

INSTITUTE FOR LAW AND FINANCE

FABIO RECINE

PEDRO GUSTAVO TEIXEIRA

THE NEW FINANCIAL STABILITY ARCHITECTURE IN THE EU



INSTITUTE FOR LAW AND FINANCE

GOETHE-UNIVERSITÄT FRANKFURT AM MAIN

WORKING PAPER SERIES No. 110

Fabio Recine
Pedro Gustavo Teixeira

The new financial stability architecture in the EU

Institute for Law and Finance

WORKING PAPER SERIES NO. 110

12/ 2009

The new financial stability architecture in the EU

Fabio Recine and Pedro Gustavo Teixeira*

Abstract

After the introduction of the euro in 1999, the debate on the financial stability architecture in the EU focused on the adequacy of a decentralised setting based on national responsibilities for preventing and managing crises. The Financial Services Action Plan in 1999 and the introduction of the Lamfalussy process for financial regulation and supervision in 2001 enhanced the decentralised arrangements by increasing significantly the level of legal harmonisation and supervisory cooperation. In addition, authorities adopted EU-wide MoUs to safeguard cross-border financial stability. In this context, the financial crisis has proved to be a major challenge to the ongoing process of European financial integration. In particular, momentous events such as the freezing of interbank markets, the loss of confidence in financial institutions, runs on banks and difficulties affecting cross-border financial groups, questioned the ability of the EU financial stability architecture to contain threats to the integrated single financial market. In particular, the crisis has demonstrated the importance of coupling to micro-prudential supervision a macro dimension aimed at a broad and effective monitoring and assessment of the potential risks covering all components of the financial system. In Europe, following the de Larosière Report, the European Commission has put forward proposals for establishing a European System of Financial Supervision and a European Systemic Risk Board, the latter body to be set up under the auspices of the ECB. While the details for the implementation of these structures still need to be spelt out, they should reinforce significantly – ten years after the introduction of the euro – the financial stability architecture at the EU level.

& &

Introduction

The financial crisis has put the global and European financial stability architectures to a momentous test. In particular, the crisis has highlighted key features of the financial market landscape, which had been possibly underestimated and need to be addressed by a new structure for financial regulation and supervision. Such features include the increasing relevance of systemic risk stemming from structural developments related to financial integration and financial innovation, as well as the close links between the financial system and the real economy. As a result, the crisis largely materialised out of mutually reinforcing dynamics between macroeconomic conditions, structural changes, and the specific vulnerabilities linked to individual institutions. These dynamics were not

* Fabio Recine is Senior Expert and Pedro Gustavo Teixeira is Adviser at the Directorate Financial Stability and Supervision of the European Central Bank, as well as Lecturer at the Institute for Law and Finance, Goethe-Universität, Frankfurt/M. The views expressed in this paper are those of the authors and do not necessarily reflect those of the ECB. Comments are welcome to fabio.recine@ecb.europa.eu and pedro.gustavo.teixeira@ecb.europa.eu

sufficiently captured by the regulatory and supervisory system. Therefore, the crisis reinforced the view that the safeguarding of financial stability requires an effective combination of micro and macro-prudential approaches to regulation and supervision.¹

In light of the lessons stemming from the crisis, the policy recommendations for regulatory reform emerging in global fora and in Europe suggest that there is consensus in the direction of introducing the tools and structures devoted to macro-prudential supervision, as well as of ensuring an effective interplay with micro-prudential supervision and the monitoring of individual financial institutions. At the international level, the G-20 Action Plan,² the strengthening of the role of the International Monetary Fund and the Financial Stability Board, as well as the initiatives taken by the Basel Committee on Banking Supervision,³ include elements towards strengthening the macro-prudential components of the regulatory system. In the EU, the European Commission set-up a High-Level Group chaired by Jacques de Larosière to give advice on the future of European financial regulation and supervision. The High Level Group recommended in February 2009 a new EU financial stability architecture based on a two-pillar structure comprising a European Systemic Risk Board (ESRB), for the conduct of macro-prudential oversight, and a European System of Financial Supervision (ESFS), for supporting supervisory coordination and convergence of supervisory standards.⁴ The Commission issued the legislative proposals for the setting-up of these structures on 23 September 2009.⁵

Against this background, this article provides an overview of the main features of the new European financial stability architecture on the basis of the state of play by 20 October 2009. The structure of this article is as follows. The first Section will describe the evolution of the financial stability framework in the EU. The second Section will refer to the main lessons from the crisis and the regulatory reforms taking place. The third and fourth sections will focus on the features of the ESRB and ESFS, respectively. The fifth section will identify the main challenges for the new architecture to work effectively.

¹ See M. Knight, “Marrying the micro- and macro-prudential dimensions of financial stability”, remarks before the Eleventh International Conference of Banking Supervisors, held in Basel on 20-21 September 2000; and Jaime Caruana (ECB book on “Simulating financial instability”) for the development of this perspective. See also L. Papademos, Financial stability and macro-prudential supervision: objectives, instruments and the role of the ECB, speech at the conference “The ECB and Its Watchers XI” Frankfurt, 4 September 2009, available at <http://ecb.europa.eu>.

² See G20 Leaders Statement – The Global Plan for Recovery and Reform, London, 2 April 2009 available at <http://g20.org>.

³ See G20 Progress Report on the actions to promote financial regulatory reform issued by the U.S. chair of the Pittsburgh G-20 Summit – 25 September 2009 available at <http://g20.org>

⁴ The High-Level Group on Financial Supervision in the EU, February 2009, available at <http://ec.europa.eu>

⁵ Available at <http://ec.europa.eu>

1. The evolution of the European financial stability framework

The development of the financial stability framework in the EU can essentially be traced back to 1985, the year in which the single market approach to financial services was introduced with the Commission's White Paper.⁶ The 1985 White Paper was the culmination of a number of economic, political and legal factors which provided the conditions for progress in European financial market integration. It represented the political willingness for undertaking economic reform, namely in the direction of market liberalisation and further market integration within the Community.

The 1985 White Paper put forward three key principles of legal and market integration.⁷ First, the principle of *home-country control*, according to which the primary task of regulating a financial institution and its branches established in host countries would be entrusted to the authorities of the Member State of origin. The financial institution would, therefore, only report to its home-country authorities regarding both domestic and cross-border provision of services directly or through branches.

The second principle was the *mutual recognition* by Member States and their respective authorities of the regulatory regimes and practices of each other. Financial institutions would be free to provide financial services directly or through branches in the jurisdiction of host Member States, subject to the laws, regulation and supervision of the home-country. For host-countries, this would imply recognising that the safeguard of the public interests underlying financial regulation in their jurisdictions – such as depositor and investor protection, and financial stability – would be adequately pursued by the home-country authorities.

Third, home-country control and mutual recognition would be supported by the *minimum harmonisation of national laws*, which would set the standards regarding authorisation, supervision and winding-up of financial institutions⁸. The application of these principles

⁶ European Commission, *Completing the Internal Market*, White Paper to the European Council of 28/29 June 1985 in Milan, COM (85) 310 final, 14 June 1985.

⁷ The cross-border provision of financial services would be facilitated essentially through the extension of the *Cassis de Dijon* doctrine from industrial and agricultural products under Article 28 (ex Article 30) EEC Treaty to the free circulation of "financial products" throughout the Community.

⁸ Minimum standards concerning supervision have been introduced to take care of host Member States' concern about foreign entities providing services in their territories. The European passport, by imposing the responsibility of supervision on home Member States, has compounded the shortage of human resources in supervisory authorities, faced with the increasing importance of risk management in day-to-day supervision: G. Hertig, *Regulatory Competition for EU Financial Services*, in D. Esty and D. Geradin (eds.), *Regulatory Competition and Economic Integration. Comparative Perspectives*, Oxford 2001, p. 238.

would provide a *single passport* to financial institutions for the provision of services throughout the Community.⁹

The Maastricht Treaty of 1992 set out the framework for EMU and the creation of the single currency, involving the establishment of the ECB and the ESCB.¹⁰ The introduction of the euro implied the establishment of the first federal regulatory structure of the Community through the full transfer of competences on monetary policy to the ECB and the ESCB. This move towards federalisation was based on the realisation – diagnosed in the 1989 Delors Report – that the development of the single market necessitated more effective co-ordination of economic policy between national authorities, as there was a fundamental incompatibility between (i) full freedom of capital, (ii) freedom to provide cross-border financial services, (iii) fixed exchange rate under ERM, and (iv) autonomous monetary policy.¹¹

The federalisation of the currency and monetary policy in 1999 provided the impetus for the regulatory reform of the single financial market and the introduction of EU-wide regulatory structures. The Financial Services Action Plan (FSAP), which was launched in May 1999, provided the basis for the renewal of the Community policy on financial services following the introduction of the euro. Its aim was to obtain the commitment of the Council, the Parliament and the Member States to forty-three (mostly) legislative initiatives for harmonising by 2005 the national laws relating to the provision of financial services. Such initiatives represented a shift from implementing the single passport concept on the basis of minimum harmonisation to an approach based on a high-level of harmonisation of national laws.

