European Business Organization Law Review 11: 379-407

doi:10.1017/S1566752910300048

Sources of Law in European Securities Regulation – Effective Regulation, Soft Law and Legal Taxonomy from Lamfalussy to de Larosière

Thomas M.J. Möllers*

* Professor Dr., Universität Augsburg. Translated from the original German by Jason Grant Allen BA & LL.B (Hons) (UTas), Attorney and Counselor-at-Law (New York), and Arne Fuchs, Dipl.-Jur. Univ.

Abstract

The four Framework Directives of the Lamfalussy Process constituted a further step towards guaranteeing an efficient and dynamic functioning of the EU's securities market. Since then, a number of implementing directives and regulations have been passed and further changes have already been suggested.

Regarding the existing system from a German point of view, this article focuses on the role of the Committee of European Securities Regulators (CESR) and the legal nature of its guidelines and recommendations. It establishes the claim that the CESR's statements have a binding effect despite their character set out in the Framework Directives and argues that the traditional dichotomy of legal sources needs to be substituted by a trichotomy of hard law, soft law and a third kind of secondary law. This so-called third kind of secondary law has three consequences: first of all, it needs to be recognised; secondly, it needs to be complied with; and thirdly, in case of non-compliance, extensive reasons must be given. This puts the third kind of secondary law in a position similar to that of persuasive authorities. Regulation (EC) No. 1060/2009, which was adopted following the financial crisis, confirms this notion by requiring that the national financial supervisors consider the CESR's advice but that they can deviate if they give full reasons for their decision.

Lastly, the creation of a European Securities and Markets Authority (ESMA), which has already been proposed, is discussed and compared with the existing system. The ESMA's expanded supervisory powers over national authorities are a step in the right direction. It remains to be seen, however, whether the Proposal for a Regulation creating the ESMA will achieve the goal of establishing a common supervisory culture for European financial markets.

Keywords: financial supervision, Lamfalussy Process, de Larosière Report, CESR, ESMA, dichotomy of law, trichotomy of law, soft law.

1. THE LAMFALUSSY PROCESS

1.1 Particularities of the Lamfalussy Process

1.1.1 *From minimum to full harmonisation*

As in the field of tax law, the density of regulation in capital markets law increases year by year; an overview of the flood of statutes, regulations and regulatory statements from the German and European legislatures and the securities supervisory authorities is hard to maintain.[1] This tide of norms in capital markets law seeks to ensure legal certainty and, above all, the creation of equal competition – i.e., the establishment of a level playing field and the avoidance of 'gold-plating' particular Member States.[2]

From 1985, the European Commission committed itself to the concept of minimum harmonisation.[3] Capital markets law was characterised by this general approach, and many legislative areas featured so-called minimum clauses that expressly allowed stricter national law.[4] Under the direction of Baron Alexander Lamfalussy, the Commission instituted a Committee of Wise Men in July 2000 which investigated how the efficient and dynamic functioning of the securities market could be guaranteed by EU regulation.[5] This occurred in an initial step with the release of the four Framework Directives of the so-called Lamfalussy Process: the Market Abuse Directive (MAD),[6] the Prospectus Directive,[7] the Misuse of

---

[1] For a structured overview, see the capital markets law database at: <http://www.thomas-moellers.de>.

[2] P.O. Mülbert, 'Auswirkungen der MiFID-Rechtsakte für Vertriebsvergütungen im Effektengeschäft der Kreditinstitute', 172 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (2008) p. 170, at p. 180; H. Fleischer, 'Das Anschleichen an eine börsennotierte Aktiengesellschaft. Überlegungen zur Beteiligungstransparenz de lege lata und de lege ferenda', 11 *Neue Zeitschrift für Gesellschaftsrecht (NZG)* (2009) p. 401, at p. 408.

[3] J. Köndgen, 'Regulation of Banking Services in the European Union', in J. Basedow, et al., eds., *Economic Regulation and Competition of Services in the EU, Germany and Japan* (The Hague, Kluwer Law International 2002) p. 27, at p. 47 et seqq.; J. Köndgen, in U. Everling and W. Roth, *Mindestharmonisierung im Europäischen Binnenmarkt* (Baden-Baden, Nomos Verlag 1997) p. 111.

[4] See Art. 6 of Council Directive 89/592/EEC of 13 November 1989 on insider dealing (no longer in force), *OJ* 1990 L 334/30; Recital 5 of Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing, *OJ* 1979 L 66/21; Recital 3 and Art. 11(1) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, *OJ* 1993 L 141/27. Further examples in T.M.J. Möllers, *Die Rolle des Rechts im Rahmen der europäischen Integration* (Tübingen, Mohr Siebeck 1999), at p. 15 et seq.

[5] *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets of 15 February 2001*, available online at: <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf>.

[6] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ* 2003 L 96/16.

Financial Instruments Directive (MiFID)[8] and the Transparency Directive.[9] To overcome the existing problems, the Committee suggested a four-staged process for creating European law in the area of financial services that is ultimately based on the Comitology Decision of the Council.[10] Two committees were instituted: the European Securities Committee (ESC) and the Committee of European Securities Regulators (CESR).

In the first step, the European Council and European Parliament make the initial, foundational decisions that determine the framework of the legislative programme according to the ordinary legislative procedure under Article 294 TFEU (ex Article 251 TEC: co-decision procedure). In the second step, the European Commission and European Parliament create the implementing legislation delegated in the first step, in consultation with the ESC and CESR.[11] In the third step, the supervisory bodies represented in the CESR create recommendations, guidelines and standards for their everyday supervisory activities[12] and guarantee a coherent and consistent transposition of the legal provisions of steps one and two.[13] In the fourth step, the Commission reviews conformity with the relevant EU legal provisions.[14] This process is discussed as a four-stage concept with its individual stages of framework principles, implementing measures, cooperation and enforcement.[15]

---

[7] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, *OJ* 2003 L 345/64.

[8] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *OJ* 2004 L 145/1.

[9] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, *OJ* 2005 L 390/38.

[10] Council Decision 1999/468/EC of 28 June 1999, *OJ* 1999 L 184/23; on this topic, see A. Karpf, et al., 'Die Integration der Finanzmärkte der EU – Die Rolle von CESR, CEBS und CEIOPS im Lamfalussy-Prozess', 3 *Zeitschrift für Finanzmarktrecht* (2007) p. 6; K. Schmolke, 'Der Lamfalussy-Prozess im Europäischen Kapitalmarktrecht – Eine Zwischenbilanz', 22 *NZG* (2005) p. 912.

[11] K. Schmolke, 'Die Einbeziehung des Komitologieverfahrens in den *Lamfalussy*-Prozess – Zur Forderung des Europäischen Parlaments nach mehr Entscheidungsteilhabe', 3 *Europarecht (EuR)* (2006) p. 432, at p. 433; Schmolke, *supra* n. 10, at p. 913.

[12] Karpf, et al., *supra* n. 10, at p. 7.

[13] *Final Report of the Committee of Wise Men*, *supra* n. 5, at p. 46 et seq.; Schmolke (2006), *supra* n. 11, at p. 435.

[14] *Final Report of the Committee of Wise Men*, *supra* n. 5, at p. 49.

