NEW PAN-EUROPEAN REGULATORS FOR THE FINANCIAL SECTOR

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«In life, global banks make profits internationally. In death, they cause cross-border problems» (2).

The euro-zone turmoil that began in the fall of 2009, when the real level of Greek sovereign debt became apparent, set into movement a series of chain-events in the European Union that have since unfolded on an almost weekly basis. The past two years have seen the Union deal with the discovery of further emergency financial rescues (Ireland, November 2010) and the necessity to stop bond market contagion from spreading elsewhere (Portugal, Spain, Italy, and beyond). Fundamentally, the crisis triggered the need to establish a new and stable basis for the governance of the euro-zone's economy. In attempting to restore confidence and prevent the build-up of further risks that might imperil the stability of the entire financial system, EU policy-makers devised the emergence of four pan-European regulators for the financial sector. Three of these bodies are specifically endowed with supervisory tasks and responsibilities. As such, they are collectively referred to as European supervisory authorities (ESAs). They include a European Banking Authority (EBA), established in London, a European Securities and Markets Authority (ESMA) established in Paris, as well as a European Insurance and Occupational Pensions Authority (EIOPA) based in Frankfurt am Main, Germany. In addition to the three ESAs proper, the EU established a European Systemic Risk Board (ESRB), also based in Frank-

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(2) Editorial comment, *Financial Times*, July 15, 2010.

furt am Main, vested with the larger task of macro-prudential oversight of the financial system of the Union.

Few would argue that the context in which these regulators came into being was one of turbulence and haphazard improvisation. In view of the long-term future of the 11-year-old euro-zone being thrown into disarray, the actors involved – European finance ministers, the President of the European Council, the Commission and the European Parliament – were summoned to demonstrate quasi-artistic levels of persuasion and imagination. Three principal challenges stood in their way. Firstly, the dramatic turn of events, and the speed through which they unfolded, compelled EU authorities to take urgent measures of assistance, resorting to heretofore untested mechanisms. Bilateral loans were thus afforded to Greece at the beginning of the month of May 2010, and in their heed, a "European Financial Stabilization Mechanism" (EFSM) was established to safeguard financial stability for euro area as well as non-euro area Member States (3). The EFSM can mobilize a loan of up to €60 billion (its funds coming from the European Commission and guaranteed by the EU budget). Meanwhile, a "European Financial Stability Facility" (EFSF) was established to provide temporary financial assistance to euro area Member States in difficulty (4). Given a three-year lifespan, the EFSF can – with the help of the German Debt Management Office (DMO) – issue bonds or other debt instruments (notes, commercial paper, debt securities) to raise the funds needed to provide loans to States that submit a request. Issues are to be backed by guarantees given by euro area Member States of up to €440 billion. The IMF may participate in the package by providing at least half as much as the EU contribution, i.e. €250 billion. Amounting to €750 billion, the

(3) See Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European stabilization mechanism, *O.J.* 2010, L118/1. Adopted on the basis of Article 122(2) TFEU (ex-100(2) EC), the activation of this mechanism must be understood in the context of a joint EU/IMF support.

(4) The European Financial Stability Facility, owned by euro areas Member States, was incorporated on 7 June 2010 in Luxembourg under Luxembourgish law (the law of 10 August 1915 on commercial companies, as amended). The EFSF was formed as a public limited liability company (*société anonyme*) (tenure of 3 years, up to June 2013, or if loans are made, the maturity of the financing instruments). The EFSF became fully operation on a 4 August 2010 and is currently headed by Klaus Regling (CEO), former Director-General for economic and financial affairs at the European Commission. For the EFSF Articles of Incorporation, see http://www.efsf.europa.eu/attachments/efsf_articles_of_incorporation_en.pdf (visited February 2011). An EFSF Framework Agreement between euro area Member States and the EFSF was entered into the same day. See http://www.efsf.europa.eu/attachments/efsf_framework_agreement_en.pdf (visited February 2011). The registered office of the EFSF is at 43, avenue John F. Kennedy, L-1855 Luxembourg. The website of the European Financial Stability Facility may be found at http://www.efsf.europa.eu/about/index.htm (visited February 2011).

overall rescue package was initially greeted as a "shock and awe" strategy to end the eurozone bond crisis. It soon raised a number of objections. From a legal perspective, the main issue had to do with whether the assistance schemes were in conformity with the so-called "no bail-out" rule of Article 125 TFEU. Unarguably, the "no bail-out" rule "prohibits guarantees, either beforehand or ex post, by EU institutions or by Member States with one exception in the text, concerning 'mutual financial guarantees for the joint execution of a specific project'" (5). Notwithstanding, "Article 122(2) TFEU provides for an action of the EU, not of the Member States" (6). All the while, political objections were thrown at these plans, most notably from non-eurozone members as well as from the European Central Bank (7). In addition to the tensions in the financial markets, the two Council presidencies of 2010 were themselves marred by economic and political problems of the most serious magnitude. Spain, which held the Presidency over the first semester, found itself a suspect of serious financial unworthiness. As to Belgium, it began – and ended – its Presidency with a caretaker government, embroiled in a permanent state of identity crisis (8). It appeared all but obvious that this Presidency would produce meaningful results. All the while, the different solutions to these conflicts and the setting up of new pan-European regulators took place against the backdrop of the new institutions created by the Lisbon Treaty, which entered into force on December 2010. The cumbersome ratification process that had all but delivered a fatal blow to the TEU and TFEU seemingly dashed any thought of further Treaty amendment.

In the main, this paper deals with the setting up of the four pan-European regulators intended to bolster national supervisory structures and stave off a repeat of the financial mayhem seen two years ago. Institutional issues aside, it also examines ancillary matters related to these new forms of economic governance, most notably efforts to extend the single market and current plans to enhance policy coordination of the 17 eurozone members, rather than all 27 Member States of the Union.