⁹ The implementation of the single passport concept was made possible by the Single European Act (SEA) of 1985, which committed Member States to achieving a single market by 1992. First, the SEA placed the free movement of capital at the same level as that of goods and services, providing the basis for Directive 88/361, which established the basic principle of free movement of capital as directly enforceable as a matter of Community law, both between Member States and with third countries. Second, the SEA lifted the unanimity requirement and introduced voting by qualified majority for the adoption by the Council of harmonisation measures for the achievement of the internal market. In addition the SEA also subjected the legislation on internal market to newly introduced “co-operation procedure”, according to which the Parliament would be consulted by the Council on such legislation. Lastly, the SEA formally recognised the possibility of comitology procedures as a condition that the Council may set for the exercise by the Commission of delegated powers. The constitutionality of these procedures had been previously challenged before the Court, which confirmed their validity in the *Koster* Case 25/70, *Koster* [1970] ECR 1161

¹⁰ The Maastricht Treaty also introduced the co-decision procedure between the Council and the Parliament in Article 251 of the Treaty, which governs the adoption of measures regarding the approximation of national laws under Article 47 EC, the legal basis for the directives regarding the single financial market. In addition, the Treaty made the principle of subsidiarity - only applicable to environmental policy under the ESA - as of general applicability to all Community policies, including therefore the single financial market.

¹¹ See T. Padoa-Schioppa, *L'Europa verso l'unione monetaria*, Einaudi, 1997.

In 2001, the so-called Lamfalussy Report¹² (after the chairman of a “Committee of Wise Men” established by the ECOFIN in 2000) provided the overall diagnosis that there was a lack of an EU regulatory system able to provide practical effect to Community legislation and also to cope with the needs of a single financial market as a whole. Community law provided both insufficient and unsatisfactory harmonisation and uniformity among national laws, was cumbersome to design and adopt, and the procedure for law-making was too rigid for coping with the fast pace of market integration. The governance of financial markets was provided by an uneven patchwork of national laws, regulations and enforcement practices. This was particularly worrisome at the time since the FSAP contained a number of measures, most of them directives, aimed at introducing a complete, coherent and consistent legislative and regulatory framework for securities markets. At the rhythm of current procedures and with the current loose implementation practices by Member States, the FSAP would not be able to meet its objectives.

The Lamfalussy report led to the setting-up of a European regulatory system for the single financial market in 2003. Such regulatory system would rely on the existing institutional framework for the adoption of Community legislation. It would not involve any transfer of competences from the national to the Community level, thus not requiring any Treaty change. The regulatory system comprised essentially two elements:

- (1) the expansion of the use of comitology procedures for Community legislation, in order to enable more flexible, swift and detailed enactment of rules at the European level; and
- (2) the establishment of committees of national regulators (supervisors), in order to facilitate, on the one hand, the development of EU-wide regulatory solutions in the form of technical advice to the Commission, and, on the other hand, the convergence of national regulatory practices in the implementation of Community law. As a result, the governance of the single financial market became largely based on a committee-architecture, without any transfer of competences to the Community.

¹² See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (the Lamfalussy Report), 15 February 2001, available at ec.europa.eu. The Lamfalussy Committee was established by ECOFIN on 17 July 2000 with a mandate to assess the current conditions for the implementation of securities markets regulation in the European Union. The Committee was asked ‘to assess how the mechanism for regulating those markets can best respond to developments, and, in order to eliminate barriers, to propose scenarios for adapting current practices to ensure greater convergence and cooperation in day-to-day implementation’. As a result, upon adoption of the Committee’s recommendations by the Stockholm European Council on 23-24 March 2001, a new structure was set up. New committees were established such as the European Securities Committee (ESC) established in June 2001 with both advisory and regulatory capacities; and the Committee of European Securities Regulators (CESR) also established in June 2001 with various responsibilities including that for advising the European Commission on the detailed implementing rules needed to give effect to framework securities laws. See E Ferran *Building an EU Securities Market* (Cambridge University Press 2004) 75 ff. The Commission adopted a number of Decisions setting-up a new structure of financial services committees on 5 November 2003.

Figure 1: the Lamfalussy committee-structure for financial regulation and supervision

	Banking	Insurance and Occupational Pensions	Securities (including UCITS)
Regulatory committees (Level 2)	European Banking Committee (EBC)	European Insurance and Operational Pensions Committee (EIOPC)	European Securities Committee (ESC)
Committees of Supervisors (Level 3)	Committee of European Banking Supervisors (CEBS) (London)	Committee of European Insurance and Occupational Pension Supervisors (CEIOPS) (Frankfurt)	Committee of European Securities Regulators (CESR) (Paris)

The process of European financial integration accelerated as a result of these efforts to provide an EU-wide framework for the provision of cross-border financial services. This led to the integration of financial markets, the emergence of pan-European banking groups and financial conglomerates, and to the consolidation of some market infrastructures.¹³ At the same time, such integration also led to broader and deeper systemic inter-linkages across the EU, which increased the likelihood that a disturbance in one Member State would spillover into other Member States and the single financial market as a whole.

The awareness of financial stability authorities of the increasing systemic inter-linkages between Member States provided the impetus for the enhancement of the European arrangements for dealing with financial crises. In May 2005, the EU Banking Supervisors, Central Banks and Finance Ministries signed a Memorandum of Understanding (MoU) on co-operation in financial crisis situations, which set out principles and procedures for sharing information, views and assessments, in order to facilitate the pursuance of national mandates and preserve the overall stability of the financial system of individual Member States and of the EU as a whole. This MoU was replaced in June 2008, by an MoU on cross-border financial stability which provides for further detailed procedures and structures for crisis management, including (1) common principles, including on the sharing of a potential fiscal burden between Member States; (2) rules regarding the coordination of home-country authorities; (3) the creation of Cross-Border Stability Groups, composed of the authorities of various Member States with a view to enhance preparedness in normal times and facilitate the resolution of a cross-border crisis; (4) a template for Voluntary Specific Cooperation Agreements

¹³ See ECB, *Financial Integration in Europe*, 2008.

among authorities, and (5) a template for a Systemic Assessment Framework, offering a common methodology to assess the systemic implications of a crisis.¹⁴

In addition to the MoU, EU-wide cooperation for safeguarding financial stability is based on a number of EU committees. These include: (1) the Financial Stability Table of the Economic and Financial Committee, which meets at least twice a year (spring and autumn) in order to prepare a financial stability assessment for the ECOFIN; (2) the Financial Services Committee, comprising finance ministries' representatives, which also provides advice to the ECOFIN; (3) the Banking Supervision Committee of the ESCB, which monitors financial sector developments from a financial stability perspective and promotes cooperation between national central banks, supervisory authorities and the ECB; and (4) the Level 3 Committees (CEBS, CESR and CEIOPS), which also regularly offer an assessment of the risks to financial stability in the EU.

In conclusion, the European arrangements for safeguarding financial stability were based on the guiding principle that a decentralised institutional setting mostly based on the exercise of national responsibilities would be able to prevent and manage crises affecting the single financial market. The national authorities of home- and host-country authorities would cooperate in the management of a crisis on the basis of Community legislation and non-binding agreements such as Memorandum of Understanding. However, also due to the potential impact on national fiscal responsibilities, national authorities would preserve full responsibility and discretion in the actions to take to manage a crisis situation.¹⁵

2. The lessons of the financial crisis in Europe

The financial crisis unfolded in Europe in July 2007 with the first reports of sub-prime related losses suffered by the European banks and in August 2007 with the freezing of interbank markets.¹⁶ The crisis involved a number of significant events of financial instability which included a loss of confidence in the soundness of European banks, bank-runs, the prospect of failure of cross-border and domestic financial institutions which required recapitalisation measures,¹⁷ and even the financial collapse of an entire country which was part of the EU single financial market as a member of the EEA.

¹⁴ The 2008 MoU is available at www.ecb.europa.eu.

¹⁵ See Garry J. Schinasi and Pedro Gustavo Teixeira, *Financial crisis management in the European single financial market*, Bančni vestnik – The Journal for Money and Banking, Ljubljana, vol. 55, no. 11, November 2006, pp. 47-55.

¹⁶ For a full chronology and description of the global financial crisis, see the 79th Annual Report of the Bank for International Settlements (1 April 2008-31 March 2009), Basel, 29 June 2009, available at <http://www.bis.org>.

¹⁷ The definition provided by Reinhart and Rogoff of a financial crisis is useful in this context: “one of two types of events: (i) bank runs that lead to closure, merger or takeover by the public sector of one or more financial institutions, (ii) in the absence of runs, closure, merger, takeover or large-scale government assistance of an important financial institution (or group of institutions) that marks the start of a string of similar outcomes for other financial institutions”. See C. Reinhart, and K. Rogoff (2008), *Banking crises: an equal opportunity menace*, NBER Working Paper, no 14587.

These events revealed inadequacies in the institutional and regulatory frameworks to safeguard the stability of domestic financial systems and of the single financial market as a whole. The main lessons that are being drawn for the European financial stability arrangements may be summarised as follows.