[15] Para. 1 of Council Resolution 2001/C-138/01 of 23 March 2001 on more effective securities market regulation in the European Union, *OJ* 2011 C 138/1.

Meanwhile, numerous implementing directives and regulations have been created around the four Framework Directives, as have many recommendations for the activities of the third step.[16]

1.1.2 *Levels of norms*

The wished-for increased density and concretisation brought about by the Lamfalussy Process also creates a certain complexity, albeit a uniform one:[17] at the national level, statutes, regulations and the soft law of the German federal supervisory authority for financial services (*Bundesanstalt für Finanzdienstleistungen* – BaFin) already existed. At the European level now come the Framework Directives, implementing directives, as well as the recommendations and guidelines of the third step of the Lamfalussy Process. Because the framework and implementing directives of the first and second step of the Lamfalussy Process represent primary sources of law, the legislatures and courts of the various Member States are also bound by their objectives. Regulations have direct effect; directives must be transposed into national law.[18] In this context, the complexity of the regulatory structure and the piecemeal character of the individual documents have been rightly criticised.[19]

1.1.3 *The CESR as an 'Interpretation Committee'*

On the third level, the CESR has to concretise the norms created at the first and second levels of the Lamfalussy Process.[20] Its goal is to ensure that the transposition and implementation by the national supervisory bodies of the Member States of the norms created in the first two steps are harmonised.[21] This occurs by means of supposedly non-binding standards, guidelines and recommendations.[22] Guidelines tend to be oriented towards the supervisory authorities and recommendations directly

---

[16] For a comprehensive overview, see <http://www.cesr.org>.

[17] For a discussion of the advantages and disadvantages from an economic point of view, see T.M.J. Möllers, 'Effizienz als Maßstab des Kapitalmarktrechts – Die Verwendung empirischer und ökonomischer Argumente zur Begründung zivil-, straf- und öffentlich-rechtlicher Sanktionen', 208 *Archiv für die civilistische Praxis (AcP)* (2008) p. 1.

[18] Art. 288 TFEU (ex Art. 249 TEC). Administrative regulations which are not legally binding do not meet the requirements for transposition of a directive into domestic law, ECJ, Case C-361/88 *Commission of the European Communities* v. *Federal Republic of Germany* [1991] *ECR* I-2567, para. 15 et seq.

[19] S. Kalss, in K. Riesenhuber, *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis* (Berlin, De Gruyter Verlag 2006) § 20, para. 13.

[20] *The Role of CESR at 'Level 3' under the Lamfalussy Process*, April 2004, CESR/04-104b.

[21] See the statements of the Austrian *Finanzmarktaufsicht* on the importance of the CESR, available online at: <http://fma.cms.apa.at/cms/site/DE/einzel.html?channel=CH0165>; see also *Final Report of the Committee of Wise Men*, *supra* n. 5, at p. 46.

[22] E. Ferran, *Building an EU Securities Market* (Cambridge, Cambridge University Press 2004), at p. 104.

towards market participants.[23] In contrast to the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG), there is no allocation of duties to the CESR in any European Framework Directive. The Directives only delegate to the CESR the interpretative authority regarding the norms created in the first two steps. The CESR is not permitted to undertake any activity that goes beyond the objects of the framework and implementing directives.[24] The work of the CESR on the third level of the Lamfalussy Process was, as such, already characterised as non-binding in the final report of the Committee of Wise Men.[25] This is also consistent with the self-perception of the CESR, according to which recommendations do not constitute acts creating law and therefore do not require any national transposition.[26]

1.2 Legislative competence of national parliaments beyond full harmonisation

In the meantime, the Lamfalussy Process has been extended from securities to the areas of banking,[27] insurance and pension funds,[28] and has seen the creation of committees to improve the supervision of finance groups that offer services in the areas of banking, insurance and securities.[29] So too, enforcement procedures for the transposition of the IFRS standards into European law orient themselves on the Lamfalussy Process.[30] There is, however, a need for optimisation with regard to the

---

[23] *Publication and Consolidation of MiFID Market Transparency Data*, February 2007, CESR/07-043, para. 1.14.

[24] Kalss, in Riesenhuber, *supra* n. 19, § 20, para. 25.

[25] *Final Report of the Committee of Wise Men*, *supra* n. 5, at p. 38: 'The outcome of this work would be non-binding although clearly it would carry considerable authority.'

[26] CESR Action Plan 2005 of October 2004, CESR/04-527b, para. 2.3.9; CESR, *Publication and Consolidation of MiFID Transparency Data*, *supra* n. 23, para. 1.12, p. 3: 'The outcome of CESR's work is reflected in common guidelines and recommendations *which do not constitute European Union legislation and will not require national legislative action*' [emphasis added]. See also the CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses n° 809/2004 of January 2005, CESR/05-054b, at I.9, p. 5.

[27] For this purpose, the European Banking Committee (EBC) – Commission Decision 2004/10/EC of 5 November 2003, *OJ* 2004 L 3/36 – and the Committee of European Banking Supervisors (CEBS) – Commission Decision 2004/5/EC of 5 November 2003, *OJ* 2004 L 3/28 – were established.

[28] A European Insurance and Occupational Pensions Committee (EIOPC) – Commission Decision 2004/9/EC of 5 November 2003, *OJ* 2004 L 3/34 – and a Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) – Commission Decision 2004/6/EC of 5 November 2003, *OJ* 2004 L 3/30 – were established.

[29] The European Finance Conglomerate Committee (EFCC) based on Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, *OJ* 2003 L 35/1.

[30] Accordingly, an Accounting Regulatory Committee (ARC) and a European Financial Reporting Advisory Board exist, see <http://www.efrag.org>. See also T. Oversberg, 'Übernahme

structure and systematisation of the legal texts and the 'transposition' of the English-language texts created on the third level of the Process.

Two problems remain unsolved. First, despite the full harmonisation concept, details regarding the competence to concretise normative instruments and clarify uncertainties remain undetermined. In the Daimler case, it was contentious whether the resignation of the (supervisory board) director Schrempp was sufficiently probable to trigger a reporting duty at the point in time where Schrempp had already formed the intention of leaving but the rest of the supervisory board had not yet adopted a resolution to that effect. While the Federal Court of Justice (*Bundesgerichtshof* – BGH) and the Higher Regional Court (*Oberlandesgericht* – OLG) Stuttgart denied a sufficient probability, the OLG Frankfurt took the opposite position.[31] There also remains the nagging question whether the BGH in fact had the competence to determine this question of law, or whether such ambiguous questions should be brought before the Court of Justice of the European Union. A current controversy also helps to throw some light on this problem: Germany's lower chamber of parliament, the *Bundestag*, has recently enacted a requirement for banks to produce comprehensive memoranda of their professional advice for the purpose of facilitating better supervision.[32] Does the German legislature have the competence to enact such a requirement? Such comprehensive duties to create written memoranda of advice are by no means found in the relevant European instruments.[33]

1.3 The legal status of guidelines and recommendations of the CESR – secondary sources of law versus soft law

1.3.1 *The traditional doctrine of sources of law and its flaws*

Second, it must be analysed whether the CESR's statements are in fact as non-binding as commonly assumed. The term 'sources of law' describes the various manifestations of objective law. In a broader sense, it includes all materials that have

---

der IFRS in Europa: Der Endorsement-Prozess – Status quo und Aussicht', 30 *Der Betrieb (DB)* (2007) p. 1597.