(5) Cf. Jean-Victor LOUIS, "Guest editorial : the no-bail-out clause and rescue packages", *Common Market Law Review* 47 : 971-986, at 977 (2010).

(6) *Ibid.*, at 985.

(7) See http://www.ecb.int/press/key/date/2010/html/sp100528.en.html (visited February 2011).

(8) For an American perspective on political disunity in Belgium, see Ian BURUMA, "Le Divorce", *The New Yorker*, 10 January 2011.

I. – THE NEW REGULATORS

The four bodies that came to light in January 2011 are in large part the brain-child of a report that was published on 25 February 2009 by a group of high level experts chaired by the former Managing Director of the International Monetary Fund (IMF), Mr. Jacques de Larosière (9). The *de Larosière Report*, as it became known, had been requested by the President of the European Commission, José Manuel Barroso, in order to give advice on the future of European financial regulation and supervision (10). In succinct but resounding terms, it began by acknowledging that "[t]he European Union [wa]s suffering" and "too much of the European Union's framework remains seriously fragmented". A host of examples of regulatory inconsistency were singled out : diverse reporting obligations with respect to the issuance of accounting reports, the absence of an agreed methodology to validate risks assessments by financial institutions,... Taking note of these different problems, the Report called for critical policy changes to correct the situation and harmonize a set of core rules in the EU. This in itself would improve the functioning of the single financial market, reduce distortions of competition and regulatory arbitrage and improve the efficiency of cross-border financial activity in the EU (11). Regarding supervisory repair, the *de Larosière Report* also noted the existence of substantial differences in the powers granted to national supervisors in the different Member States of the EU (called "level 3 committees" in the Lamfalussy Framework). Most importantly, it underscored the inability of

(9) The Report published by the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, may be found at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf (visited March 2011).

(10) The distinction between financial regulation and supervision is laid down in paragraph 38 of the *de Larosière Report* : "Regulation is the set of rules and standards that govern financial institutions; their main objective is to foster financial stability and to protect the customers of financial services. Regulation can take different forms, ranging from information requirements to strict measures such as capital requirements. On the other hand, supervision is the process designed to oversee financial institutions in order to ensure that rules and standards are properly applied. This being said, in practice, regulation and supervision are intertwined [...]".

(11) It being noted that the oversight of banks generally costs far more in the United States than in the European Union. According to the Oliver Wyman consultancy, the various federal and state agencies that supervise banks in the U.S. spent $4.4bn on 18,000 frontline employees in 2009-2010, while the 27 EU Member States spent $2.2bn on 10,000 employees. The reasons for this difference have to do with the fact that : (a) the U.S. has far more very small banks and spends correspondingly more on them; (b) the U.S has more overlap between its state and federal agencies; (c) the U.S. invests more in areas that the EU has traditionally neglected, such as consumer protection and winding up failing banks. For extended discussion, see Brooke MASTERS, "Oversight of banks costs US far more than EU", *Financial Times*, January 24, 2011.

supervisors to take urgent common decisions, due to the absence of legal powers. In short, the Report concluded that there was a marked need for greater convergence between Member States on technical rules, along with the establishment of mechanisms to ensure agreement and co-ordination between supervisors of the same cross-border institutions or in colleges of supervisors. Resorting to the Court of Justice of the European Union was quite obviously lengthy and ineffective. By way of conclusion, the *de Larosière* Report advocated immediate legislative action on the part of the Commission, the Council and the Parliament to build a consensus to transform the level 3 Committees into three European Authorities : a European Banking Authority, a European Insurance Authority and a European Securities Authority. Repeatedly, the *de Larosière* Report resorted to the necessity of "immediate" action or "urgency", adding that, "[i]n essence, we have two alternatives : the first 'chacun pour soi' beggar-thy-neighbour solutions; or the second – enhanced, pragmatic, sensible European cooperation for the benefit of all to preserve the world economy. This will bring undoubted economic gains". Based on the *de Larosière* Report, the European Commission brought forward proposals in September 2009. On 22 September 2010, the European Parliament, following agreement by all Member States in the Council, voted through the new regulatory framework. Four regulations of the European Parliament and of the Council, adopted on 24 November 2010 and published in the Official Journal of the EU of 15 December 2010, effectively gave light to the three ESAs and the European Systemic Risk Board (12). Generally speaking, the ESAs will set common standards while competent national authorities supervise individual institutions. Any "power grab" by Brussels (in fact, London, Paris and Frankfurt) will only be possible in a crisis or if national regulators enter into conflict or break EU law. As such, a national bank cannot be forced to bail out a bank. Whilst acknowledging their respective distinctive features, each ESA is expected to co-ordinate and work closely on issues of cross-sector importance with their fellow supervisory authorities. Accordingly, a Joint Committee of European Supervisory Authorities was established. Composed of the Chairpersons of the ESAs, and supported by a secretariat drawn from the

(12) Each regulation is developed below. Note should also be had of Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010, published in the same edition of the Official Journal of the EU, i.e. No L 331 of 15 December 2010, at p. 120. This directive amends a series of relevant directives regarding the powers of the three ESAs. Finally, mention should be had of Council Regulation (EU) No 1096/2010 of 17 November 2010, conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, also in *O.J.* No L 331 of 15 December 2010, at p. 162.

three ESAs, the main tasks of the Joint Committee are, precisely, to serve as a forum and ensure cross-cultural consistency in these matters. The chairmanship of the Joint Committee rotates annually among the three Authorities and meets at least once every 2 months. The Executive Directors of the ESAs, a representative of the Commission, and the ESRB are further invited to the meetings of the Joint Committee. Generally speaking, the EBA, ESMA, EIOPA, and the ESRB form what is known as the European System of Financial Supervision (ESFS).