First, the financial crisis has challenged fundamental assumptions regarding the functioning and expansion of the single financial market. It highlighted in particular the so-called “trilemma of financial stability” according to which (1) a stable financial system, (2) an integrated financial system and (3) national financial autonomy are incompatible.¹⁸ The incompatibility derives basically from the fact that the single financial market was constructed in a setting where market integration is managed on the basis of home-host-country relationships and where the economic benefits of integration are spread and shared among Member States. Conversely the common economic risks stemming from the increased financial integration are not mutualised but rather dealt with on the basis of national responsibilities, as regulators and governments remain only accountable to national parliaments and taxpayers.¹⁹ Therefore, the framework of the single financial market implies that as market integration increases, the common economic risks expand and need to be addressed as a matter of common concern among Member States. As an evidence of this, Member States took coordinated actions to jointly support the single financial market at the euro area summit of Heads of State in Paris on 12 October 2008. Looking forward, this implies that the framework for financial stability has to be continuously enhanced to address such risks, particularly when the degree of market integration leads to significant cross-border spillovers in the case of a crisis.

Second, the crisis demonstrated the need for an adequate macro-prudential supervision of the financial system. In particular, the crisis demonstrated the importance of monitoring, assessing and mitigating the risks to the financial system as a whole that may derive from the collective behaviour of financial institutions, their interaction in financial markets and from the close links between the financial system and the macro-economy. In this context, the crisis has shown that the nature and magnitude of the systemic risk in the financial sector is related not only to the potential illiquidity or insolvency of large banks or other major regulated financial institutions, but it also depends on the degree of “interconnectedness” or “interdependence” between financial institutions and between markets. Therefore, the introduction of macro-prudential supervision would allow capturing the factors and processes that can affect the stability

¹⁸ See D. Schoemaker, *The trilemma of financial stability*, Working Paper: SSRN #1340395.

¹⁹ In order to address the limitations of the national mandates, the concept of a common European mandate for national regulators was vented in several instances. Such mandate would include an obligation for each national regulator to minimise the collective costs facing Member States. See D. Hardy, *A European Mandate for Financial Sector Supervisors in the EU* IMF Working Paper no. 09/5.

of the financial system as a whole.²⁰ This is in contrast with the scope of micro-prudential supervision, which focuses on the factors and processes that can affect the stability of individual financial institutions, thus aiming to ensure that financial institutions have a strong shock-absorbing capacity and effective risk management.²¹

Third, the crisis also provided further evidence of the implications of increasing financial integration at the EU and global levels for the design of the financial stability framework. In particular, the cross-border distribution and propagation of systemic risk needs to be monitored addressed by appropriate structures. At the global level, the Financial Stability Board was established by the G-20 for this purpose. Within the EU, the growing presence and significance of cross-border financial institutions requires the strengthening of the pan-European character of supervision. At the same time, it also requires close cooperation and efficient information exchange between the financial stability authorities, and in particular supervisory authorities and central banks on a cross-border basis.

Lastly, the crisis demonstrated that an effective financial safety net for the operation of the single European financial market requires a more extensive convergence and harmonisation of national arrangements, also in matters deeply rooted in Member States' legal systems. This includes areas such as deposit guarantee schemes, early intervention tools, and bank resolution regimes.

These lessons are reflected in the series of comprehensive reviews which are taking place at the national and European levels to enhance the legal and regulatory system for financial stability.

At the national level,²² experiences such as those with the bank run on Northern Rock on 15 September 2007 and problems in other UK banks,²³ the failures of Icelandic banks, the losses suffered by German banks, and the difficulties affecting the Fortis and the Dexia banking groups provided the basis for important reports setting out recommendations on improvements to national regulatory systems. These reports include, among others, the Turner Review in the UK,²⁴ the Issing Report in Germany,²⁵

²⁰ See *The Fundamental Principles of Financial Regulation*, Geneva Reports on the World Economy 11, Centre for Economic Policy Research (CEPR), 2009.

²¹ See L. Papademos, *Financial stability and macro-prudential supervision: objectives, instruments and the role of the ECB*, cit. See also M. Aglietta and L. Scialom, *A systemic approach to financial regulation: a European perspective*, in Working Paper 2009-29, available at <http://economix.u-paris10.fr>.

²² For an overview of the individual cases assessed by the European Commission under state aid rules, see *Report from the Commission: State aid scoreboard, Spring 2009 Update, Special edition on state aid interventions in the current financial and economic crisis*, 08.04.2009, COM(2009) 164.

²³ See the account provided in *The Run on the Rock*, Report by the UK House of Commons Treasury Committee setting out its findings on the Northern Rock case, issued on 24 January 2008, available at www.parliament.uk.

²⁴ The Turner Review: a regulatory response to the global banking crisis, Financial Services Authority, March 2009, available at www.fsa.gov.uk.

and the Lamfalussy Report in Belgium.²⁶ These reports generally acknowledge the need for (1) improving financial regulation and supervision at the European level, (2) introducing macro-prudential supervision in national systems (e.g. through systemic risk committees), and (3) devising specific rules for dealing with crisis situations and upgrading existing ones, such as relating to deposit-guarantee schemes.

At the European level, the Commission mandated in October 2008 a High-Level Group, chaired by Jacques de Larosière, with the mandate to put forward proposals to improve the arrangements for financial supervision in the EU in light of the financial crisis experience.²⁷ The Economic and Financial Committee also mandated in December 2008 a High-Level Working Group, chaired by Lars Nyberg, to draw the lessons for the financial crisis management arrangements.²⁸ The Commission adopted in May 2009 a Communication on European Financial Supervision, which set out the proposed steps for enhancing the EU supervisory arrangements, and which were broadly endorsed by the ECOFIN Council of 9 June and the European Council of 18 and 19 June 2009.²⁹ In addition, the Commission initiated reviews and put forward proposals for enhancing the Community legislation in areas such as banking supervision, deposit-guarantee schemes, and bank resolution regimes.

The ECOFIN Council in Luxembourg on 20 October 2009 consolidated all these initiatives in a single European roadmap which sets out the short, medium and long term priorities in strengthening EU financial supervision, stability and regulation. These priorities include actions on (1) the supervisory framework, (2) the framework for crisis prevention, management and resolution, (3) the regulatory framework, and (4) promoting the integrity of financial markets.³⁰

²⁵ New Financial Order: Recommendations by the Issing Committee, Part I (October 2008) and Part II (March 2009), Center for Financial Studies, University of Frankfurt, White Papers no.1 and no.2, respectively, February 2009, available at <http://www.ifk-cfs.de>

²⁶ High-Level Committee on a New Financial Architecture, chaired by Alexandre Lamfalussy, June 2009, available at <http://www.docufin.fgov.be>

²⁷ The High-Level Group on Financial Supervision in the EU, February 2009, available at <http://ec.europa.eu>. The de Larosière Report, acknowledges the limitations of the institutional and legal architecture of the single financial market which were made evident by the crisis. In order to enhance the European framework, the de Larosière Report contains a comprehensive set of recommendations at the EU level covering: (1) Financial regulation and international cooperation, with recommendations covering a wide range of areas, including Basel II, accounting rules, credit rating agencies, Solvency 2, hedge funds, securitised products and derivatives, investment funds, corporate governance, internal risk management of financial institutions (Recommendations 1-12); (2) Financial crisis management, with recommendations covering a framework for managing crises, the further harmonisation of deposit-guarantee schemes, and the need for Member States to agree on more detailed criteria for burden sharing than those contained in the existing Memorandum of Understanding, which should be amended accordingly (Recommendations 13-15); and (3) The European supervisory framework, with proposals for the setting-up of a two-pillar structure for the EU regulatory and supervisory architecture. In particular, it proposes to distinguish at the EU level the conduct of macro- from micro-prudential supervision through the establishment of two distinct structures.

²⁸ ECOFIN Council Conclusions of 20 October 2009, available at www.se2009.eu and www.consilium.europa.eu

²⁹ Communication from the Commission - European financial supervision, COM/2009/0252 final.

³⁰ ECOFIN Council Conclusions of 20 October 2009, available at www.se2009.eu

3. The European System of Financial Supervision

The de Larosière Report identified a number of weaknesses relating to the conduct of financial supervision at the EU level.³¹ Such weaknesses included issues relating to (1) supervisory failures with regard to individual institutions; (2) the impossibility to challenge supervisory practices on a cross-border basis; (3) the lack of frankness and cooperation between supervisors; (4) the lack of consistent powers across Member States; (5) the lack of recourses in the Level 3 Committees; and (6) the lack of means for supervisors to take common decisions.³²

In this context, in its Communication on European Financial Supervision, the Commission considered that the EU has reached the limits of what can be done with the Level 3 committees. These committees only play an advisory technical role to the Commission and do not provide a mechanism to ensure cooperation and information exchange between national supervisors and the best possible supervisory decisions for cross-border institutions. In addition, the patchwork of national regulatory and supervisory requirements may prevent joint action by national supervisors, which may lead to the prevalence of national solutions in responding to European problems.³³

Following the recommendations of the de Larosière Report and the Commission Communication, as well as the Conclusions of the ECOFIN Council of 9 June 2009 and of the European Council of 18 and 19 June 2009, the Commission adopted on 23 September 2009 legislative proposals to enhance the EU supervisory framework. In the micro-prudential field, the Commission put forward proposals for Regulations of the European Parliament and the Council leading to the setting-up of a *European System of Financial Supervision (ESFS)*.