[31] Recently addressed by T.M.J. Möllers and B. Bornemann, 'Begriff der Insiderinformation', 7 *Wirtschaft- und Bankrecht* (2009) I G 6. § 13 WpHG 1.09.

[32] Introduced as § 34(2a) WpHG and § 14(6) WpDVerO *Gesetz zur Neuregelung der Rechtsverhältnisse bei Schuldverschreibungen aus Gesamtemissionen und zur verbesserten Durchsetzbarkeit von Ansprüchen von Anlegern aus Falschberatung*, RegE BT-Drs. 16/12814.

[33] Critical, T.M.J. Möllers and T. Wenninger, *Stellungnahme im Rechtsausschuss als Gutachter des Deutschen Bundestages zum Regierungsentwurf eines Gesetzes zur Neuregelung der Rechtsverhältnisse bei Schuldverschreibungen aus Gesamtemissionen und zur verbesserten Durchsetzbarkeit von Ansprüchen von Anlegern aus Falschberatung (BT-Drs. 16/12814)* of 29 April 2009, available online at: <http://www.thomas-moellers.de>. For further details, see T.M.J. Möllers, in C. Herresthal and B. Gsell, eds., *Vollharmonisierung im Privatrecht* (Baden-Baden, Mohr Siebeck 2009) p. 247 et seqq.

(significant) influence on law, for example, the legal literature, administrative practice, judicial rules and precedents.[34] But the prevailing legal opinion construes the concept of 'sources of law' more narrowly. It only recognises such factors as a source of law that are of a binding normative nature.[35] Other factors, which merely influence the law without being strictly legally binding, are considered non-binding *Rechtserkenntnisquellen* (informative sources). Case law, administrative regulations and private normative regimes are not recognised as sources of law but considered *Rechtserkenntnisquellen*. Case law,[36] administrative regulations[37] or private normative regimes[38] are commonly said to have but a *de facto* binding effect. This distinction exists because in the past a differentiation was made between 'law making' and the 'application of law'.[39]

1.3.2 *Soft law*

The term 'soft law' was first used in the United States to characterise the Restatements of Law and Model Codes.[40] It is also used in international public law to describe norms created by recognised subjects of the law of nations which in an abstract sense may imply an expectation of compliance but have only a persuasive

---

[34] On this sociological interpretation of 'sources of law', see, for example, B. Rüthers, *Rechtstheorie*, 4th edn. (Munich, C.H. Beck 2008), at para. 217 et seq. See also T. Vesting, *Rechtstheorie* (Munich, C.H. Beck 2007), at para. 185.

[35] Rüthers, *supra* n. 34, at para. 217 et seq.

[36] L. Enneccerus and H. Nipperdey, *Allgemeiner Teil des Bürgerlichen Rechts*, 15th edn. (Tübingen, Mohr Siebeck 1959), at p. 206; K. Larenz, *Methodenlehre der Rechtswissenschaft*, 6th edn. (Berlin, Springer-Verlag 1991), at p. 432; E. Picker, 'Richterrecht oder Rechtsdogmatik – Alternativen der Rechtsgewinnung – Teil 2', 43 *JuristenZeitung (JZ)* (1988) p. 62, at p. 72 et seq.; H. Köhler, 'Gesetzesauslegung und "gefestigte höchstrichterliche Rechtsprechung"', 2 *Juristische Rundschau* (1984) p. 45, at p. 48. Regarding statements made by the BaFin, see J. Köndgen, 'Wieviel Aufklärung braucht ein Wertpapierkunde?', 8 *Zeitschrift für Bankrecht und Bankwirtschaft (ZBB)* (1996) p. 361; T.M.J. Möllers and T. Ganten, 'Die Wohlverhaltensrichtlinie des BAWe im Lichte der neuen Fassung des WpHG – Eine kritische Bestandsaufnahme', 4 *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* (1998) p. 773, at p. 801; I. Koller, in H.-D. Assmann and U.H. Schneider, eds., *Wertpapierhandelsgesetz Kommentar*, 5th edn. (Cologne, Verlag Dr. Otto Schmidt 2009) section 35, para. 6; P. Balzer, 'Aufklärungs- und Beratungspflichten vor Geschäftsabschluss', in R. Welter and V. Lang, *Handbuch der Informationspflichten im Bankverkehr* (Cologne, RWS-Verlag 2005), at paras. 7 and 8.

[37] BVerwG judgment of 6 November 1986, *BVerwGE* 75, p. 109, at pp. 115 and 117; BVerwG judgment of 25 November 1993, *BVerwGE* 94, p. 335, at p. 340.

[38] Regarding duties arising from the law of torts, see G. Wagner, in *Münchener Kommentar zum BGB*, 5th edn. (Munich, C.H. Beck 2009) section 823, paras. 270 and 487.

[39] A. von Bogdandy, *Gubernative Rechtssetzung* (Tübingen, Mohr Siebeck 2000), at p. 156; M. Ruffert, in W. Hoffmann-Riem, E. Schmidt-Aßmann and A. Voßkuhle, *Grundlagen des Verwaltungsrechts*, Vol. 1 (Munich, C.H. Beck 2006) § 17, para. 1.

[40] G. Borges, 'Selbstregulierung im Gesellschaftsrecht – Zur Bindung an Corporate Governance-Kodizes', 4 *ZGR* (2003) p. 508, at p. 517.

character in the concrete relations between the parties involved.[41] Soft law is not supposed to possess any legally binding character.[42] Since its adoption into European usage, the term 'soft law' has expanded in an almost inflationary manner. Besides European forms of self-administration such as resolutions, statements, declarations, etc,[43] the term also covers regulatory statements of the CESR,[44] guidelines for securities issuers,[45] publications of the Basel Committee[46] and the German Corporate Governance Code.[47]

---

[41] K. Röhl, *Allgemeine Rechtslehre*, 4th edn. (Cologne, Heymann 2008), at p. 222; R. Karmel and C. Kelly, 'The Hardening of Soft Law in Securities Regulation', 34 *Brooklyn Journal of International Law* (2009) p. 1; D. Thürer, ' "Soft Law" – Eine neue Form von Völkerrecht?', 104 *Zeitschrift für Schweizerisches Recht* (1985) p. 429, at p. 431. *Contra*, C. Jabloner and W. Okresek, 'Theoretische und praktische Anmerkungen zu Phänomenen des "soft law"', 34 *Austrian Journal of Public and International Law (ZÖR)* (1983) p. 217, at p. 223 (granting soft law some legal effect).

[42] H. Ballreich, 'Nachdenkliches über "Soft Law". Seine Rolle beim internationalen Schutz des geistigen Eigentums', 5 *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (1989) p. 383, at p. 384; H. Hillgenberg, 'A Fresh Look at Soft Law', 10 *European Journal of International Law* (1999) p. 499, at p. 500; Ferran, *supra* n. 22, at p. 101; Thürer, *supra* n. 41, at p. 434; U. Ehricke, '"Soft law" – Aspekte einer neuen Rechtsquelle', 4 *Neue Juristische Wochenschrift (NJW)* (1989) p. 1906, at p. 1907; U.H. Schneider, 'Kapitalmarktorientierte Corporate Governance-Grundsätze', 53 *DB* (2000) p. 2413, at p. 2416; J. Scott and D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the. European Union', 8 *European Law Journal* (2002) p. 1, at p. 7.