A. – *The European Banking Authority (EBA)*

The European Banking Authority (hereafter, *EBA*), established in Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 (hereafter, *EBA Regulation*), took over the existing and current tasks and responsibilities of the Committee of European Banking Supervisors (CEBS) (13). The very first recital of consideration of the EBA Regulation lays out – in stark terms – the justification behind its existence : the EBA was set up in response to "shortcomings in financial supervision" and "shortcomings in the areas of cooperation, coordination, consistent application of Union law and trust between national supervisors". To make matters clearer still, the same recital adds that "[n]ationally based supervisory models have lagged behind financial globalization and the integrated and interconnected reality of European financial markets, in which many financial institutions operate across borders" (14). Crisis looms behind this Regulation and the *de Larosière* Report, specifically referred to in the third recital to the Regulation, along with the conclusions of different meetings of the European Council, make the sense of urgency perfectly clear. As it is, the EBA is intended to address these accumulated "shortcomings" whilst guaranteeing a level playing field and strengthening international supervisory coordination. The beneficiaries would not only be the European economy

(13) The Committee of European Banking Supervisors was established by Commission Decision 2009/78/EC, in *O.J.* L 25, 29.1.2009, p. 23. For the current European Banking Authority, see Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, in *O.J.* L 331, 15.12.2010, p. 12. The European Banking Authority has its seat in London (Article 7 of Regulation (EU) No 1093/2010). It is located in the City of London at the following address : EBA, Tower 42 (level 18), 25 Old Broad Street, London EC2N IHQ, UK. The website of the European Banking Authority may be found at http://www.eba.europa.eu/ (visited March 2011).

(14) Note that the recital uses the present perfect tense.

as a whole, but also "consumers and employees" (15). Its general aim should be to ensure a "high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial institutions" (16). From the very outset, the EBA is faced with a tight-rope walking act. On the one hand, it has to avoid impinging on the fiscal responsibilities of Member States. On the other, it should be able to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union. All the while, it is to be accountable to the European Parliament and the Council. Both its organization and its tasks and functions make the responsibilities of the EBA appear all the more daunting.

1. *Organization*

Generally speaking, the European Banking Authority is a Union body endowed with legal personality (17). The case being, it may acquire or dispose of movable and immovable property and be a party to legal proceedings. In terms of financial autonomy, the revenues of the EBA consist for the most part of a combination of a subsidy from the Union, entered in the General Budget, and obligatory contributions from the national public authorities competent for the supervision of financial institutions (18). The auditing of accounts is undertaken by the Court of Auditors and the overall budget is subject to a discharge granted by the European Parliament, following a recommendation from the Council acting by a qualified majority (19). No less than five organs make up the EBA (20). Besides the Executive Director, appointed for a period of 5 years and entrusted with the management of the Authority (21), the principal decision-making organ of the EBA is to be found in the Board of Supervisors, headed by one non-voting Chairperson (appointed by the Board (22)) and

(15) Recital 11 of the EBA Regulation.
(16) *Ibid.*
(17) Article 5.
(18) Article 62.
(19) Article 64.
(20) Article 6.
(21) Articles 51 to 53.
(22) Article 43(3). The current Chairperson, Andrea Enria, was selected by the Board of Supervisors on 11 January 2011 and confirmed by the European Parliament on 3 February 2011, following a public hearing held at the Economic and Monetary Affairs Committee (ECON). He took up his office on 1 March 2011. Generally speaking, the European Parliament may object to the designation of the person selected as Chairperson (Article 48(2)) and is called upon to confirm the extension of the Chairperson's term of office for one additional term of office of 5 years (Article 48(4)). The Chairperson represents the

made up of the relevant competent authorities in each of the 27 Member States of the European Union, each endowed with voting rights (each member having one vote (23)). In addition, there are three observers from the European Economic Area (Iceland, Liechtenstein and Norway), as well as non-voting representatives from the Commission, the European Central Bank, the ESRB, and the other two supervisory authorities (EIOPA and ESMA) (24). Members of the Board of Supervisors are expected to act independently and only in the Union's interest, it being added that "[n]either Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks" (25). Meetings are convened either by the Chairperson *sua sponte* or by a request of one third of the Board's members (26). As a general rule, decisions of the Board of Supervisors are taken by a simple majority of its members (27). Notwithstanding, certain acts may require qualified majority voting, according to the rules laid down in Article 16(4) of the TEU and in Article 3 of the Protocol (No 36) on transitional provisions annexed to the TEU and to the TFEU. Such acts include a reconsideration by the Board of Supervisors of decisions pertaining to the temporary prohibition or restriction of a State's financial activities in the event that such activities threaten the orderly functioning of and integrity of financial markets or the stability of the whole or part of the financial stability of the Union (such reconsideration being introduced upon request by any Member State) (28). As it is, a special configuration of the Board of Supervisors may be called upon to settle disagreements between national supervisory authorities with respect to the procedure or substance of an action or inaction of a competent authority in another Member State (29). Indeed, failure to reach conciliation within a set time limit may lead to the case being submitted to a restricted and independent panel made up of members who are neither representatives of the competent authorities which are party to

European Banking Authority and is entrusted with preparing the work of the Board of Supervisors (Article 48(1)).

(23) Article 44(1).

(24) Article 40. The Executive Director may attend meetings of the Board of Supervisors and the Management Board without the right to vote.

(25) Article 42.

(26) Article 44(2).

(27) Article 44(1).

(28) Article 9(5), third subparagraph. Other acts requiring qualified majority voting are listed in Article 44(1), second subparagraph.

(29) Article 19.

the disagreement nor have any interest to the said parties (30). The case arising, the panel forwards proposals to the Board of Supervisors which then adopts a decision, approved by a simple majority, save rejection by a blocking minority of the votes as defined in Article 16(4) of the TEU and in Article 3 of the Protocol (No 36) on transitional provisions (31). Such decisions have binding effects for the competent authorities concerned (32). Failure to comply with the EBA's decisions may lead to a further decision addressed directly to a financial institution in the Member State concerned requiring necessary action (irrespective of the Commission's powers under Article 258 TFEU to ensure compliance with Union law) (33).