The ESFS would be established as an integrated network comprising the national supervisors and three new European Supervisory Authorities (replacing the existing Level 3 committees): a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA). The Authorities will be Community bodies with a legal personality.³⁴

In addition, the three new Authorities will cooperate through a Joint Committee of European Supervisory Authorities, composed of the Chairpersons of the Authorities.

³¹ See Guido Ferrarini and Filippo Chiodini, *Regulating cross-border banks in Europe: a comment on the de Larosière report and a modest proposal*, Capital Markets Law Journal 2009, 4 (Supplement 1): pp.S123-pp.S140.

³² See paragraphs 152 to 166 of the de Larosière Report.

³³ See Commission Communication, *European Financial Supervision*, COM(2009) 252 final, 27.5.2009, p.8-ff.

³⁴ For the characterisation of the new European Supervisory Authorities as a new type of European agency, see E. Chiti, *An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies*, Common Market Law Review, Vol.46, No. 5, October 2009, pp.1395-1442.

This Committee should also aim at ensuring supervisory consistency across sectors. In this context, there will be a Subcommittee to deal specifically with cross-sectoral issues, including financial conglomerates.

Figure 2: the European System for Financial Supervision (ESFS)

Current institutional setting		ESFS
Coordination of the three committees on the basis of a Joint Protocol	Cross-sectoral	Joint Committee of European Supervisory Authorities
Committee of European Banking Supervisors (CEBS)	Banking	European Banking Authority (EBA)
Committee of European Insurance and Occupational Pension Supervisors (CEIOPS)	Insurance	European Insurance and Occupational Pensions Authority (EIOPA)
Committee of European Securities Regulators (CESR)	Securities	European Securities and Markets Authority (ESMA)
Colleges of supervisors for banking and insurance groups		
National supervisors		

The establishment of the ESFS is expected to enhance significantly the framework for financial supervision in the EU. In particular, the ESFS will have the objectives of (1) improving the coordination of cross border supervision, including through colleges of supervisors and ensuring consistent supervisory decisions across borders; (2) raising the quality of financial regulation across the EU, including through a consistent application of rules and the development of a single EU rulebook; (3) improving crisis prevention, coordination and management across the EU as a whole; and (4) improving the effectiveness and efficiency of supervision.

In order to fulfil these objectives, the new European Supervisory Authorities will take on all the tasks of the existing supervisory committees – CEBS, CEIOPS and CESR – and in addition have significantly increased responsibilities, defined legal powers and greater authority than the committees. According to the Commission’s proposals, the tasks and powers of the Authorities will include the following.

First, the Authorities will issue technical standards with the aim of identifying and removing differences among national financial regulations, which may stem from exceptions and derogations allowed under Community law. This should allow developing a harmonised core set of standards across the EU, which will provide as much as a possible a single rulebook for participants in the single financial market. In order for standards to be as effective as possible, the Commission will endorse them as Community law, thus providing for binding legal effect at the EU level.

Second, they will issue guidelines and recommendations that contribute to ensuring coherent application of Community legislation. These guidelines and recommendations will not have a legally binding nature, but national supervisors will have an interest in complying with them in order to provide a level playing field for market participants. The Authorities will conduct periodical peer reviews of national supervisors' activities in order to enhance consistency in supervisory practices.

Third, the Authorities may also issue recommendations to specific national supervisors, particularly when a specific supervisor is considered to be diverging from the existing Community legislation, including the technical standards. This will therefore represent a mechanism for supporting the compliance with the Authorities' instruments.

Fourth, the Authorities will be expected to play a coordination role in financial crisis situations – which are defined as adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Community. In particular, they will be expected to promote a coordinated Community response by facilitating the exchange of information between supervisors, determining the scope and verifying the reliability of relevant information, acting as mediator between supervisors, and notifying the European Systemic Risk Board of any potential emergency situation. In this context, the Authorities may adopt decisions requiring national supervisors to take an appropriate action to address the risks in the crisis situation. The types of action that may be taken will be defined in Community legislation. Furthermore, if a national supervisor does not comply with the decision, the Authorities may adopt a decision directed at a specific financial institution requiring it to comply with the relevant Community legislation.

Fifth, the Authorities will contribute to the efficient and consistent functioning of colleges of supervisors. The Authorities may participate as observers in colleges and receive all relevant information shared between the members of the college. In addition, the Authorities will have the task to collect information for national supervisors in order to facilitate the work of colleges. In this context, the Authorities will have the obligation to establish and manage a central database to make information available to the national supervisors involved in colleges.

Sixth, the Authorities will have the general task of contributing to consistent supervision across the EU. In addition to the tools of technical standards, guidelines, and recommendations, the Authorities may, in case of disagreements among national supervisors on cooperation, coordination or joint decision-making, take a decision, after an attempt for conciliation, requiring the national supervisors to take or refrain from taking action. Moreover, the Authorities can also facilitate the delegation of tasks among

supervisors, and generally support a common supervisory culture through opinions, reviews, and training programmes.

Seventh, the Authorities will be able to collect information from supervisors and other public authorities of Member States necessary to carry out their tasks.

Lastly, the Authorities will be responsible for monitoring and assessing market developments, particularly with regard to the relevant micro-prudential trends, potential risks and vulnerabilities. For this purpose, the Authorities shall conduct stress-testing exercises, in cooperation with the ESRB. The outcome of such monitoring and assessment should be conveyed to the ESRB, the European Parliament, the Council and the Commission.

Figure 3: The toolbox of the European Supervisory Authorities

Tools	
1	Guidelines and recommendations for the consistent supervisory practices and application of EU law
2	Specific recommendations to national supervisors failing to ensure compliance of financial institutions with EU law
3	Last resort decisions addressed to individual financial institutions not in compliance with EU law
4	Decisions addressed to national supervisors in crisis situations
5	Last resort decisions addressed to individual financial institutions in crisis situations
6	Collection of information and setting-up of central database
7	Mediation of disagreements between national supervisors, including the possibility to address decisions to national supervisors to take or refrain from taking action

In addition to these tasks, which are common to all Authorities, the ESMA will have supervisory powers for credit rating agencies. Such powers could include the power to request information and to conduct investigations or on-site inspections and, in addition, such as the possibility to withdraw the registration or suspend the use for regulatory purposes of credit ratings. The responsibilities of ESMA in this regard will be possibly defined in an amendment to the Regulation on Credit Rating Agencies.

The framework proposed by the Commission for the European Supervisory Authorities implies that national supervisors will continue carrying out day-to-day supervision, also on the basis of colleges of supervisors, which will be set up for all major cross-border institutions. Accordingly, the tasks and powers of the new Authorities are largely of a coordinating nature which falls short of a federal architecture such as the one of the ECB and the Eurosystem. In the words of the de Larosière Report, the new “European System for Financial Supervision would be a largely decentralised structure, fully respecting the proportionality and subsidiarity principles of the Treaty. So existing

national supervisors, who are closest to the markets and institutions they supervise, would continue to carry-out day-to-day supervision and preserve the majority of their present competences.”³⁵

In this context, an important element of the proposals of the Commission is the introduction of a safeguard clause relating to the fiscal responsibilities of Member States. In particular, the Commission proposals provide that no decision by the Authorities – namely those adopted in emergency situations and for settling disagreements among national supervisors – may impinge in any way on the fiscal responsibilities of Member States. This is in line with the ECOFIN and European Council conclusions of June 2009. In order to ensure that this is respected, it is provided that, where a Member State considers that a decision by an Authority impinges on its fiscal responsibility, it may notify the Authority and the Commission that the national supervisor does not intend to implement the Authority's decision. This notification should be accompanied by a justification clearly demonstrating how the decision by the Authority impinges on fiscal responsibilities. Within a period of one month the Authority shall inform the Member State as to whether it maintains its decision or whether it amends or revokes it. Where the Authority maintains its decision, the Member State may refer the matter to the Council and the decision of the Authority is suspended. The Council shall, within two months, decide whether the decision should be maintained or revoked, acting by qualified majority.

In conclusion, the setting proposed by the Commission for the ESFS and the three European Supervisory Authorities should enhance significantly the financial regulation and supervision at the EU level. This will be achieved by attributing to the Authorities a set of tasks and powers, which will be conducive essentially to (1) a single EU rulebook for market participants, (2) better coordination at the EU level between national supervisors, (3) improved exchange and collection of information relevant for micro-prudential supervision, and (4) improving the ability of the EU as a whole to respond to a financial crisis situation.