[43] Ruffert, in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle, *supra* n. 39, § 17, para. 38.

[44] Ferran, *supra* n. 22, at p. 101; T.M.J. Möllers, 'Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht – Vollharmonisierung, Generalklauseln und Soft Law im Rahmen des Lamfalussy-Verfahrens als Mittel zur Etablierung von Standards', 3 *Zeitschrift für Europäisches Privatrecht* (2008) p. 480, at p. 490; G. Spindler and J. Hupka, in T.M.J. Möllers, *Geltung und Faktizität von Standards* (Baden-Baden, Nomos Verlag 2009) p. 117, at p. 118.

[45] Regarding norm-interpreting administrative regulations see, for example, C. Gusy, 'Verwaltung durch Information – Empfehlungen und Warnungen als Mittel des Verwaltungshandelns', 14 *NJW* (2000) p. 977, at p. 979; C. Claussen and U. Florian, 'Der Emittentenleitfaden', 20 *Die Aktiengesellschaft* (2005) p. 745, at p. 747; H. Fleischer, 'Ad-hoc-Publizität beim einvernehmlichen vorzeitigen Ausscheiden des Vorstandsvorsitzenden – Der DaimlerChrysler-Musterentscheid des OLG Stuttgart', 11 *NZG* (2007) p. 401, at p. 404.

[46] K.-H. Boos, R. Fischer and H. Schulte-Mattler, eds., *Kreditwesengesetz – Kommentar*, 3rd edn. (Munich, C.H. Beck 2008) SolvV § 1, para. 9; S. Kümpel, *Kapitalmarktrecht*, 3rd edn. (Berlin, Verlag Dr. Otto Schmidt 2003), at p. 210; F.-C. Zeitler, 'Internationale Entwicklungslinien der Bankenaufsicht', 30 *Wertpapier-Mitteilungen (WM)* (2001) p. 1397, at p. 1400.

[47] M. Kort, 'Standardisierung durch Corporate Governance-Regeln: Rechtliche Vorgaben für die Größen und die Zusammensetzung des Aufsichtsrats', in T.M.J. Möllers, *Standardisierung durch Markt und Recht* (Baden-Baden, Nomos Verlag 2008) p. 137, at p. 142; M. Kort, 'Corporate Governance-Grundsätze als haftungsrechtlich relevante Verhaltensstandards?', in G. Bitter, et al., eds., *Festschrift für Karsten Schmidt zum 70. Geburtstag* (Cologne, Verlag Dr. Otto Schmidt 2009) p. 945, at p. 964; E. Vetter, 'Der Deutsche Corporate Governance Kodex nur ein zahnloser Tiger?', 4 *NZG* (2008) p. 121, at p. 126; S. Schüppen, 'To Comply or Not to Comply – That's the Question! "Existenzfragen" des Transparenz- und Publizitätsgesetzes im magischen Dreieck kapitalmarktorientierter Unternehmensführung', 29 *Zeitschrift für Wirtschaftsrecht (ZIP)* (2002) p. 1269, at p. 1278.

According to the still prevailing opinion, a distinction must be made between hard law and soft law.[48] According to this strict approach, there is only binding legal obligation on the one hand and the absence of it on the other. No third option is recognised.[49] Voices in the legal literature have however criticised this 'poverty' in the traditional taxonomy of law, arguing that this *numerus clausus* does not adequately reflect the situation in reality.[50]

1.3.3 *Legal pluralism and post-modern approaches to justification*

Factions in the legal literature now call for a *tabula rasa* and expansion of our current notions of 'sources of law'. After all, judge-made law can – and, in the common law tradition, does – have binding effect for all similar cases.[51] So too, according to a growing body of opinion, administrative regulations should have direct effect vis-à-vis the citizen.[52] The regulatory frameworks of private (such as

---

[48] On this topic, see H. Kelsen, 'Zur Soziologie des Rechts', 39 *Archiv für Sozialwissenschaften und Sozialpolitik* (1915) p. 839, at p. 842, and M. Weber, *Wirtschaft und Gesellschaft*, 5th edn. (Tübingen, Mohr 1972), at p. 187; J. Köndgen, 'Privatisierung des Rechts – Private Governance zwischen Deregulierung und Rekonstitutionalisierung', 206 *AcP* (2006) p. 477, at p. 510. With regard to Anglo-American legal systems, see J. Austin, *The Province of Jurisprudence Determined* (Cambridge, Cambridge University Press 1995), Ch. 1. Thürer draws a clear distinction, *supra* n. 41, at p. 442: 'Es gibt also dogmatisch gesehen nur "hard law" oder "no law".' ['Dogmatically speaking, there is only "hard law" or "no law".']

[49] M. Bothe, 'Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?', 11 *Netherlands Yearbook of International Law* (1980) p. 65, at p. 94: 'A certain rule is a legal or a non-legal one; one cannot say that one rule is more legal than another'; Thürer, *supra* n. 41, at p. 441: '… juristisch undenkbar, den Begriff der rechtlichen Geltung zu graduieren' ['… juridically unthinkable to graduate the term legal validity']; but see, *inter alia*, N. Walker, 'The Idea of Constitutional Pluralism', 65 *Montana Law Review* (2002) p. 317, at p. 339: 'The full range of constitutional possibilities should be conceived … as questions of nuance and gradation'; similar results had already been reached by W. Wengler, 'Rechtstheoretische und rechtssoziologische Betrachtungen zur Unterscheidung zwischen völkerrechtlich verbindlichen und völkerrechtlich unverbindlichen Äußerungen völkerrechtlicher Organe', 33 *ZÖR* (1982) p. 173, at p. 175.

[50] Köndgen, *supra* n. 48, at p. 516 et seq. Similar criticism by Ruffert, in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle, *supra* n. 39, § 17, para. 38.

[51] See, for example, H.-M. Pawloswki, *Methodenlehre für Juristen*, 3rd edn. (Heidelberg, C.F. Müller 1999) § 11, para. 519 et seqq. and § 24, para. 1020.