Alongside the Board of Supervisors, the Management Board is entrusted with ensuring that the European Banking Authority carries out its tasks and performs the tasks assigned to it in accordance with the Regulation. It is much smaller than the Board of Supervisors as it is made up of the Chairperson of the Authority, a representative of the Commission, and six representatives of national supervisory authorities (elected by and from the voting members of the Board of Supervisors (34)). The term of office of members of the Management Board is 2 ½ years (35). Its tasks generally revolve around the annual and multi-annual work programme of the EBA, the exercise of certain budgetary powers (36) and the adoption of the Authority's staff policy plan (37).

Finally, it should be emphasized that the EBA Regulation sets up a Board of Appeal to deal with parties who claim they have been adversely affected by a decision of the Authority (38). Made up of six members and an equal number of alternates, the Board of Appeal consists of a joint body of European Surveillance Authorities, independent from their administrative and regulatory structures. Decisions are taken on the basis of a majority of at least four of six members, within 2 months of the appeal having been lodged (39). The decisions of the Board of Appeal are themselves subject to proceed-

(30) Article 41(2). The panel is made up of the Chairperson and two of the Board of Supervisors' members.
(31) Article 41(3) and 44(1), third subparagraph.
(32) Article 19(3).
(33) Article 19(4).
(34) Article 45.
(35) Article 45(1).
(36) In accordance with Articles 63 and 64.
(37) Article 47.
(38) Articles 58 to 60.
(39) Articles 58(4) and 60(2).

ings before the Court of Justice of the European Union, in accordance with Article 263 TFEU (40).

2. *Tasks and Powers*

Referring to a vast swathe of existing Union legislation regulating the field covered by the EBA Regulation, the European Banking Authority carries out three principal functions. First, it is entrusted with contributing to a "common supervisory culture" (41). The term is beautifully chosen, albeit open to dispute since the word "culture" has no clear definition and has become one of the most abused words in the English language (42). Semantic controversy aside, the Authority's contribution to a "common supervisory culture" is essentially carried out through the establishment of guidelines and recommendations (43) as well as draft regulatory technical standards (44) and draft implementing technical standards for submission to the Commission (45). The end-result of these standards will lead to a single rulebook, and in turn, to a level playing field across the Union. The Authority's contribution to a "common supervisory culture" is further carried out by reviewing the application of the relevant regulatory and implementing technical standards adopted by the Commission (46), and by generally conducting peer reviews of competent authorities to further strengthen consistency in supervisory outcomes (47).

Second, the EBA has a major role to play with respect to resolving instances of incorrect or insufficient application of Union law. A three-step mechanism is involved. On a first level, the EBA has powers of investigation of alleged incorrect or insufficient application of Union law by national authorities in their supervisory practice (48).

(40) Article 61. Similarly, proceedings may be brought before the Court of Justice of the European Union contesting a decision by the Authority in cases where there is no right of appeal before the Board of Appeal.

(41) Article 8(1)(b). See also Article 29.

(42) The word "culture" has come to mean almost any collection of habits that develops among a group of people. You can have a "sick-note culture" or a culture of driving at 10 km an hour over the speed limit on motorways...

(43) Article 16 + Article 17(3).

(44) Article 8(2)(a) + Articles 10 to 14. Draft regulatory technical standards are then submitted to the Commission for endorsement by means of delegated acts pursuant to Article 290 TFEU.

(45) Article 8(2)(b) + Articles 15. Draft implementing technical standards are then submitted to the Commission for endorsement by means of implementing acts pursuant to Article 291 TFEU

(46) Article 29(1)(d).

(47) Article 30.

(48) Article 17(2). The powers of investigation may be triggered upon a request from a competent authority, the European Parliament, the Council, the Commission or the Banking Shareholder Group. The EBA may take up action on its own initiative.

The result of its investigations will lead to a recommendation being made within two months. Thereafter, the competent authority that is subject of the measure has a period of 10 working days from receipt of the notified recommendation to inform the Union of the "steps it has taken or intends to take to ensure compliance with Union law" (49). On a second level, the Commission is empowered to issue a formal complaint in the event of persistent non-compliance by the competent authority of the recommendation which was addressed to it. Here again, strict deadlines are clearly specified in the EBA Regulation (50), On a third level, the Authority may adopt decisions addressed to individual financial institutions. This power, however, is to be used in "exceptional circumstances", where it necessary to overcome "exceptional situations of persistent inaction" (51). In short, it is to be used as a last resort mechanism, wielded without prejudice to the powers of the Commission under Article 258 TFEU. Should there be a serious threat to the orderly functioning and integrity of financial markets or the stability of the financial system, the EBA may further intervene to require national supervisory authorities to take specific action (52). The EBA is generally entrusted with "taking actions, *inter alia*, in emergency situations" (53). As mentioned above, the EBA may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union (including the order of the cessation of any practice that may be the cause of adverse developments (54)). Again, it is interesting to note that such emergency-type measures taken by the EBA are without prejudice of infringement proceedings brought by the Commission under Article 258 TFEU. They are also without prejudice to the Commission's requesting interim measures in accordance with the rules of procedure of the Court of Justice of the European Union. Finally, they are without prejudice to any liability that a Member State might incur if its supervisory authorities fail to take the action required by the Authority.

Taken from a broad perspective, the key justification behind the existence of the EBA is its permanent capacity to respond to "systemic risks" as defined in Article 2(c) of Regulation (EU) No 1092/

(49) Article 17(3).
(50) Article 17(4) and (5).
(51) Article 17(6) and recital 29.
(52) Article 18.
(53) Many of these terms remain unspecified. Made up of one sentence, Article 8(1)(b) of the EBA Regulation contains no less than three references to the adjective "consistent" (+ "coherent", once).
(54) Article 18(4).

