
FINANCIAL REGULATION AND SUPERVISION

A Post-Crisis Analysis

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PREFACE

The financial crisis has left no part of the financial system untouched. While the cause or causes of the crisis are still a much-debated subject, and as the crisis is moving from private financing to public and even sovereign financing, definite steps have been taken to combat at least the symptoms. Ambitious reform plans have been adopted at the level of the world's most important political powers, especially at the G-20 Pittsburgh Summit. These measures are now being implemented in the US through a single act, the Dodd Frank Act and its numerous implementing regulations. In the EU, the Commission has undertaken this work by submitting a long list of proposals to the European legislator, the Council and the Parliament that calls for extensive delegated acts from the Commission and heavily involves the newly constituted regulatory agencies. The final profile of the new framework will not become visible for another couple of years. In the meantime, new issues for which regulatory initiatives are also needed pop up almost every month, which may lead to another wave of legislation and regulatory initiatives. All these proposals amount to a considerable workload at financial institutions and among their advisors and representative organisations. In academia there is also a strong need for further explanation and analysis, both to understand the newly adopted regulations and to grasp their impact and how they relate to each other. The further consequences on the overall financing of the economy and on the functioning of companies and their financing have already begun to be the subject of detailed analysis.

In 2008, when the crisis reached its apex, politicians in both the US and the EU decided that bold initiatives were needed. In the EU, a high level Committee chaired by Jacques de Larosi re was installed by President Barroso, who requested to develop proposals to strengthen European supervisory arrangements covering all financial sectors, with the objective to establish a more efficient, integrated, and sustainable European system of supervision'. The Report, dated 25 February 2009, concluded that the European system of regulation was in great need of 'repairs' as it had not sufficiently addressed certain issues, such as the relationship of financial stability with micro-financial regulation and supervision. This was the direct motive for some of the most thorough reforms that the financial markets in Europe have known. Their final objective remains the restoration of the public's confidence, which was shaken for so many people. These reforms involved strengthening the financial position of the banks, better regulating the functioning of the markets and making them more transparent, providing better protection for investors, and

especially keeping systemic risk under control. The goal was that no part of the financial business would escape the eyes of the regulators and supervisors, and all unregulated segments would come under some form of supervision. To a large extent, the regulatory upgrade in the US runs parallel with the developments in the EU. Focusing on the EU alone, the list of reforms is impressive. At the moment of writing, many are still under discussion at the level of the legislators and regulators. This book aims to give an insight into some of the more important changes in the EU regulatory system that will shape financial activity for many years to come. And as Sir Howard Davies (Chapter 2) rightly states, the business is far from over. Indeed, new areas of concern have shown up that are affecting even the rarely doubted solvency of sovereign debtors.

Regulating financial activity is not an easy task. As Julia Black (Chapter 1) reveals, there are major difficulties in terms of cognitive limitation and even bias; the regulators' partial information on real practices and risks often lacks deep knowledge of the interactions in the markets, while regulatory remedies are often insufficient or contradictory. The European context is particularly complex because it is based on a multi-jurisdictional system with generally framed coordination through harmonization instruments, but it remains differentiated in terms of implementation and supervisory practice, leaving room for a non-level playing field and regulatory arbitrage. The coordination becomes even more complex at the international level. With the financial crisis, all these hurdles have become significantly amplified.

The crisis brought to light some major defects in the regulatory system. The link between prudential supervision and overall financial stability issues was not clearly perceived nor understood. The idea that if institutions were sufficiently healthy individually the whole system would be healthy as well did not survive the systemic shock that started in August 2007. Therefore, a new platform in the supervisory structure had to be opened, coming under the name of 'macro-prudential' policy, and ultimately was aimed at identifying, mitigating, and avoiding systemic risk. Two main new bodies were created, the Financial Stability Oversight Council in the US and the European Systemic Risk Board. Although in many respects different, these two bodies will monitor developments that may put in danger the overall stability of our financial system. In Europe their action will liaise with the national stability boards, with the national central banks, and especially with the new supervisory authorities that coordinate the action in the fields of banking, insurance, and securities markets in the EU. The structure and functioning of the ESRB is analysed by Chryssa Papathanasiou and Georgios Zagouras (Chapter 6).

The supervisory framework has not been left untouched by the crisis. In the US, the Dodd Frank Act has largely maintained the existing framework, creating just two new bodies – the FSOC and the Consumer Financial Protection Bureau – and putting to rest the Office of Thrift Supervision. The US system remains very complicated with its many intersecting elements, but it has been the will of Congress

to maintain competing financial supervisors. If Europeans complain about the number of financial supervisors in cross-border business, they should compare theirs with the complex US structures.