[52] For example, F. Ossenbühl, 'Zur Außenwirkung von Verwaltungsvorschriften', in O. Bachof, et al., eds., *Verwaltungsrecht zwischen Freiheit, Teilhabe und Bindung. Festgabe 25 Jahre Bundesverwaltungsgericht* (Munich, C.H. Beck 1978) p. 433; F. Ossenbühl, in J. Isensee and P. Kirchhoff, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band 3* (1988) § 65, para. 39 et seqq.; K. Vogel, 'Verwaltungsvorschriften zur Vereinfachung der Sachverhaltsermittlung und normkonkretisierende Verwaltungsvorschriften', in *Festschrift für Werner Thieme von Hans P. Bull, Otfried Seewald, Bernd Becker* (Cologne, Carl Heymanns Verlag 1993) p. 605, at p. 607 et seqq.; R. Wahl, 'Verwaltungsvorschriften: Die ungesicherte dritte Kategorie des Rechts', in E. Schmidt-Aßmann, et al., eds., *Festgabe 50 Jahre Bundesveraltungsgericht* (Cologne, Carl Heymanns Verlag 2003) p. 571, at p. 595; A. Leisner, 'Verwaltungsgesetzgebung durch Erlasse',

industry-based) normative regimes should also assume the role of law. To this extent, especially in the international context, a new notion of legal pluralism is currently under discussion.[53]

It must be conceded that the real normative character of judgments, administrative regulations and privately created norms is inadequately explained in terms of their *de facto* binding effect. However, these opinions in the literature may at times go too far. In the civilian legal tradition, judgments are effective *inter partes*, not *inter omnes*.[54] They are, as such, not directly comparable with statutory law.[55] Precedent judgments simply do not have the lawmaking function they have under the common law doctrine of *stare decisis*. This has the advantage that any given precedent decision can be limited or corrected more easily by subsequent courts.[56] Likewise, the binding effect of administrative regulations is unconvincing when they do not in fact affect the citizens.[57] When the term *Handelsformen* (or 'modes of [legal] dealing') is used in German jurisprudence,[58] this only relates to lawmaking

---

57 *JZ* (2002) p. 219. Similar, VGH Mannheim Judgment of 4 May 1990, 10 *Neue Zeitschrift für Verwaltungsrecht* (1991) p. 92.

53 Old: M. Schwierz, *Die Privatisierung des Staates am Beispiel der Verweisungen auf die Regelwerke privater Regelgeber im technischen Sicherheitsrecht* (Frankfurt, P. Lang 1986), at p. 64 et seqq. Recently: G. Teubner, *Die zwei Gesichter des Janus: Rechtspluralismus in der Spätmoderne*, in E. Schmidt/H.L. Weyers, eds., *Liber Amicorum Josef Esser* (Heidelberg, C.F. Müller 1995) p. 191, at p. 198 et seqq.; G. Teubner, 'Global Bukovina. On the Emergence of a Trans-National Legal Pluralism', 15 *Rechtshistorisches Journal* (1996) p. 255; G. Teubner, ed., *Global Law without a State* (Aldershot, Dartmouth 1997); G. Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) p. 1, at p. 15 (considering private normative regimes 'Normen konstitutioneller Qualität'); K.-H. Ladeur and S. Augsberg, 'Auslegungsparadoxien. Zu Theorie und Praxis juristischer Interpretation', 36 *Rechtstheorie* (2005) p. 143, at p. 165 et seqq. Regarding Anglo-American legal systems, see, for example, S. Roberts, 'After Government? On Representing Law without the State', 68 *Modern Law Review* (2005) p. 1, at p. 16 et seqq. Concurring, T. Vesting, *Rechtstheorie* (Munich, C.H. Beck 2007) paras. 190 and 242 et seqq.

54 BVerfG judgment of 26 January 1991, *BVerfGE* 84, p. 212, at p. 227 – *Arbeitskampf*; J. Vogel, *Juristische Methodik* (Berlin, De Gruyter Verlag 1998), at p. 84.

55 BVerfG judgment of 26 January 1991, *supra* n. 54, at p. 227*:* 'Höchstrichterliche Urteile sind kein Gesetzesrecht und erzeugen keine damit vergleichbare Rechtsbindung.' ['Judgments by the highest courts are not statute law and do not create a comparable legally binding effect']; BVerfG judgment of 2 February 1993, *BVerfGE* 88, p. 1093, at p. 1116 et seq. (on the judgments of the BAG regarding labour disputes).

56 Regarding this flexibility, see J. Esser, 'Richterrecht, Gerichtsgebrauch und Gewohnheitsrecht', in J. Esser and H. Thieme, eds., *Festschrift für Fritz von Hippel zum 70. Geburtstag* (Tübingen, Mohr Siebeck, 1967) p. 95, at p. 121; Larenz, *supra* n. 36, at p. 431 et seq.; E. Kramer, *Juristische Methodenlehre*, 2nd edn. (Munich, C.H. Beck 2005), at p. 213; V. Röhricht, 'Von Rechtswissenschaft und Rechtsprechung', 6 *ZGR* (1999) p. 453, at p. 454 et seq.

57 See H. Maurer, *Allgemeines Verwaltungsrecht*, 17th edn. (Munich, C.H. Beck 2009) § 24, para. 24.

58 Critical with regard to the term 'sources of law': v. Bogdandy, *supra* n. 39, at p. 156 et seqq. (arguing that this term is outdated and *Handelsformen* should be used instead).

actions by the executive and legislature, not to court judgments or the normative activity of private entities. To ascribe the quality of law to private normative activity is equally unconvincing, because of lacking sovereignty. In that respect, 'is' cannot be drawn from 'ought' without further discussion.[59]

The fundamental principle of *Gesetzesvorbehalt* – that all legislative acts be referable to an enumerated head of power – is based on the principle of rule of law,[60] but is not mentioned expressly in Article 20(3) of the German Basic Law (*Grundgesetz* – GG). This principle demands that certain activities by the state require a basis in legislation by the parliament.[61] The principle of democracy in Article 20(2) GG also supports this position, whereby important decisions are to be made through public and open discussion.[62] Precedent from the Federal Constitutional Court requires that the legislature must make all important decisions in fundamental legislative areas itself rather than through delegation.[63] This is distinct from the principle in Article 80(1) GG that the content, purpose and extent of a statutory empowerment must be certain.

1.3.4 *Hard law, soft law and secondary sources of law: a new trichotomy*

Martin Kriele, Franz Bydlinski and Robert Alexy were the first to postulate a subsidiary duty for courts to conform to relevant earlier decisions.[64] With time, this subsidiary duty was determined with greater precision. Where several solutions to a given problem are available and all represent a more or less equally supportable approach, the precedent decisions of the superior courts are binding to the extent that they reverse the onus of substantiating the argument: whoever wishes to deviate from such earlier decisions must do so with some special justification.[65] By now, such a subsidiary duty to conform, also expressed as a presumption in favour of precedent,

---

[59] H. Kelsen, *Über Grenzen zwischen juristischer und soziologischer Methode* (Tübingen, Mohr Siebeck 1911), at p. 6 et seqq. This is a major point of criticism against the authors in *supra* n. 53.

[60] BVerfG judgment of 10 May 1988, *BVerfGE* 78, p. 179, at p. 197.

[61] BVerfG judgment of 14 July 1998, *BVerfGE* 98, p. 218, at p. 251 – *Rechtschreibreform*.

[62] BVerfG judgment of 25 March 1992, *BVerfGE* 85, p. 386, at p. 403 et seq.; BVerfG of 8 April 1997, *BVerfGE* 95, p. 267, at p. 307 et seq.

[63] On the German *Wesentlichkeitstheorie*, see, for example, BVerfG judgment of 14 July 1998, *BVerfGE* 98, p. 218, at p. 251 et seq. (discussing the legality of the *Rechtschreibreform* absent respective acts of parliament). On this topic, see also H. Bauer and C. Möllers, 'Die Rechtschreibreform vor dem Bundesverfassungsgericht', 54 *JZ* (1999) p. 697, at p. 700 et seqq.