2010 (55). In tangible terms, this translates into developing a common set of quantitative and qualitative rules on a complete set of tools for the prevention and resolution of failing banks (the so-called "stress-tests") (56). Barely appointed, Andrea Enria, chairman of the European Banking Authority, highlighted the weakness of consensual efforts to coordinate banking regulation in Europe and insisted on restoring the market's faith in stress-testing Europe's banks, destroyed in 2010 when the Irish banking system collapsed four months after being given a clean bill of health by the EBA's predecessor, the Committee of European Banking Supervisors (57). Within weeks, the EBA said it would design more robust stress-tests, taking into account an extremely negative macroeconomic situation as well as country-specific shocks on property prices, interest rates and government borrowing. The tests themselves would begin in April 2011, with the results set to be made public in June or July 2011. Generally speaking, the EBA shall endeavor to strengthen the European system of deposit guarantee schemes and, if worse come to worse, develop ways to avoid contagion and allowing failing financial institutions to be wound down "in an orderly and timely manner" (58).

B. – *The European Securities and Markets Authority (ESMA)*

The European Securities and Markets Authority (hereafter, *ESMA*) replaced the Committee of European Securities Regulators established by Commission Decision 2009/77/EC (59). Made up of the same number of recitals of consideration as those contained in the EBA Regulation, Regulation (EU) No 1095/2010 of the European Par-

(55) See 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, in *O.J.* L 331, 15.12.2010, p. 1. Pursuant to Article 2(c), "'systemic risk' means a risk of disruption in the financial system with the potential to have serious consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructure may be potentially systemically important to some degree".

(56) Articles 22 to 25.

(57) The CEBS gave a clean bill of health to all but 7 of 91 banks that were tested, identifying an aggregate capital shortfall of only €3.5bn, way below the €30-40bn estimates put forward by bank analysts. Two Irish banks that had passed the test had to be bailed out.

(58) Article 27(1).

(59) Cf. Regulation (EU) No 1095/2010 of the European Parliament and of 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, in *O.J.* L 331, 15.12.2010, p. 84. The European Securities and Banking Authority is located : 11-13, Avenue de Friedland, F-75008 Paris. The website of the European Securities and Banking Authority may be found at http://www.esma.europa.eu/ (visited March 2011).

liament and of the Council of 24 November 2010 establishing a European Securities and Markets Authority (hereafter, *ESMA Regulation*) is generally aimed at the same shortcomings of financial supervision. As such, it was deemed indispensable to overcome the existing patchwork of regulatory and supervisory requirements and to provide for a system which would be in line with the objective of a stable and single Union financial market for financial services, linking national supervisors within a strong European network. It hence appears that the ESMA Regulation finds itself within the philosophy and regulatory framework that came out of the *de Larosière* Report. As many ideas resemble those that underlie the EBA, lengthy developments on the governance of ESMA are forsaken here (60). It will suffice to point out that the brunt of ESMA's work on securities legislation, primarily aimed at the development of a single rule book in Europe, strives to ensure the consistent treatment of investors across the Union (enabling an adequate level of protection of investors through effective regulation and supervision) whilst promoting equal conditions of competition for financial service providers. Taken from a "negative" perspective, "deeper and more integrated financial markets offer better opportunities for financing and risk diversification, and thus help to improve the capacity of the economies to absorb shocks" (61). Taken from a more "positive" perspective, "[r]estoring and maintaining a stable and reliable financial system is an absolute prerequisite to preserving trust and coherence in the internal market, and thereby to preserve and improve the conditions for the establishment of a fully integrated and functioning internal market in the field of financial services" (62).

In essence, ESMA's tasks and powers resemble those carried out by the Committee of European Securities Regulators. It nevertheless has new competencies which include the following :

- additional responsibilities with respect to consumer protection and financial activities (ranging from the power to "issue warnings" in the event that a financial activity poses a serious threat to the objectives laid down in Article 1(5) of the ESMA Regulation to the power to "prohibit or restrict" certain financial activities that

(60) There are two principal bodies in ESMA's governance structure : the Board of Supervisors which gathers the heads of the national competent authorities, and the Management Board. There is also a Chairperson (currently Steven Maijoor), an Executive Director (currently Verena Ross) and a Board of Appeal. The independence of ESMA is fully guaranteed whilst at the same it is fully accountable to the European Parliament where it will appear at the request of the Parliament for formal hearings. Full accountability towards the Council and the Commission also exists.

(61) ESMA Regulation, recital 7.

(62) *Ibid.*

threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union) (63);

- the ability to draft regulatory technical standards (for submission to the Commission for endorsement) which are binding (64);
- the ability to initiate a fast-track procedure to ensure consistent application of EU law (instead of resorting to the Commission which would then take up the matter before the Court of Justice of the European Union (65);
- upon declaration of an "emergency situation" by the Council and the subsequent informing of this state to the European Parliament and the Commission, ESMA may exercise "emergency powers" which basically cover the ability to adopt individual decisions requiring competent authorities to take the necessary action in accordance with the Union acts referred to in Article 1(2) of the ESMA Regulation (i.e. all the securities legislation) (66);
- new powers in resolving disagreements between competent authorities in cross-border situations; (67)
- participating in Colleges of supervisors and taking part, if need be, in on-site examinations, carried out jointly by two or more competent authorities (68);
- identifying and measuring systemic risk and developing an adequate stress testing regime (69);
- the ability to enter into administrative arrangement with supervisory authorities, international organizations and the administrations of third countries (70).