In Europe, a different solution has been worked out for a different problem. The core papers in this book deal with the new supervisory landscape that was introduced by four European regulations on the basis of the de Larosière report, and this within nine months. Europe's weakness essentially lies in the lack of coordination between its numerous national supervisors. Rather than creating one Europe-wide supervisory agency, Member States preferred to maintain the existing structure, instead introducing ways to better coordinate their action through the creation of three regulatory authorities with autonomous powers and in charge of enhancing supervisory cooperation. Several of the papers in this book analyse various aspects of the new regulatory structure, whether in a technical legal analysis (Eddy Wymeersch and Eilis Ferran in Chapters 9 and 5 respectively), from a historical perspective (Eilis Ferran), or by underlining their contribution to the effective implementation of financial and supervisory practice rules (Niamh Moloney in Chapter 4). But there are also critical voices asking why there should be three Europe-wide supervisory authorities rather than a single one, active for the largest banks? Would a twin-peak system not have been more efficient, pooling banking and insurance supervision as now seems to increasingly be the case in the Member States? Carmine Di Noia and Maria Chiara Furlò (Chapter 7) consider this the preferable model, putting both functions at the central bank. But are there advantages to putting prudential supervision and central banking under one roof? Is there evidence that integrating these two functions offers considerable advantages? According to David Green (Chapter 3), the jury is still out and no model is perfect.

The consequences of these regulatory changes are only part of the ongoing re-regulation. Major changes have also been introduced in the sectoral requirements, and numerous directives and regulations have been or are still in the process of being adopted. Therefore, the present reforms should still be seen as steps towards some future scheme that will be more resilient in terms of financial stability. But the challenges are formidable and driven mainly by the ongoing financial crisis, both in terms of highly urgent tasks and of organisation and means. At the same time, these authorities are in the process of defining their position both in relation to their members, the national supervisors, and the European institutions.

Guido Ferrarini and Filippo Chiodini (Chapter 8), while admitting that progress has been made, point to the shortcomings of the present framework, especially for dealing with international banks, whether worldwide banks or banks active in several EU states. 'More Europe' would be needed to enable Europe to resist the next crisis, and the creation of a strong regulatory and supervisory system will be the indispensable cornerstone for not repeating the dramatic consequences we

have seen in the present crisis. The European Banking Authority has some powers, but these authors consider them too weak for effective action. Rather than the big leap forward, however, others (Eilis Ferran) prefer cautious pragmatism and incremental advances. As the legislation evolves, the balance of power may shift; due to the increasing globalization and technicality of the subjects, the European level is likely to be the only alternative.

Analysing these institutional developments against the background of the detailed measures that are being considered leads to some interesting analyses. The reform of the banking supervisory provisions will also include the corporate governance rules. Klaus J. Hopt (Chapter 11) and Jaap Winter (Chapter 12) approach these from different angles. The CRD IV corporate governance provisions are likely to change the traditional approach to banking governance whereby banks were free to organise their internal governance, usually with a nod from the supervisor. In the future, the rules will be formally laid down in the banking law, and the supervisor will only verify whether they have been appropriately applied. Jaap Winter strongly criticizes this approach and considers it a considerable and regrettable loss, reducing flexibility and creativity and serving as an example of the downside of overzealous regulatory action. Klaus J. Hopt also reflects on the proposed governance reforms. He reviews the long list of failures that have been observed in pre-crisis banking and concludes that repairs are manifestly due, even if the failures were not the only cause of the crisis. Numerous repairs are due from shareholders, debtholders, supervisors, and regulators. He warns against overregulation: 'a careful mix of mandatory and fall-back rules and soft law under the shadow of supervisory law' is what he considers the optimal balance, whereby spillovers from the banking field into general corporate governance are to be avoided. Gerard Hertig (Chapter 10) takes a critical look at policies and proposals dealing with the market organization in the context of today's high-technology environment. He identifies a danger of regulatory capture, leading to rent extraction and lower efficiency, especially in terms of transparency.

Several chapters pay special attention to the international or cross-border aspects of financial regulation. The widespread differences in markets and their regulation create numerous distortions with respect to whether transactions take place across borders or with financial institutions operating in several countries. These differences frequently lead to lower-efficiency, unjustified exclusions, or regulatory arbitrage that sometimes results in considerable structural effects. Some are winners; others are losers. In other cases, risk – sometimes even systemic risk – is shifted from one jurisdiction to another; differences in the definition of derivatives eligible for mandatory clearing could result in shifting the risk from CCPs from one jurisdiction to another. Closing off certain markets is sometimes presented as investor protection. A level playing field, along with better international coordination, is the way to make markets more reliable and more efficient.

This objective, however, is still far away. Antoine Van Cauwenberge (Chapter 13) reports on considerable progress that has been made in the field of coordination among the world's securities regulators in the context of IOSCO. The introduction of the so-called Multilateral Memorandum of Understanding (MMOU), to which all IOSCO members were invited to adhere, provided strong incentives to upgrade their domestic regulations, the more so as the conditions for adherence were verified by an international verification committee. This approach could stand as a model for implementing common rules on an international basis.

Coordination remains the exception, however; often financial regulation leads to conflicting outcomes in the international sphere, leading to blocking access to certain areas of activity, unjustified regulatory burdens, or outright political conflicts. James Cox (Chapter 15) gives an interesting insight in the extraterritorial application of laws, not only of US laws, where the extraterritorial reach has been curtailed by the Supreme Court in the *Morrison* case, but also from the European angle. In the absence of a political will to solve these issues, unilateral action will continue, resulting in the encroachment of the legal order of one state on to the legal system of other jurisdictions. Fortunately, one also sees some hopeful signs of better coordination. Eva Hüpkes (Chapter 14) looks at these challenges from a worldwide view, proposing some prerequisites for dealing with large financial institutions, especially in crisis resolution terms. Although progress is being made, we are still far from an internationally workable solution.

EW KJH GF
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