3 Concluding Remarks

The Lisbon Treaty and the adoption of the recommendations of the Larosiére Report on a new European supervisory and regulatory structure have made important changes to the Lamfalussy regulatory process, and in particular the roles of associated committees/authorities.

While CESR, CEBS and CEIOPS only had competences at two levels of the Lamfalussy process, ESMA, EBA and EIOPA have powers at levels 2, 3 and 4. In principle the latter committees could also be relevant for level 1 since, pursuant to Article 34 of the ESA regulations, a supervisory authority may, upon a request from the European Parliament, the Council or the Commission, or on its own initiative, provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence. As pointed out above, the ESAs' influence at the different levels has been considerably increased compared with the previous committees, as the ESAs have been given other and additional powers. In particular the right to draft proposals for binding technical standards at level 2, and to make decisions directly applicable to financial institutions at level 4, should be emphasised.

55 See Article 17 of the ESA regulations. Article 17 is in part supplemented by Article 18 of the ESA regulations, on action in emergency situations.

In addition to powers directly linked to the Lamfalussy process, the ESAs have been given many additional powers. For example, they can settle disagreements between competent authorities in cross-border or cross-sectoral situations (Articles 19 and 20 of the ESA regulations), participate in colleges of supervisors (Article 21), issue warnings against or prohibit or restrict certain financial activities (Article 9), and ESMA can also undertake the direct supervision of credit rating agencies (Title III, Chapter II of Regulation (EC) No 1060/2009 on credit rating agencies). One of the explanations for this difference between the tasks of the previous committees and the supervisory authorities is the context in which these committees and authorities were established. Even though one of the goals of the work of the Lamfalussy Group was to ensure the convergence of the supervisory practices of the national authorities and a uniform interpretation and application of Union rules, the Lamfalussy process in connection with the which the committees were set up (CESR, CEBS and CEIOPS) was not concerned with such prudential supervision of the financial markets and institutions. In contrast, the supervisory authorities (ESMA, EBA and EIOPA) have been created as part of the establishment of a new European supervisory culture. The previous committees had a relatively passive role, and particularly at the start of the financial crisis lacked the capacities and legal authority to decide and implement quick and necessary decisions, the ESAs appear as proactive European authorities with a key role in both legislation and supervision of the financial sector. Even though the ESAs do not have an institutional basis, they must be considered powerful actors in this area.

There is no doubt that the new structure and regulatory set up regarding the securities financial market in the EU aim at and facilitate the creation regulation of a Single Rulebook for financial markets. Clear evidence is the preferred and extensive use of regulations at level 1 as well as at level 2. To the extent directives are used they seem for the most to contain detailed rules and full harmonisation provisions leaving little or no room for the Member States in the implementation process. Even though guidelines at level 3 still are not legally binding the introduction of the comply and explain and naming and shaming principles will put additional pressure on the national competent authorities of the Member States when considering whether and how to implement guidelines into national law. Further, the regulatory power of the ESAs will play an important role in the regulatory process. Figures comparing the MiFID I- and MiFID II/MiFIR-regulation show e.g. that MiFID I contained 71 recitals and 66 articles whereas MiFID II/MiFIR have a total of 226 recitals and 152 articles, and in MiFID I 18 provisions granted legal basis for level 2 measures whereas MiFID II/MiFIR contained 81 such provisions.

The new system and the regulatory methods and mechanism applica-

ble have laid out a road map for the creation of one Single Rulebook for the regulation of financial markets in the EU and the work is in progress. However, during the working process concerns and questions have been raised. Is harmonisation going too far? Is the regulation going to be too far reaching, too detailed and too inflexible to facilitate the needs of the market? Most recently the principle of proportionality has been added to the discussion, see EBAs workshop: «The application of the principle of proportionality in the context of Institutional and Regulatory Reforms» held on 3 July 2015.

Thus, the degree of harmonisation to be found in the Single Rulebook for the European financial market still has to be seen.