C. – *The European Insurance and Occupational Pensions Authority*

The European Insurance and Occupational Pensions Authority (hereafter, *EIOPA*), established in Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 (hereafter, *EIOPA Regulation*), took over the existing and current tasks and responsibilities of the Committee of European Insurance

(63) Article 9.
(64) Article 10.
(65) Article 17.
(66) Article 18.
(67) Article 19.
(68) Article 21(1).
(69) Article 23(1).
(70) Article 33.

and Occupational Pensions Supervisors established by Commission Decision 2009/79/EC (71). Again made up of the same number of recitals of consideration as those contained in the other two ESA regulations, the principal aim of EIOPA has to do with upgrading the quality and consistency of national supervision, strengthening oversight of cross-border groups and establishing a single rule book applicable to all the relevant institutions in the internal market. Again, it appears that the EIOPA Regulation develops a conspicuous link with the philosophy and regulatory framework that came out of the *de Larosière* Report. Again, many ideas contained in this Regulation resemble those that underlie the EBA and ESMA. Accordingly, lengthy developments on the governance of EIOPA are not called for (72). Finally, it should be noted that while there is an obvious overlap with Committee of European Insurance and Occupational Pensions Supervisors, again, new competencies exist, many of which are very similar to those developed above for the EBA and ESMA.

D. – *The European Systemic Risk Board*

The European Systemic Risk Board (hereafter, *ESRB*), established in Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 (hereafter, *ESRB Regulation*), is primarily entrusted with warning about macro-economic threats or risk building up in the EU region. It does not have power to force decisions on Member States but is generally expected to make influential recommendations to ministers (73).

(71) Cf. Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC, and repealing Commission Decision 2009/79/EC, in *O.J.* L 331, 15.12.2010, p. 84. The European Insurance and Occupational Pensions Authority is based in Frankfurt am Main, Germany. The website of the European Insurance and Occupational Pensions Authority may be found at https://eiopa.europa.eu/ (visited March 2011).

(72) There are two principal bodies in EIOPA's governance structure : the Board of Supervisors which gathers the heads of the national competent authorities, and the Management Board. There is also a Chairperson (currently Gabriel Bernardino), an Executive Director (currently Carlos Montalvo) and a Board of Appeal. As with the other ESAs, the independence of EIOPA is fully guaranteed whilst noting that at the same it is fully accountable to the European Parliament where it will appear at the request of the Parliament for formal hearings. Full accountability towards the Council and the Commission also exists.

(73) Cf. 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, in *O.J.* L 331, 15.12.2010, p. 1. The Secretariat of the ESRB is ensured by the ECB. The website of the ESRB may be found at http://www.esrb.europa.eu/home/html/index.en.html (visited March 2011).

Made up of far fewer recitals of consideration than those contained in the three ESA regulations, the ESRB Regulation again draws on the *de Larosière Report* and underlines the shortcomings of the recent past : existing arrangements of the European Union placed too little emphasis on macro-prudential oversight and on linkages between developments in the broader macroeconomic environment and the financial system.

From an organizational standpoint, the ESRB is comprised, in the main, of the region's central bank governors. They are fleshed out in a "General Board" which also comprises the President and Vice-President of the ECB, a member of the Commission, as well as the Chairpersons of the three ESAs (74). All have voting rights, with one vote each, and votes are taken, in the main, on a simple majority basis (75). Meetings take place at least four times a year with the possibility of convening extraordinary meetings at the initiative of the Chair of the ESRB or at the request of at least one third of the members of the General Board with voting rights. In addition to the General Board, the ESRB is endowed with a Steering Committee (76), an Advisory Scientific Committee composed of 15 experts (77) and an Advisory Technical Committee (78). Forsaking lengthy explanations on the composition of each of these committees, it will suffice to point out that the last two Committees are generally entrusted with providing advice and assistance to the ESRB, at the request of the Chair, on issues relevant to the ESRB. The Steering Committee is more simply entrusted with preparing the meetings of the General Board and monitoring the progress of the ESRB's ongoing work. The Chair (79) and Vice-Chairs, elected in accordance with Article 5 of the ESRB Regulation, generally preside meetings of the General Board and the Steering Committee.

The first and foremost task of the ESRB is that of collecting, analyzing, and exchanging information (80). In itself, this task appears

(74) ESRB Regulation, Article 6(1).

(75) Article 6(1) and Article 10. In the event of a tie, the Chair of the ESRB has the "casting vote" (Article 10(2)), it being noted that Article 6 does not specify that the Chair actually has voting rights...

(76) Article 11.

(77) Article 12.

(78) Article 13.

(79) Following the entry into force of the ESRB Regulation, and for a period of 5 years, the Chair of the ESRB is to be held by the President of the ECB : Article 5(1).

(80) Article 15. In terms of "exchanging" information, reference is had here to the fact that the ESRB is entrusted with providing the three ESAs "with the information on risks necessary for the achievement of their tasks" (Article 15(1)). This is also understood of close cooperation with the European System of Central Banks, the Commission, the national supervisory authorities and national statistics authorities.

somewhat mundane. The ESRB Regulation, however, grants considerable – and understandable – importance to the matter. Quoting Article 15(5) *in extenso* : "If the requested information [from the ESRB] is not available or is not made available in a timely manner, the ESRB may request the information from the ESCB, the national supervisory authorities or the national statistics authorities. If the information remains unavailable, the ESRB may request it from the Member State concerned, without prejudice to the prerogatives conferred, respectively, on the Council, the Commission (Eurostat), the ECB, the Eurosystem and the ESCB in the field of statistics and data collection".