4. The European Systemic Risk Board

The de Larosière Report recommended the establishment of a European Systemic Risk Council (ESRC) with the responsibility for conducting macro-prudential supervision. The report recommended in particular three main design features for the ESRC. First, macro-prudential supervision should concern all the financial sector and not only banks. Second, macro-prudential supervision should take a wide EU perspective, and take also into account the judgements made by the authorities of individual Member States. Third,

³⁵ See paragraphs 184 of the de Larosière Report.

there must be an effective and enforceable mechanism to translate the assessment of risks identified by macro-prudential analysis into specific supervisory actions. In this context, the ESRC would have the tasks to “form judgements and make recommendations on macro-prudential policy, issue risk warnings, compare observations on macro-economic and prudential developments and give direction on these issues”.

The de Larosière Report acknowledged that central banks have a key role to play in a macro-prudential framework in view of their role and interest in safeguarding the stability of the financial system as a whole. Central banks’ focus on systemic stability puts them in a position to better assess not only the likelihood and the potential impact of macro-shocks or disturbances in domestic and international capital markets, but also the operation of common factors affecting the stability of groups and intermediaries. Accordingly, the ESRC would be primarily composed of the members of the General Council of the ECB, and the ESRC would be set-up under the auspices of the ECB.

The ECOFIN Council of 9 June renamed the proposed macro-prudential body as European Systemic Risk Board (ESRB), possibly in order to follow the terminology used for the setting-up of the Financial Stability Board by the G-20 in April 2009.³⁶ The ECOFIN defined many of the features of the ESRB namely with regard to its core tasks, the general scope of financial stability risk warnings and recommendations, the composition of the General Board of the ESRB, and considered that the ECB should provide analytical, statistical, administrative and logistical support to the ESRB, also drawing on technical advice from national central banks and supervisors.³⁷ The European Council of 18 and 19 June 2009 agreed that the members of the General Council of the ECB will elect the ESRB Chair.³⁸

The Commission presented on 23 September 2009 two legislative proposals for the setting-up of the ESRB: (1) a proposal for a Parliament and Council Regulation on Community macro-prudential oversight of the financial system and establishing a ESRB, on the basis of Article 95 of the Treaty, and (2) a proposal for Council Decision entrusting the ECB with specific tasks concerning the functioning of the ESRB, on the basis of Article 105 (6) of the Treaty, which enables the Council to confer upon, through unanimity voting, the ECB tasks relating to prudential supervision, after consulting the ECB and after receiving the assent of the Parliament.

³⁶ See the Charter of the Financial Stability Board, endorsed at the G-20 Pittsburgh Summit of 25 September 2009, available at www.financialstabilityboard.org

³⁷ See www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/108392.pdf

³⁸ See www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf

On the basis of the Commission's legislative proposals, which will be subject to the Community's legislative procedure, the ESRB will have the following distinguishing features.

First, the ESRB will be set up as an independent EU body without legal personality – in contrast to the European Supervisory Authorities, which will have legal personality – responsible for macro-prudential oversight of the EU financial system.³⁹

Second, in order to fulfil its mission, the ESRB will be entrusted with a set of tasks, which will include (1) the collection and analysis of information, (2) the identification and prioritisation of systemic risks, (3) the issuance of warnings where risks are deemed to be significant, (4) the issuance of recommendations for remedial action, (5) the monitoring of the follow-up to warnings and recommendations, (6) the cooperation and exchange of information with the ESFS, and (7) the coordination with the IMF and the Financial Stability Board, as well as other relevant macro-prudential bodies.

Third, the ESRB's governance structure includes a General Board composed of the ECB President and Vice-President, the EU central bank governors, the three Chairs of the European Supervisory Authorities and the Commission as members with voting rights. National supervisors and the Chairman of the Economic and Financial Committee are members without voting rights. The Commission's proposal provides for the establishment of a Steering Committee, to set the agenda and prepare the decisions, as well as a Technical Advisory Committee through which the ESRB will obtain the assistance of EU central banks and supervisors.

Fourth, the ECB and the ESCB will play a key role in the functioning of the ESRB. In particular, in line with the ECOFIN Conclusions of 9 June 2009, the ECB will provide analytical, statistical, administrative and logistical support to the ESRB. This entails also the provision of the Secretariat, in line with the Commission proposal for a Council Decision. In addition, the ESRB Chair will be elected by the members of the General Council of the ECB. The ESRB will also be supported by an advisory committee of EU central banks and supervisors, which can in principle be based on the existing ESCB Banking Supervision Committee.

Fifth, the ESRB may request information from the European Supervisory Authorities in summary or collective form, such that individual financial institutions cannot be identified. If the requested data are not available to those Authorities or are not made available in a timely manner, the ESRB may request the data from national supervisory authorities, national central banks or other authorities of Member States. The ESRB may also address a reasoned request to the European Supervisory Authorities to

³⁹ For an overview, see Michel Aglietta and Laurence Scialom, *A systemic approach to financial regulation: a European perspective*, Working Paper 2009-29, Economix, Université Paris X Nanterre.

provide data that are not in summary or collective form. In this case, the ESRB should consult the relevant European Supervisory Authority in order to ensure that the request is proportionate.

Sixth, and most importantly, the ESRB will have the power and obligation to issue risk warnings and recommendations. Warnings or recommendations issued by the ESRB may be either of a general or specific nature. They may be addressed to the Community as a whole or to one or more Member States, or to one or more of the European Supervisory Authorities, or to one or more national supervisors. Recommendations may also be addressed to the Commission in respect of the relevant Community legislation. In the case of recommendations, they should specify a timeline for the policy response. The addressees will have the obligation to communicate to the ESRB their policy response or to explain why they have not acted ("act or explain" mechanism). If the ESRB decides that its recommendation has not been followed and that the addressees have failed to explain their inaction appropriately, it shall inform the Council and, where relevant, the European Supervisory Authorities concerned.

The degree of effectiveness of the risk warnings and recommendations will be a crucial aspect of the functioning and credibility of the macro-prudential tasks to be exercised by the ESRB. In particular, the ESRB will have no legally-binding powers to ensure compliance by the addressees of risk warnings and recommendations. Therefore, it will need to rely on a combination of (i) solid technical analysis, (ii) institutional and policy credibility, and (iii) peer pressure as the sources of its legitimacy.

In this context, the ESRB could rely on the combination of five main tools and mechanisms. Firstly, the active monitoring by the ESRB on the extent to which its policy recommendations are implemented and the mitigating effects of such implementation on the identified risks.

Secondly, the regular reporting to the ECOFIN of the outcome of such monitoring, in order to raise attention and foster action by policy-makers.

Thirdly, the "act or explain" principle, according to which the addressees of ESRB recommendations will be required to take the appropriate remedial action or justify the reasons why they have not acted.

Fourthly, the close cooperation with the European Supervisory Authorities, particularly to support the implementation of recommendations addressed to one or more competent national supervisory authorities. In particular, the European Supervisory Authorities will be required to use their powers to ensure a timely follow-up. Furthermore, when a national supervisor does not follow-up, it has to inform the Board of Supervisors of the respective ESA. In its reply to the ESRB, the national supervisor has to take into account the input of the respective ESA.

Lastly, the right of the ESRB to decide to publish its risk warnings and/or recommendations on a case by case basis, which may increase the pressure for the prompt corrective actions. Given the sensitiveness of such a publication, it will be expected the decision of the ESRB would be taken on an exceptional basis, when serious threats to financial stability are not being addressed to the extent necessary. The appropriate combination of these tools and mechanisms, which will be contemplated in the Community legislation establishing the new European financial stability architecture, will provide an adequate institutional framework for ensuring the effectiveness of the risk warnings and policy recommendations of the ESRB.

Overall, the proposed establishment of the ESRB will considerably enhance the current financial stability framework as it will allow, in particular: (1) overcoming the current lack of an integrated financial stability assessment at the EU level covering the whole financial sector; (2) translating financial stability assessments into risk warnings and policy recommendations for EU and national authorities; (iii) exploiting at the EU level the central banking, as well as supervisory, analytical capabilities and expertise in financial stability and macroeconomic analysis.⁴⁰

Figure 4: The toolbox of the European Systemic Risk Board

Tools	
1	Issuance of risk warnings
2	Issuance of recommendations with a specified timeline for policy response addressed to the Community as a whole, to one or more Member States, to one or more of the European Supervisory Authorities, or to one or more national supervisors, and also to the Commission in respect of Community legislation.
3	Publication of risk warnings and recommendations
4	Monitoring of the follow-up to the ESRB recommendations; in particular, the addressees have the obligation to communicate to the ESRB their policy response or to explain why they have not acted (“act or explain”),
5	If the ESRB decides that its recommendation has not been followed and that the addressees have failed to explain their inaction appropriately, it shall inform the Council and, where relevant, the European Supervisory Authorities concerned.
6	The ESRB may request information from the European Supervisory Authorities in summary or collective form, such that individual financial institutions cannot be identified. If the requested data are not available to those Authorities or are not made available in a timely manner, the ESRB may request the data from national supervisory authorities, national central banks or other authorities of Member States. The ESRB may address a reasoned request to the European Supervisory Authorities to provide data that are not in summary or collective form.

⁴⁰ See the comment by S. Gleeson, *Macroeconomic regulation: new regulators, new powers*, Capital Markets Law Journal, vol.4, No. S1, pp.S99-S111.