[64] On this topic, see Vogel, *supra* n. 54, at p. 86.

[65] M. Kriele, *Theorie der Rechtsgewinnung, entwickelt am Problem der Verfassungsinterpretation*, 2nd edn. (Berlin, Duncker & Humblot 1976), at p. 243 et seqq.; F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd edn. (Wien, Springer-Verlag 1991), at p. 506 et seqq.; R. Alexy, *Theorie der juristischen Argumentation*, 4th edn. (Frankfurt am Main, Suhrkamp 2001), at p. 339.

enjoys majority support.[66] This doctrine is similar to the common law approach to persuasive authorities.[67] A certain presumption of correctness prevails, which requires rebuttal. The judge in question will, however, only follow such authorities when he also finds them convincing.

These considerations can also be extended to the regulatory action of executive authorities, and even of private institutions. The doctrine relevant to secondary sources of law applies here, and extends the considerations regarding the duty to take cognisance and conform. Secondary sources of law are distinguished negatively by the fact that they may apply to certain parties only and not to the world at large. Nor do they bind courts as strongly as statutes or regulations, because the court need not establish the legal invalidity of the secondary legal source in order to derogate from it. With a flexible system[68] composed of various criteria, the strength of any presumption or legitimate expectation may be weighed and reinforced through argument. To these criteria belong, for example, the degree of democratic legitimation, any express binding effect, the quality, the durability over time, the level of acceptance and the authority of the relevant position as well as the nature of the investments concerned and potential claims in damages.[69]

1.3.5 *Consequences for capital markets law*

It remains a substantially open question whether statements of the CESR can have, beyond their *de facto* normative effect, some form of weakened legally binding

---

[66] W. Fikentscher, 'Die Bedeutung der Präjudizien im heutigen deutschen Privatrecht', in U. Blaurock, *Die Bedeutung von Präjudizien im französischen und deutschen Recht: Referate des 5. Deutsch-Französischen Juristentreffens in Lübeck (Deutschland) vom 13. – 16. Juni 1984*, Arbeiten zur Rechtsvergleichung, Vol. 123 (1989) p. 11, at p. 19; P. Raisch, *Juristische Methoden. Vom antiken Rom bis zur Gegenwart* (Heidelberg, C.F. Müller 1995), at p. 192; Vogel, *supra* n. 54, at p. 86; Rüthers, *supra* n. 34, at para. 239 et seqq.; K. Langenbucher, *Die Entwicklung und Auslegung von Richterrecht* (Munich, C.H. Beck 1996), at p. 105 et seqq.; Möllers, *supra* n. 4, at p. 70.

[67] Möllers, *supra* n. 4, at p. 74; C. von Bar, 'Vereinheitlichung und Angleichung von Deliktsrecht in der Europäischen Union', 35 *Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung* (1994) p. 221, at p. 231.

[68] W. Wilburg, *Die Elemente des Schadensrechts* (Marburg, N.G. Elwert'sche Verlagsbuchhandlung 1941), at p. 26 et seqq; W. Wilburg, *Entwicklung eines Beweglichen Systems im Bürgerlichen Recht* (Graz, Kienreich 1950), at p. 12, or *The Development of a Flexible System in the Area of Private Law* (Wien, MANZ'sche 2000), at p. 12 et seqq.; W. Wilburg, 'Zusammenspiel der Kräfte im Aufbau des Schuldrechts', 163 *AcP* (1964) p. 346; see also F. Bydlinski, et al., eds., *Das Bewegliche System im geltenden und künftigen Recht (Forschungen aus Staat und Recht)* (Wien, Springer-Verlag 1986).

[69] For a detailed discussion, see T.M.J. Möllers, 'Sekundäre Rechtsquellen', in J.-H. Bauer, et al., eds., *Festschrift für Herbert Buchner zum 70. Geburtstag* (Munich, C.H. Beck 2008) p. 649; T.M.J. Möllers, 'Standards als sekundäre Rechtsquellen', in T.M.J. Möllers, ed., *Geltung und Faktizität von Standards* (Baden-Baden, Nomos Verlag 2009) p. 143; concurring, G. Spindler and J. Hupka, 'Bindungswirkung von Standards im Kapitalmarktrecht', in T.M.J. Möllers, *Geltung und Faktizität von Standards* (Baden-Baden, Nomos Verlag 2009) p. 117, at p. 118.

effect. Indeed, the CESR's guidelines[70] and recommendations can be distinguished positively from non-binding soft law, inasmuch as they produce legal effects. First, national authorities are obliged to follow the CESR's statements absent better reasons: a duty to take cognisance of the instrument in question exists along with a so-called subsidiary duty of compliance. Second, a legitimate expectation on the part of the citizen may be recognisable as worthy of protection. On the European level, for example, the CESR has implemented a 'safe harbour' rule for its guidelines.[71] Similar rules already exist under English law, where the guidance of the Financial Services Authority (FSA) creates a certain reliance on the part of market participants which the FSA will honour.[72] This reliance does not, however, give rise to a private cause of action.[73]

2. THE SUPERVISORY SCHEME OF THE NEW REGULATION (EC) NO. 1060/2009 ON CREDIT RATING AGENCIES[74]

2.1 **Cooperation of the national supervisory authorities and the CESR**

2.1.1 *Bodies and committees*

Above all, the financial crisis has emphasised the fact that national financial supervisors and the CESR were too weak to react to individual grievances as quickly and effectively as required.[75] As credit rating agencies contributed substantially to the

---

[70] Sometimes also referred to as *interpretative guidelines*, see Communication from the European Commission of 27 May 2009 on European financial supervision, COM(2009) 252 final, at p. 10.

[71] The relevant passage reads: 'They should also be understood as a *safe harbour* to ensure that investment firms, MTFs and regulated markets fulfil their respective obligations when following the proposed guidelines and recommendations' [emphasis added]. See CESR *Publication and Consolidation of MiFID Transparency Data*, *supra* n. 23, para. 1.10. See also Möllers, *supra* n. 44, at p. 492.

[72] FSA, *The FSA's Approach to Giving Guidance and Waivers to Firms*, Policy Statement, September 1999: 'If a firm acts in accordance with general guidance in the circumstances contemplated by that guidance, then the FSA will proceed on the footing that it has complied with the aspect of the rule to which the guidance refers.' Should the FSA take disciplinary measures anyway, it would probably violate the principle of *legitimate expectation*, M. Threipland, 'Regulated and Prohibited Activities', in M. Blair, ed., *Blackstone's Guide to the Financial Services and Market Act 2000* (Oxford University Press 2001) p. 140; A. Schädle, *Exekutive Normsetzung in der Finanzmarktaufsicht* (Banden-Baden, Nomos Verlag 2006), at p. 77.

[73] On Sec. 157(1) Financial Services and Markets Act (FSMA) and its binding effect, see Threipland, in Blair, ed., *supra* n. 72; Möllers, *supra* n. 44, at p. 492.