The ESRB is further entrusted with identifying and prioritizing systemic risks, and issuing "warnings" where such systemic risks are deemed to be significant and, where appropriate, make those warnings public. In this respect, the ESRB is to elaborate a colour code, corresponding to different risk levels, in order to allow interested parties to assess the exact nature of the risk (81). In addition to "warnings", the ESRB may issue "recommendations" for remedial action, including – where appropriate – for legislative action (82). Depending on the circumstances, public disclosure of recommendations may help to foster compliance. In the event of an "emergency" situation arising under one of the three ESA Regulations, the ESRB may simply resort to issuing a warning addressed to the Council, "providing an assessment of the situation, in order to enable the Council to assess the need to adopt a decision addressed to the ESAs determining the existence of an emergency situation" (83). Once these steps have been taken there remains the task of monitoring the follow-up to warnings and recommendations. The Regulation provides that if the addressee of a recommendation takes no – or inadequate – action in response to the recommendation, and fails to supply adequate justification for its inaction, the ESRB may inform the addressee, the Council, and where appropriate, the European Supervisory Authority concerned. If need be, an exchange of views may take place before the European Parliament.

Generally speaking, the ESRB is expected to cooperate closely with all the other parties to the European System of Financial Supervision, most particularly in developing a common set of quantitative and qualitative indicators (risk dashboard) to identify and measure systemic risk. In the words of the ESRB's first Chair, Jean-Claude

(81) Article 16.

(82) *Ibid.* According to Article 16(3), *in fine*, "Recommendations may also be addressed to the Commission in respect of the relevant Union legislation".

(83) Article 3(2)(e).

Trichet, "One aspect of the the comprehensive mandate of the ESRB is to look horizontally at the risks which may be generated by banks, insurance companies, occupational pension funds, securities markets, market infrastructures, and financial products generally. This is a remarkably broad mandate [...]" (84).

II. – RE-VISITING ECONOMIC GOVERNANCE

Amidst the setting up of pan-European regulators and concerns at fixing internal market mechanisms that still malfunction, European Union capitals have also granted greater attention recently to the issue of fiscal sustainability and the necessity of a rule-based framework. A most notable measure, promoted by Berlin, would be to induce eurozone Member States to adopt national constitutional amendments to curb public borrowing via a so-called "debt brake" mechanism (hereafter, DB) that would help them make their public finances sustainable. The mechanism, which was introduced in Switzerland in 2002 (85), and in Germany in 2009 (86), must be appraised in the context of existing European rules, namely the European Stability and Growth Pact (SGP). By way of reminder, the SGP requires roughly balanced budgets in structural terms, while allowing for a limited degree of flexibility based on two principal corrective arms : a 3% deficit ceiling and a 60% debt ceiling. With a view to limiting the increase in public debt in Germany (87), Berlin set up a so-called "federalism reform commission" ("Förderalismuskommission II") in 2008 whose major policy proposal was precisely to agree on the DB. Similar to the SGP, the DB rests on the idea of structurally

(84) J.-Cl. TRICHET, "The conditions for efficient global and regional macro-supervision – Key success factors in international cooperation". Keynote address at the Eurofi G20 High Level Seminar, Paris, 17 February 2011. Internet available at : http://www.esrb.europa.eu/news/pr/2011/html/sp110217.en.html (visited March 2011). By way of comparison, Jean-Claude Trichet draws the link with the United States, referring specifically to the Financial Stability Oversight Council, whose mandate includes the entire sector of "non-banks.

(85) Switzerland approved the DB mechanism in a December 2001 referendum with the approval of 85% of voters. Between 1990 and 1998, public debt ratios rose faster in Switzerland than in any other member of the Organization for Economic Cooperation and Development. Debt rose from 32% of GDP in 1990 to 55% in 1998. Switzerland's public debt fell to less than 40% of GDP in 2009, compared with 115% for Greece and an average of 79% in the euro region. For a presentation of the situation in Switzerland in 2002, with international comparisons, see Stephan DANNINGER, "A New Rule : 'The Swiss Debt Brake'", International Monetary Fund (IMF) : Working Paper, WP/02/18 (January 2002).

(86) Cf. Lars P. FELD and Thushyanthan BASKARAN, "Federalism, Budget Deficits and Public Debt : On the Reform of Germany's Fiscal Constitution", *Review of Law & Economics*, Vol. 6 : Iss. 3 (2010).

(87) Germany breached the 3% deficit threshold of the SGP in four successive years, from 2002 to 2005.

balanced budgets over an entire economic cycle. It nevertheless goes further by striving to tie government spending (including interest on outstanding debt) to government revenues, and by providing for the existence of corrective stabilizing mechanisms (so that surpluses in "good times" might finance expenditure from deficits in "bad times"). Deviations from the expenditure limit have to be corrected and are judicially sanctioned. The federal budget must satisfy the expenditure rule and the spending ceiling cannot be overturned throughout the year by budget amendments. According to a discussion paper written by two authors for the *Deutsche Bundesbank*, "leaving aside some different thresholds regarding debt and deficit limits, the main difference between the SGP and the DB is the implemented adjustment mechanism by means of an adjustment account" (88). Fundamentally, the setting up of the DB and the adoption of accompanying measures (such as commitments to make competitiveness more ambitious and more binding), raise questions with respect to whether sanctions might be imposed for States which fail to abide by their commitments. One solution might be to agree on a form of "reinforced cooperation" as allowed by the Lisbon Treaty (89) and implemented for the first time in December 2010 regarding the Area of Freedom, Justice and Security, with respect to the establishment of Europe-wide guidelines applicable to cases of cross-border divorce litigation (90).

In addition to such initiatives, Angela Merkel, the German chancellor, and Nicolas Sarkozy, France's president, at a summit of European leaders held on 4 February 2011, unveiled a "competitiveness pact" aimed at committing all 17 users of the single currency to coordinating their budgetary and economic policies (91). The pact included an agreement on mutual recognition of qualifications to promote labour mobility, the creation of a common basis for the assessment of company taxes (92), as well the commitment to put the

(88) See Eric MAYER and Nikolai STÄHLER, "The debt brake : business cycle and welfare consequences of Germany new fiscal policy rules", *Deutsche Bundesbank*, Discussion Paper, Series I : Economic Studies, No 24/2009, at p. 12. Internet available at http://www.econstor.eu/bitstream/10419/27750/1/608213276.PDF (visited February 2011).