5. Outlook: implementation challenges

The setting-up of the ESFS and of the ESRB will enhance significantly the EU financial stability architecture.⁴¹ The proposed two-pillar framework for micro-prudential and macro-prudential supervision poses a number of challenges in its implementation.

The first challenge regards the appropriate interplay between the macro- and the micro-prudential pillars. The aim of the proposed architecture is that the focus of the work of the ESRB will be macro, aggregate, systemic and economic in outlook, while the work of the micro-ESFS will be micro, prudential, and regulatory. In this context, it is important to achieve the right synergies between the micro- and macro-prudential functions in safeguarding financial stability, also in order to avoid overlaps and duplication. As analysed above, the Commission's proposals include a number of provisions which aim at ensuring an adequate ongoing cooperation and sharing of information between the ESRB and ESFS, as well as the support of the ESFS in the implementation of the ESRB recommendations.

A second challenge relates to the effective translation of macro-prudential analysis into policy actions. The financial crisis has demonstrated that there was an inadequate translation of risk warnings provided by different fora and central banks into concrete policy actions. Financial stability assessments were often formulated in broad terms and on the basis of alternative benign and less-benign scenarios and outcomes. Furthermore, assessments were made with a view to developing the knowledge and raising the awareness of authorities, the financial industry, and the public at large with regard to potential sources of risks and vulnerabilities to the financial system. They were not made with the specific aim of identifying the appropriate policy and regulatory actions to safeguard financial stability. The effectiveness of the two-pillar approach in the proposed supervisory framework will require the establishment of mechanisms and procedures that would ensure that the advice concerning corrective actions that aim at containing risks and vulnerabilities is duly reflected in EU and national policies.

A third challenge is to set-up appropriate cooperation and coordination structures between macro- and micro-prudential functions also in crisis situations. The crisis has shown that that crisis prevention, crisis management and crisis resolution tools should be reinforced and be handled in a consistent regulatory framework. In addition, the crisis has made it evident that resolving a crisis involving cross-border EU institutions is challenging due to the different supervisory, crisis management and resolution tools as well as differences and inconsistencies in national legislation regarding company and insolvency laws. The proposed supervisory framework will not solve these differences

⁴¹ For a critical assessment, see I. Begg, *Regulation and Supervision of Financial Intermediaries in the EU: The Aftermath of the Financial Crisis*, *Journal of Common Market Studies*, vol. 47, No.5, pp.1107-1128.

as long as the differences in national legislation are not resolved, and issues such as deposit guarantee schemes and burden sharing are not addressed at the EU level.⁴²

A final main challenge is to ensure the interaction with international bodies and structures. The financial crisis has underscored the importance of concerted policy responses on a global level. To that end, the IMF and the Financial Stability Board are expected to play a key role in the early identification and assessment of risks and vulnerabilities, the issuance of risk warnings, and the adoption of the related macro-prudential policies at the global level. In this respect, the interplay between the European macro-prudential supervisory body and the IMF/FSB will be an important element.

Conclusion

Taken as a whole, the Commission proposals inspired on the de Larosière Report provide an innovative and complete blueprint for enhancing and reinforcing the EU architecture for financial supervision. They provide a good response for addressing the issues highlighted by the crisis as regards the need for further enhancements of the existing arrangements, reflecting the increasing financial integration in the EU.

The setting-up of the ESFS should significantly strengthen the coordination and convergence of supervisory standards and practices at the EU level, while retaining national responsibilities for direct supervision of institutions.

The proposed establishment of the ESRB would allow enhancing substantially the scope of financial stability assessments at the EU level. In addition, the proposed role of the ESRB acknowledges the contribution already provided by central banks in the monitoring and assessment of financial risks and vulnerabilities, therefore fully exploiting the synergies with their activities and resources.

A key condition for the efficient and effective functioning of this new two-pillar structure is to ensure an appropriate interplay between the EU macro-prudential function – represented by the ESRB – and the micro-prudential function – represented by the ESFS. This requires a well-defined distribution of tasks, as well as working procedures which allow mutual support and exploiting synergies between the two functions. The future effectiveness of the new structures should be supported by the timely implementation of the various actions that have been agreed upon, namely those set

⁴² See the Commission Communication, *An EU framework for cross-border crisis management in the banking sector*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the European Court of Justice and the European Central Bank, COM (2009) 561/4.

out in the ECOFIN roadmap on crisis prevention, management and resolution of 20 October 2009.

Timeline of the financial crisis since Summer 2007

2007

- 9 August:** BNP Paribas suspends calculation of asset values of three money market funds exposed to sub-prime and halts redemptions.
Interbank markets freeze due to loss in confidence. ECB injects €95 billion overnight to improve liquidity.
- 14 September:** Bank of England announces it has provided liquidity support to Northern Rock. A retail deposit run follows in the next days.

2008

- 15 September:** Lehman Brothers files for bankruptcy.
- 22 September:** US Treasury Secretary, Hank Paulson, announces \$700bn TARP bailout. Goldman Sachs and Morgan Stanley abandon their status as investment banks.
- 29 September:** Belgian, Dutch and Luxembourg governments inject €11.2 billion in Fortis.
- 30 September:** Dexia receives equity capital injection from Belgian, French and Luxembourg governments and from existing shareholders.
Irish Government announces a blanket guarantee of all deposits. Other European governments follow with extensions to deposit guarantees.
- 6 October:** German authorities announce package to rescue Hypo Real Estate.
- 7 October:** The Icelandic Government takes control of Glitner and Landsbanki.
- 8 October:** UK support package announced — including provision of 50 billion pound in capital to UK banks, guarantee for new short to medium-term senior unsecured debt issuance and the extension and widening of a Special Liquidity Scheme.
Interest rate cuts of 50 basis points by the ECB, the Bank of England, and the Federal Reserve.
- 13 October:** Heads of State of the euro area meet for the first time and announce measures to provide their banks with capital funding (Paris Declaration). The European Council endorses the Paris Declaration on 15 and 16 October.
- 19 October:** Dutch Government injects €10 billion into ING. UK government pledges 37 billion pounds to RBS, Lloyds and HBOS. German government commits to 500 billion euro bank rescue.
- 27 October:** Hungary receives \$15 billion loans from IMF, EU, and World Bank.
- 24 November:** US rescues Citigroup with a \$300 billion package.
- 8 December:** EU agrees 200 billion euro stimulus package.
- 22 December:** IMF provides \$2.4 billion help to Latvia.
Three Irish banks get 5.5 billion euro rescue.

2009

- 28 February:** Publication of the De Larosière Report with recommendations on a new EU structure for financial supervision based on a two-pillar approach: macro-prudential and micro-prudential supervision.
- 2 April:** G20 Summit, in London. G20 agrees on the establishment of a new Financial Stability Board as a successor to the Financial Stability Forum, including all G20 countries, Spain and the European Commission, with a strengthened mandate to promote financial stability, a stronger institutional basis and enhanced resources.
- 23 September:** European Commission puts forwards its proposals for the establishment of a European Systemic Risk Board and of three European Supervisory Authorities.
- 24 September:** G20 Summit in Pittsburgh, Pennsylvania. The G20 is designated as the premier forum for international economic cooperation, replacing the G8.
- 20 October:** ECOFIN adopts European roadmap on crisis prevention, management and resolution.

WORKING PAPERS

- 1 Andreas Cahn Verwaltungsbefugnisse der Bundesanstalt für
Finanzdienstleistungsaufsicht im Übernahmerecht und
Rechtsschutz Betroffener
(publ. in: ZHR 167 [2003], 262 ff.)
- 2 Axel Nawrath Rahmenbedingungen für den Finanzplatz Deutschland: Ziele
und Aufgaben der Politik, insbesondere des
Bundesministeriums der Finanzen
- 3 Michael Senger Die Begrenzung von qualifizierten Beteiligungen nach § 12
Abs. 1 KWG
(publ. in: WM 2003, 1697-1705)
- 4 Georg Dreyling Bedeutung internationaler Gremien für die Fortentwicklung
des Finanzplatzes Deutschland
- 5 Matthias Berger Das Vierte Finanzmarktförderungsgesetz – Schwerpunkt
Börsen- und Wertpapierrecht
- 6 Felicitas Linden Die europäische Wertpapierdienstleistungsrichtlinie-
Herausforderungen bei der Gestaltung der Richtlinie
- 7 Michael Findeisen Nationale und internationale Maßnahmen gegen die
Geldwäsche und die Finanzierung des Terrorismus – ein
Instrument zur Sicherstellung der Stabilität der
Finanzmärkte
- 8 Regina Nößner Kurs- und Marktpreismanipulation – Gratwanderung
zwischen wirtschaftlich sinnvollem und strafrechtlich
relevantem Verhalten
- 9 Franklin R. Edwards The Regulation of Hedge Funds: Financial Stability and
Investor Protection
(publ. in: Baums/Cahn [Hrsg.] Hedge Funds, Risks and
Regulation, 2004, S. 30 ff.)
- 10 Ashley Kovas Should Hedge Fund Products be marketed to Retail
Investors? A balancing Act for Regulators
(publ. in: Baums/Cahn [Hrsg.] Hedge Funds, Risks and
Regulation, 2004, S. 91 ff.)
- 11 Marcia L. MacHarg Waking up to Hedge Funds: Is U.S. Regulation Taking a
New Direction?
(publ. in: Baums/Cahn [Hrsg.] Hedge Funds, Risks and
Regulation, 2004, S. 55 ff.)