[74] Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

[75] This result was also reached by the European Commission, see Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets

financial crisis, it was decided in the United States and in Europe to supervise these market participants more closely than before.[76] The question of who, exactly, should register and supervise credit rating agencies has been seriously discussed in recent months. According to the Proposal for a Regulation on credit rating agencies,[77] the registration and supervision of rating agencies should be effected through the respective national financial supervisors. The uniformity of registration criteria should be guaranteed, however, by the CESR's examination of the registration documents.[78] The national supervisory bodies should also consult the CESR on questions of supervision.[79] Sanctions, such as suspension of the rating or publication of violations (the 'name and shame' approach) would remain in the realm of the national supervisory bodies.[80] In the end, this model was also adopted in the final version of the Regulation on credit rating agencies, despite massive criticism. It will soon be replaced, however, with a new supervisory structure.[81]

The relevant authority of the agency's home country is ultimately responsible for registration, supervision and sanctions. The registered office of the credit rating agency is dispositive.[82] The provisions on the cooperation between the supervisory bodies of different Member States are found, from a systematic perspective, too far towards the back of the Regulation.[83] However, some important duties of the individual offices are enumerated at the outset.

The supervisory structure increases in complexity given the fact that there may be multiple applicants: a group of credit rating agencies is legally defined in terms of parent and subsidiary.[84] Furthermore, there is an urgent need for an association of the responsible authorities, for example, where a credit rating agency has a subsidiary in

---

Authority, Brussels, 23 September 2009, COM(2009) 503 final, at para. 1. For an overview of the national financial supervisory authorities, see, for example, E. Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors', 8 *European Business Organization Law Review* (2007) p. 237.

[76] For a survey of this topic, see T.M.J. Möllers, 'Regulating Credit Rating Agencies: The New US and EU Law – Important Steps or Much Ado about Nothing?', 4 *Capital Markets Law Journal* (2009) p. 477; T.M.J. Möllers, 'Regulierung von Ratingagenturen', 18 *JZ* (2009) p. 861.

[77] Proposal for a Regulation of the European Parliament and of the Council on credit rating agencies, Brussels, 12 November 2008, COM(2008) 704 final.

[78] Art. 13 Proposal for a Regulation on credit rating agencies, *supra* n. 77.

[79] Art. 21(2) ibid.

[80] Arts. 21(1) and 31 ibid. A first description can be found in M. Richter, 'Regulierung und Beaufsichtigung von Ratingagenturen', in S. Grieser and M. Heemann, eds., *Bankaufsichtsrecht: Entwicklungen und Perspektiven* (Frankfurt am Main, Frankfurt School Verlag 2009) p. 519, at p. 535; on the Proposal for a Regulation, see G. Deipenbrock, ' "Mehr Licht!"? – Der Vorschlag einer europäischen Verordnung über Ratingagenturen', 25 *WM* (2009) p. 1165, at p. 1173 (note that the Proposal's numbering differs from that of the actual Regulation).

[81] See *infra* at 4.1.2.

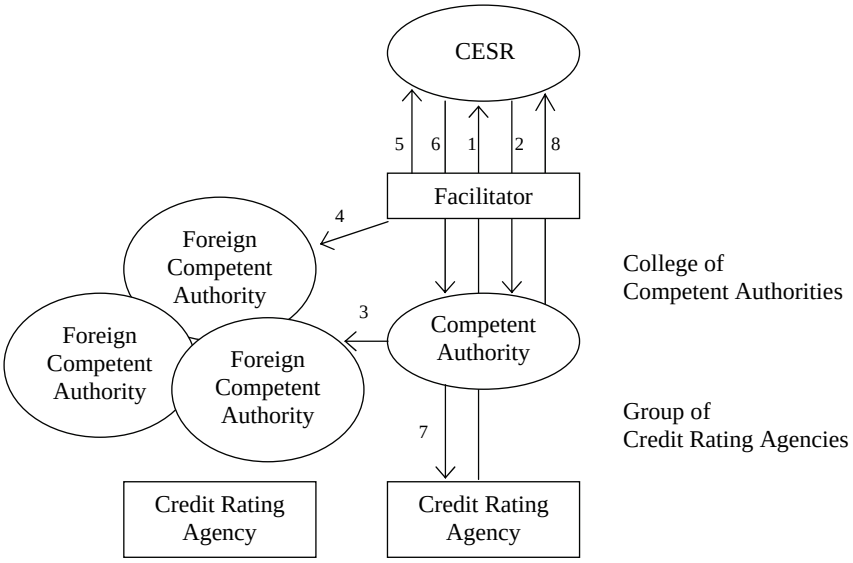
[82] Art. 14 Regulation on credit rating agencies, *supra* n. 74.

[83] Art. 26 ibid.

[84] Art. 3(1)(m) ibid.

another Member State. Some sort of association must also be instituted when a credit rating agency has a widespread international presence or where the effects of a particular rating may cause effects in another Member State. This is referred to as a 'college of competent authorities'.[85] This college is to elect a so-called 'facilitator'[86] to coordinate its work.[87] For the election of the facilitator, the relationship of the particular national authority to the credit rating agency is a relevant consideration, as is the area in which the rating is likely to be used and other similar criteria. In written cooperation agreements, the facilitator is to determine any further procedural questions.[88]

Above all of this, the CESR hovers to offer extensive advice, provide recommendations and develop guidelines, but it has no final competence to decide or make its determinations binding. The registration procedure in the case of different competent national authorities is illustrated by the following diagram and further explained below:



[85] Art. 29(3)(b) ibid.

[86] The facilitator supports the settlement of disputes by promoting communication between the disputing parties. It does not make statements regarding the merits of a dispute. The parties voluntarily elect a facilitator.

[87] Art. 29(5) Regulation on credit rating agencies, *supra* n. 74.

[88] Art. 29(6) ibid.

2.1.2 *Registration procedure*

The case where a credit rating agency has no supra-regional importance is relatively simple. The relevant national authority would register such a credit rating agency.[89] As the Regulation on credit rating agencies is fundamentally concerned with full harmonisation, this national authority would not be permitted to make the registration of the agency conditional on any requirements that go beyond those found in the Regulation itself.[90] The application, however, is not to be lodged with the national authority, but rather with the CESR (marked as step 1 in the diagram). The CESR then examines the application and makes a recommendation (2).[91]

The regular case will be, however, that the ratings in question do indeed have supra-regional effects beyond the Member State where the agency is registered. In this case, the national authority is to work in cooperation with the other relevant national authorities (3) and with the facilitator (4).[92] If these are unable to reach consensus, the CESR (5) will assume a role and make a recommendation to the original national authority (6). This authority then makes the final determination over the registration of a rating agency (7). If the authority does not follow the recommendation of the CESR, it must justify this decision rigorously (8).[93]

2.1.3 *Supervision and sanctions*

In order to ensure effective supervision, the Regulation grants the competent national authorities certain powers, e.g., to access documents and make copies thereof, demand information, carry out on-site inspections and require records of telephone and data traffic.[94] These powers are, however, restricted by a requirement of conformity with national laws, which the Regulation also prescribes.[95] Such clauses hinder full harmonisation because the national laws of the Member States still put forward different rules for the exercise of these powers. Nevertheless, the Regulation creates a common framework.[96]

---

[89] Art. 14(4) ibid.

[90] Art. 14(5) ibid.

[91] Art. 15(4)(2) ibid.

