





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

ESMA's Legal powers

Nicolette KOST DE SEVRES and Lorenzo SASSO

Friday, June 10th 2011
British Institute of International and Comparative Law

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
- <u>February 2009</u>: *Larosière Report* is submitted to the EC. It is the first and most important international integration of Financial Markets in Europe
- <u>September 2010</u>: 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.

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

3

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 ESBR has no legal personality
- MICRO-PRUDENTIAL OVERSIGHT vs. MACRO-PRUDENTIAL RISK ASSESMENT: a collaboration between the bodies: advice/warnings vs. information exchange

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

b) Regulation establishing ESFS and ESMA

- REGULATION (EU) No 1092/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board
- REGULATION (EU) No 1095/2010 OF THE EUROPEAN PARLIAMENT AND 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

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

5

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

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

B. THE LEGAL POWERS AND STRUCTURE OF ESMA

a) ESMA's governance structure

Board of Supervisors

- Responsible of ESMA's key decisions (a.43)
- Chairperson, EC rep, ESBR rcp, EBA and EIOPA rep

Management Board

- (a.47)
- Chairperson and 6 members of Boardof

The Board of Appeal

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

Kost De Sevres, N and Sasso, L., Esma's Legal powers, june 2011

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 functionning and integrity of financial markets - power to faciliate and coordinate actions and adopt individual decisions
- Identification and measurement of systemic risk in consultation

Settlement of disagreements between competent authorities(art.19,20)

- In cross border situations
- Across sectors
- ESMA has a legallyu binding mediation role to resolve disputes (art. 21 (4)).

Kost De Sevres, N and Sasso, L., Esma's Legal powers, june 2011

C. SUPERVISION OF CRAs

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

REGULATION (EU) No 513/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

9

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.

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

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 on a fine** if CRA has intentionally or negligently committed a breach of the Regulation.

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

11

D. LEGAL, ECONOMIC AND POLITICAL IMPLICATIONS

a. Potential structural, legal and technological challenges



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

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

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

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011

13

Thank you - Merci

Kost De Sevres, N and Sasso. L., Esma's Legal powers, june 2011