- 12 Kai-Uwe Steck Legal Aspects of German Hedge Fund Structures
(publ. in: Baums/Cahn [Hrsg.] Hedge Funds, Risks and
Regulation, 2004, S. 135 ff.)
- 13 Jörg Vollbrecht Investmentmodernisierungsgesetz – Herausforderungen bei
der Umsetzung der OGAW – Richtlinien
- 14 Jens Conert Basel II – Die Überarbeitung der
Eigenkapitalmarktregelungen der Kreditinstitute im Fokus
von Wirtschaft- und Wettbewerbspolitik
- 15 Bob Wessels Germany and Spain lead Changes towards International
Insolvencies in Europe
- 16 Theodor Baums /
Kenneth E. Scott Taking Shareholder Protection Seriously? Corporate
Governance in the United States and in Germany
(publ. in: AmJCompL LIII (2005), Nr. 4, 31 ff.; abridged
version in: Journal of Applied Corporate Finance Vol. 17
(2005), Nr. 4, 44 ff.)
- 17 Bob Wessels International Jurisdiction to open Insolvency Proceedings in
Europe, in particular against (groups of) Companies
- 18 Michael Gruson Die Doppelnotierung von Aktien deutscher Gesellschaften
an der New Yorker und Frankfurter Börse: Die sogenannte
Globale Aktie
(publ. in: Die AG 2004, 358 ff.)
- 19 Michael Gruson Consolidated and Supplementary Supervision of Financial
Groups in the European Union
(publ. in: Der Konzern 2004, 65 ff. u. 249 ff.)
- 20 Andreas Cahn Das richterliche Verbot der Kreditvergabe an Gesellschafter
und seine Folgen
(publ. in: Der Konzern 2004, 235 ff.)
- 21 David C. Donald The Nomination of Directors under U.S. and German Law
- 22 Melvin Aron Eisenberg The Duty of Care in American Corporate Law
(deutsche Übersetzung publ. in: Der Konzern 2004, 386 ff.)

- 23 Jürgen Than Rechtsfragen bei der Festlegung von Emissionsbedingungen für Schuldverschreibungen unter besonderer Berücksichtigung der Dematerialisierung und des Depotgesetzes
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 3 ff.)
- 24 Philipp von Randow Inhaltskontrolle von Emissionsbedingungen
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 25 ff.)
- 25 Hannes Schneider Die Änderung von Anleihebedingungen durch Beschluß der Gläubiger
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 69 ff.)
- 26 Hans-Gert Vogel Die Stellung des Anleihetrehänders nach deutschem Recht
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 94 ff.)
- 27 Georg Maier-Reimer Rechtsfragen der Restrukturierung, insbesondere der Ersetzung des Schuldners
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 129 ff.)
- 28 Christoph Keller Umschuldung von Staatenanleihen unter Berücksichtigung der Problematik einer Aggregation aller Anleihegläubiger
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 157 ff.)
- 29 René Bösch Die Emission von Schuldverschreibungen nach schweizerischem Recht – ein Rechtsvergleich mit dem geplanten deutschen Schuldverschreibungsrecht
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 189 ff.)
- 30 Lachlan Burn Bond Issues under U.K. law: How the proposed German Legislation compares
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 219 ff.)
- 31 Patrick S. Kenadjian Bond Issues under New York and U.S. Law: Considerations for the German Law Maker from a U.S. Perspective
(publ. in: Baums/Cahn [Hrsg.] Die Reform des Schuldverschreibungsrechts, 2004, S. 245 ff.)

- 32 Andreas Cahn Bankgeheimnis und Forderungsverwertung
(publ. in: WM 2004, 2041 ff.)
- 33 Michael Senger Kapitalkonsolidierung im Bankkonzern
(publ. in: Der Konzern 2005, S. 201 ff.)
- 34 Andreas Cahn Das neue Insiderrecht
(publ. in: Der Konzern 2005, 5 ff.)
- 35 Helmut Siekmann Die Unabhängigkeit von EZB und Bundesbank nach dem
geltenden Recht und dem Vertrag über eine Verfassung für
Europa
- 36 Michael Senger Gemeinschaftsunternehmen nach dem Kreditwesengesetz
- 37 Andreas Cahn Gesellschafterfremdfinanzierung und Eigenkapitalersatz
(publ. in: Die AG 2005, S. 217 ff.)
- 38 Helmut Siekmann Die Verwendung des Gewinns der Europäischen
Zentralbank und der Bundesbank
- 39 Guido Ferrarini Contract Standards and the Markets in Financial Instruments
Directive (MiFID): An Assessment of the Lamfalussy
Regulatory Architecture
(publ. in: European Contract Law Review 2005, p. 19)
- 40 David C. Donald Shareholder Voice and Its Opponents
(publ. in: The Journal of Corporate Law Studies, Vol. 5,
Issue 2, 2005)
- 41 John Armour Who should make Corporate Law? EC Legislation versus
Regulatory Competition
(publ. in: 58 Current Legal Problems [2005], p. 369 ff.)
- 42 David C. Donald The Laws Governing Corporations formed under the
Delaware and the German Corporate Statutes
- 43 Garry J. Schinasi/
Pedro Gustavo Teixeira The Lender of the Last Resort in the European Single
Financial Market
(publ. in: Cross Border Banking: Regulatory Challenges,
Gerard Caprio Jr., Douglas D. Evanoff, George G. Kaufman
eds., 2006)
- 44 Ashley Kovas UCITS – Past, Present and Future in a World of Increasing
Product Diversity

- 45 Rick Verhagen A New Conflict Rule for Securitization and other Cross-Border Assignments – A potential threat from Europe (publ. in: Lloyd’s Maritime and Commercial Law Quarterly 2006, p. 270)
- 46 Jochem Reichert/
Michael Senger Berichtspflicht des Vorstands und Rechtsschutz der Aktionäre gegen Beschlüsse der Verwaltung über die Ausnutzung eines genehmigten Kapitals im Wege der allgemeinen Feststellungsklage (publ. in: Der Konzern 2006, S. 338 ff.)
- 47 Guido A. Ferrarini One Share – One Vote: A European Rule? (publ. in: European Company and Financial Law Review 2006, p. 147)
- 48 Theodor Baums Die Fremdkapitalfinanzierung der Aktiengesellschaft durch das Publikum (publ. in: Bayer/Habersack (eds.), Aktienrecht im Wandel der Zeit, Vol. 2, 2007, 952 ff.)
- 49 Ulrich Segna Anspruch auf Einrichtung eines Girokontos aufgrund der ZKA-Empfehlung „Girokonto für jedermann“? (publ. in: BKR 2006, S. 274 ff.)
- 50 Andreas Cahn Eigene Aktien und gegenseitige Beteiligungen (publ. in: Bayer/Habersack [Hrsg.] Aktienrecht im Wandel, Band II, 2007, S. 763 ff.)
- 51 Hannes Klühs/
Roland Schmidtbleicher Beteiligungstransparenz im Aktienregister von REIT-Gesellschaften (publ. in: ZIP 2006, S. 1805 ff.)
- 52 Theodor Baums Umwandlung und Umtausch von Finanzinstrumenten im Aktien- und Kapitalmarktrecht (publ. in: Festschrift für Canaris, Bd. II, 2007, S. 3 ff.)
- 53 Stefan Simon/
Daniel Rubner Die Umsetzung der Richtlinie über grenzüberschreitende Verschmelzungen ins deutsche Recht (publ. in: Der Konzern 2006, S. 835 ff.)
- 54 Jochem Reichert Die SE als Gestaltungsinstrument für grenzüberschreitende Umstrukturierungen (publ. in: Der Konzern 2006, S. 821 ff.)
- 55 Peter Kindler Der Wegzug von Gesellschaften in Europa (publ. in: Der Konzern 2006, S. 811 ff.)