(89) See Article 20(2) TEU). See also Article 326-334 TFEU.

(90) See Council Regulation No 1259/2010 of December 20, 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal cooperation, in *O.J*, No. L 343 of December 29, 2010.

(91) For Germany, this was a major concession to a long-standing French demand for so-called "economic government" among the eurozone countries. Until recently, the German Chancellor had insisted that economic coordination be pursued by all 27 Member States (Ms Merkel wishing to be supported by the U.K. and Scandinavian countries, deemed to be fiscally prudent.

(92) This proposal in particular was dredded by Ireland for whom the abandon of its low corporate tax rates would amount to virtual suicide.

DB in national constitutions to curb public borrowing (see above). It also included the introduction of national crisis resolution regimes for banks. The Merkel-Sarkozy plan drew widespread and profound objections. On the one hand, it was seen as an effort to sideline the European Commission, deemed by the authors of the pact to constitute a dead-weight in the cumbersome Brussels legislative process. Indeed, the "competitiveness pact" clearly partook of an intergovernmental model of peer pressure, in contrast to the "Community method" backed by Jacques Delors, in which the Commission traditionally has the sole right to propose legislation (93). In effect, the pact would have the consequence of letting the large countries call the tune and impose their will on the small (94). On the other hand, the pact was seen as an unwelcome attempt by the eurozone's two largest economies to establish a binding agreement on pension, tax and labour policies that could cut across existing initiatives (95). Finally, non-eurozone countries, hardly insulated against the risks of un-coordinated growth strategies, questioned why Chancellor Merkel and President Sarkozy were so intent on excluding them from coordination in the first place (96). Instead of agreeing to a firm list of measures, the heads of State or government finally entrusted Herman Van Rompuy with the task of canvassing all 17 eurozone members to find measures that could be agreed at an emergency summit in late March 2011.

III. – CONCLUSIONS

The chapter on the governance of Europe's 12-year-old monetary union is far from closed. As mentioned above, decisions have been taken on an almost weekly basis over the past two years and scores

(93) The most staunch criticism in this respect was expressed by a former prime minister of Belgium and two former presidents of the European Commission. See Guy VERHOFSTADT, Jacques DELORS and Romano PRODI, "Europe must make a plan for reform, not a pact", *Financial Times*, March 3, 2011.

(94) In a scathing editorial, the *Financial Times* pointed out that "[t]he 'pact for competitiveness' let out in the open Berlin's (usually repressed) desire that other European countries be a bit more like Germany, and Paris' thirst for relevance on the world stage", in the *Financial Times*, March 4, 2011.

(95) In particular, Belgium's caretaker prime minister, Yves Leterme, took great care to say that he was "absolutely not in agreement" with the plan. Belgium is one of several eurozone countries that index pay raises to inflation, which would be scrapped under the Franco-German plan. Mr Leterme added, "We will not allow our social model to be undone".

(96) See in particular concerns raised by Poland and Sweden, as well as by the coalition allies of Britain's prime minister. See "Cameron warned on 'empty chair' policy in Europe", *Financial Times*, February 15, 2011.

of "brainstorming" exercises have taken place in Brussels and elsewhere with plans to give the barely nascent rescue system new powers and a wider range of ways to raise cash for a rescue of a besieged eurozone country. By agreeing on the creation of comprehensive pan-EU financial watchdogs and by appointing the chairmen of the three new pan-European regulators – for banking, securities markets, and insurance and pensions – the EU has now effectively put in place the regulatory architecture laid down in the de *Larosière Report*. These are welcome achievements, for the most part undertaken during the Belgian stewardship of the EU's rotating presidency, to which one must add a host of other tangible undertakings. By way of illustration, the Belgian Presidency also succeeded to obtain Council adoption of a regulation amending Regulation (EC) No 479/2009 as regards the quality of statistical data in the context of the excessive deficit procedure (97). Against the backdrop of all these different measures, the broader picture remains one of finding a comprehensive package of measures intended to restore long-lasting credibility to the eurozone. Some, including the president of the European Central Bank, Jean-Claude Trichet, consider that tougher rules – backed by sanctions (viz. the temporary suspension of voting rights) – should be applied with respect to eurozone members that show themselves to be serial offenders the region's rules on public finances (98). Others, particularly northern countries such as Germany, the Netherlands, and Finland, argue at the very least that there should be stronger commitments from the most indebted Member States to curb their deficits and boost competitiveness, in exchange for agreement to increase their financial guarantees to the EFSF. All the while, there still exist major differences regarding how to raise the lending capacity of the EFSF in the first place. As it is, an increase in its current lending capacity to a full €440 would require the eurozone's six triple-A rated countries, including France and Germany, to raise their loan guarantees. Besides domestic political issues (particularly in Germany), which policy actions will be taken? A wide swathe of measures may be envisaged, ranging from the DB to putting an end to indexing wage increases to inflation, or increasing retirement ages in State pension plans. Fundamentally, will such policy actions remain the responsibility of each Member State? Will they be binding? Beyond fiscal and labour market policy, the issues hinge on the degree to which States are prepared to relinquish sovereignty to

(97) http://www.cmfb.org/pdf/2010-07-12%20%20CR%20amending%20Regulation%20 (EC)%20No%20479%202009.pdf.
(98) *Financial Times*, 10 September 2010.

become well-functioning members of the monetary union. The issue of closer political integration in the European Union is at stake. These are systemic questions that call for systemic answers.

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BILANS ET PERSPECTIVES

Avec le soutien de la Fondation Paul-Henri Spaak

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