- 56 Christian E. Decher Grenzüberschreitende Umstrukturierungen jenseits von SE und Verschmelzungsrichtlinie
(publ. in: Der Konzern 2006, S. 805 ff.)
- 57 Theodor Baums Aktuelle Entwicklungen im Europäischen Gesellschaftsrecht
(publ. in: Die AG 2007, S. 57 ff.)
- 58 Theodor Baums European Company Law beyond the 2003 Action Plan
(publ. in: European Business Organization Law Review Vol. 8, 2007, 143 ff.)
- 59 Andreas Cahn/
Jürgen Götz Ad-hoc-Publizität und Regelberichterstattung
(publ. in: Die AG 2007, S. 221 ff.)
- 60 Roland Schmidtbleicher/
Anh-Duc Cordalis „Defensive bids“ für Staatsanleihen – eine Marktmanipulation?
(publ. in: ZBB 2007, 124-129)
- 61 Andreas Cahn Die Auswirkungen der Kapitaländerungsrichtlinie auf den Erwerb eigener Aktien
(publ. in: Der Konzern 2007, S. 385)
- 62 Theodor Baums Rechtsfragen der Innenfinanzierung im Aktienrecht
- 63 Theodor Baums The Law of Corporate Finance in Europe – An Essay
(publ. in: Krüger Andersen/Engsig Soerensen [Hrsg.], Company Law and Finance 2008, S. 31 ff.)
- 64 Oliver Stettes Unternehmensmitbestimmung in Deutschland – Vorteil oder Ballast im Standortwettbewerb?
(publ. in: Die AG 2007, S. 611 ff.)
- 65 Theodor Baums/
Astrid Keinath/
Daniel Gajek Fortschritte bei Klagen gegen Hauptversammlungsbeschlüsse? Eine empirische Studie
(publ. in: ZIP 2007, S. 1629 ff.)
- 66 Stefan Brass/
Thomas Tiedemann Die zentrale Gegenpartei beim unzulässigen Erwerb eigener Aktien
(publ. in: ZBB 2007, S. 257 ff.)
- 67 Theodor Baums Zur Deregulierung des Depotstimmrechts
(publ. in: ZHR 2007 [171], S. 599 ff.)
- 68 David C. Donald The Rise and Effects of the Indirect Holding System: How Corporate America ceded its Shareholders to Intermediaries

- 69 Andreas Cahn Das Wettbewerbsverbot des Vorstands in der AG & Co. KG
(publ. in: Der Konzern 2007, S. 716 ff.)
- 70 Theodor Baums/
Florian Drinhausen Weitere Reform des Rechts der Anfechtung von
Hauptversammlungsbeschlüssen
(publ. in: ZIP 2008, S. 145 ff.)
- 71 David C. Donald Die Übertragung von Kapitalmarktpapieren nach dem US-
Amerikanischen *Uniform Commercial Code* (UCC)
- 72 Tim Florstedt Zum Ordnungswert des § 136 InsO
(publ. in: ZInsO 2007, S. 914 ff.)
- 73 Melanie Döge/
Stefan Jobst Abmahnung von GmbH-Geschäftsführern in befristeten
Anstellungsverhältnissen
(publ. in: GmbHR 2008, S. 527 ff.)
- 74 Roland Schmidbleicher Das „neue“ acting in concert – ein Fall für den EuGH?
(publ. in: Die AG 2008, S. 73 ff.)
- 75 Theodor Baums Europäische Modellgesetze im Gesellschaftsrecht
(publ. in: Kley/Leven/Rudolph/Schneider [Hrsg.], *Aktie und
Kapitalmarkt. Anlegerschutz, Unternehmensfinanzierung
und Finanzplatz*, 2008, S. 525 ff)
- 76 Andreas Cahn/
Nicolas Ostler Eigene Aktien und Wertpapierleihe
(publ. in: Die AG 2008, S. 221 ff.)
- 77 David C. Donald Approaching Comparative Company Law
- 78 Theodor Baums/
Paul Krüger Andersen The European Model Company Law Act Project
(publ. in: Tison/de Wulf/van der Elst/Steennot [eds.],
*Perspectives in Company Law and Financial Regulation.
Essays in Honour of Eddy Wymeersch*, 2009, S. 5 ff.)
- 79 Theodor Baums « Lois modèles » européennes en droit des sociétés
(publ. in : *Revue des Sociétés* 2008, S. 81 ff.)
- 80 Ulrich Segna Irrungen und Wirrungen im Umgang mit den §§ 21 ff.
WpHG und § 244 AktG
(publ. in : *Die AG* 2008, S. 311 ff.)

- 81 Börsenkooperationen im Labyrinth des Börsenrechts
- Reto Francioni Börsen im internationalen Wettbewerb: Konsolidierung als Teilaspekt einer globalen Wachstumsstrategie
- Roger Müller Kooperationen und Zusammenschlüsse von Börsen als Bewährungsprobe für das Börsenrecht
- Horst Hammen Verschmelzung von Börsen?
- 82 Günther M. Bredow/
Hans-Gert Vogel Kreditverkäufe in der Praxis – Missbrauchsfälle und aktuelle Reformansätze
- 83 Theodor Baums Zur AGB-Kontrolle durch die BaFin am Beispiel des Bausparrechts
(publ. in: Entwicklungslinien im Bank- und Kapitalmarktrecht. Festschrift für Nobbe, 2009, S. 815 ff)
- 84 José Engrácia Antunes The Law of Corporate Groups in Portugal
- 85 Maike Sauter Der Referentenentwurf eines Gesetzes zur Umsetzung der Aktionärsrechterichtlinie (ARUG)
(publ. in: ZIP 2008, 1706 ff.)
- 86 James D. Cox,
Randall S. Thomas,
Lynn Bai There are Plaintiffs and... There are Plaintiffs : An Empirical Analysis of Securities Class Action Settlements
- 87 Michael Bradley,
James D. Cox,
Mitu Gulati The Market Reaction to Legal Shocks and their Antidotes : Lessons from the Sovereign Debt Market
- 88 Theodor Baums Zur monistischen Verfassung der deutschen Aktiengesellschaft. Überlegungen de lege ferenda
(publ. in: Gedächtnisschrift für Gruson, 2009, S. 1 ff)
- 89 Theodor Baums Rücklagenbildung und Gewinnausschüttung im Aktienrecht
(publ. in: Festschrift für K. Schmidt, 2008, S. 57 ff)
- 90 Theodor Baums Die gerichtliche Kontrolle von Beschlüssen der Gläubigerversammlung nach dem Referentenentwurf eines neuen Schuldverschreibungsgesetzes
(publ. in: ZBB 2009, S. 1 ff)
- 91 Tim Florstedt Wege zu einer Neuordnung des aktienrechtlichen Fristensystems
(publ. in: Der Konzern 2008, 504 ff.)

- 92 Lado Chanturia Aktuelle Entwicklungen im Gesellschaftsrecht der GUS
- 93 Julia Redenius-Hövermann Zur Offenlegung von Abfindungszahlungen und Pensionszusagen an ein ausgeschiedenes Vorstandsmitglied
- 94 Ulrich Seibert,
Tim Florstedt Der Regierungsentwurf des ARUG – Inhalt und wesentlich Änderungen gegenüber dem Referentenentwurf (publ. in: ZIP 2008, 2145 ff.)
- 95 Andreas Cahn Das Zahlungsverbot nach § 92 Abs. 2 Satz 3 AktG – aktien- und konzernrechtliche Aspekte des neuen Liquiditätsschutzes (publ. in: Der Konzern 2009, S. 7 ff)
- 96 Thomas Huertas Containment and Cure: Some Perspectives on the Current Crisis
- 97 Theodor Baums,
Maike Sauter Anschleichen an Übernahmeziele mittels Cash Settled Equity Derivaten – ein Regelungsvorschlag
- 98 Andreas Cahn Kredite an Gesellschafter – zugleich eine Anmerkung zur MPS-Entscheidung des BGH (publ. in: Der Konzern 2009, S. 67 ff)
- 99 Melanie Döge,
Stefan Jobst Aktienrecht zwischen börsen- und kapitalmarktorientiertem Ansatz
- 100 Theodor Baums Der Eintragungsstopp bei Namensaktien (publ. in: – noch in Vorbereitung –)
- 101 Nicole Campbell,
Henny Mächler Die Haftung der Verwaltungsgesellschaft einer fremdverwalteten Investmentaktiengesellschaft
- 102 Brad Gans Regulatory Implications of the Global Financial Crisis
- 103 Arbeitskreis
„Unternehmerische
Mitbestimmung“ Entwurf einer Regelung zur Mitbestimmungsvereinbarung sowie zur Größe des mitbestimmten Aufsichtsrats
- 104 Theodor Baums Rechtsfragen der Bewertung bei Verschmelzung börsennotierter Gesellschaften
- 105 Tim Florstedt Die Reform des Beschlussmängelrechts durch das ARUG
- 106 Melanie Döge Fonds und Anstalt nach dem Finanzmarktstabilisierungsgesetz

- 107 Matthias Döll „Say on Pay: Ein Blick ins Ausland und auf die neue Deutsche Regelung“
- 108 Kenneth E. Scott Lessons from the Crisis
- 109 Guido Ferrarini Understanding Director’s Pay in Europe:
Niamh Moloney A Comparative and Empirical Analysis
Maria Cristina Ungureanu

INSTITUTE FOR LAW AND FINANCE

PROF. DR. THEODOR BAUMS
PROF. DR. ANDREAS CAHN

INSTITUTE FOR LAW AND FINANCE
IM HOUSE OF FINANCE DER GOETHE-UNIVERSITÄT FRANKFURT
CAMPUS WESTEND – GRÜNEBURGPLATZ 1
D-60323 FRANKFURT AM MAIN
TEL: +49 (0)69 / 798-33753
FAX: +49 (0)69 / 798-33929

WWW.ILF-FRANKFURT.DE



INSTITUTE FOR LAW AND FINANCE

GOETHE-UNIVERSITÄT FRANKFURT AM MAIN