[92] Cooperation is mandated not only for applications for registration of a group of credit rating agencies, see Art. 17(1)(a) ibid., but also for applications for registration of single credit rating agencies under the circumstances of Art. 29(3) ibid.

[93] Art. 16(7)(2) ibid.

[94] Art. 23(3) ibid.

[95] Art. 23(3) ibid.

[96] Cf. Art. 6(2) Prospectus Directive, *supra* n. 7, Arts. 7 and 28 Transparency Directive, *supra* n. 9, and Arts. 50b and 50c Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, *OJ* 2006 L 157/87.

The Regulation also allows for a number of supervisory measures to be taken by the competent authorities where they find that a registered credit rating agency breached its obligations under the Regulation. The competent authorities may, for example, withdraw the registration of that credit rating agency; temporarily prohibit it from issuing credit ratings (with effect throughout the Community); or issue public notices (the above-mentioned shaming). Under certain circumstances, credit ratings may continue to be used for a pre-defined period of time.[97] The Regulation also allows the competent authorities to refer matters for criminal prosecution to their relevant national criminal authorities.[98] Unlike recent directives in the field of company law and capital markets law,[99] the Regulation on credit rating agencies does not introduce civil law liability. It is merely mentioned in the Recitals that such liability would be desirable under national law.[100]

The Regulation does not stipulate either under what circumstances exactly shaming may be used. One must, as such, ask whether the interests of the affected undertakings and those of the market in general are to be considered in the decision-making process.[101]

In case multiple Member States are involved, the competent authorities are to notify the facilitator and consult with the relevant authorities of other affected Member States (the college of competent authorities) before adopting any measures. In the event of disagreement on the necessity to take measures or their extent, advice from the CESR shall be requested.[102] However, the final decision will be made by the competent authority. Should it choose to deviate from the advice provided by the CESR, the decision must be fully reasoned.[103]

Article 36 of the Regulation states that penalties for infringement are to be defined and imposed by the Member States. The Regulation only prescribes that penalties have to be effective, proportionate and dissuasive. The additional level for measures thus introduced is – systematically – not convincing. The call for the introduction of monetary fines at European level was not answered.[104] New, com-

---

97 Art. 24(1) and (2) Regulation on credit rating agencies, *supra* n. 74.

98 Art. 24(1)(f) ibid.

99 *Supra* n. 96.

100 '… any claim against credit rating agencies … *should* be made in accordance with the applicable national law on civil liability' [emphasis added]. See Recital 69 Regulation on credit rating agencies, *supra* n. 74. In the US, the first lawsuits are being filed, see S. Bräuer, *Financial Times Deutschland* of 16 July 2009, p. 2; R. Brooks, *Wall Street Journal* of 16 July 2009, available online at: <http://online.wsj.com/article/SB124767147955845849.html>.

101 See § 40(b) WpHG and *infra* at 2.1.4.

102 Art. 25(2), clause 2, Regulation on credit rating agencies, *supra* n. 74.

103 Art. 25(3), clause 2, ibid.

104 Such a call was made, for example, by the CESR. See the CESR's response to the consultation document of the Commission services on a draft Proposal for a Directive/Regulation on Credit Rating Agencies, CESR/08-671, at para. 4 (criticising the lack of reference to fines). See also Committee on Economic and Monetary Affairs, *Report on the Proposal for a Regulation of the*

pared to the Proposal for a Regulation, is the envisioned disclosure of penalties that have been imposed. Member States are to ensure that the competent authorities disclose to the public every penalty unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.[105] This 'name and shame' approach is already known from several directives.[106]

2.1.4 *The German Draft for an Act implementing the requirements set out by the Regulation on credit rating agencies: §§ 17 and 39 WpHG-E*

Under the Regulation on credit rating agencies, each Member State must designate a competent authority for the purposes of the Regulation by 7 June 2010; competent authorities are to be adequately staffed, with regard to capacity and expertise, in order to be able to apply the Regulation.[107] Germany has now put forward a draft for an act implementing the Regulation.[108] A newly drafted § 17 WpHG will designate the BaFin as competent authority for the purposes of the Regulation. The BaFin may carry out investigations of its own or mandate auditing firms. The manner, extent and time of the investigations are to be further specified in an executive order. § 39 WpHG will be amended by a paragraph 2a which qualifies numerous infringements of the provisions of the Regulation as misdemeanours. The German legislator thus complies with its duty to provide for effective penalties. The above-mentioned shaming[109] is already provided for in § 40b WpHG.[110] In this matter, additional implementation is hence not necessary.

2.2 **Light and shadows in the new supervisory scheme**

2.2.1 *Complexity and subsidiarity*

The supervisory scheme can – without doubt – still be improved:[111] already the organisational issues arising from the coordination of three separate institutions

---

European Parliament and of the Council on credit rating agencies (COM(2008) 0704 – C6-0397/2008 – 2008/0217(COD)) of 1 April 2009, Rapporteur J.-P. Gauzès, amendment 30 (amending Recital 33). The Report is available online at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2009-0191&language=EN>.

105 Art. 36(2) Regulation on credit rating agencies, *supra* n. 74.

106 Art. 14(4) MAD, *supra* n. 6; Art. 51(3) MiFiD, *supra* n. 8; Art. 28(2) Transparency Directive, *supra* n. 9.

107 Art. 22(1) Regulation on credit rating agencies, *supra* n. 74.

108 *RegE eines Ausführungsgesetzes zur EU-Rating-VO* of 22 January 2010, BR-Drucks. 33/10.

109 Art. 36(2) Regulation on credit rating agencies, *supra* n. 74.

110 Regarding the considerations necessary in this context, see Möllers, *supra* n. 17, at p. 16 et seq.

111 An effort to improve the Regulation has been made with the Proposal of the European Parliament and of the Council on amending Regulation (EC) 1060/2009 on credit rating agencies, COM (2010) 289.

(college of competent authorities, facilitator, CESR) are significant. The diagram above illustrates the complexity. Whether deadlines as short as ten day can always be met seems questionable. The current need for consultation undoubtedly results in longer processing times that could be avoided if only one authority were in charge.

Furthermore, the CESR's expert knowledge is not fully taken advantage of: during the registration process, the CESR only provides advice on the completeness of applications for registration to the competent authorities[112] but does not address the correctness of their content. Regarding supervisory measures, the CESR is only involved in case of disagreement between the members of the college of competent authorities.[113] The Regulation thus stops halfway, as it does not make full use of the CESR's potential. One could also criticise that the CESR was not given any substantial decision-making powers, which were instead vested in the competent authorities. Time will show whether these powers will always be exercised by the British FSA or whether the BaFin or the French supervisory authority (*Autorité des marchés financiers* – AMF) will also likely be involved as facilitator.

Criticism can also be brought forward with regard to the CESR's organisational structure: each Member State designates a representative from its competent authority in the securities field to participate in the meetings of the Committee. Hence, the CESR is a rather large decision-making body, consisting of representatives who all push their national agendas. For this reason, its independence is not clearly ensured and disagreements are likely to arise. The CESR's response to the consultation document of the Commission services on a draft Proposal for a Directive/Regulation on credit rating agencies is symptomatic of how difficult it is for the Committee to agree on a single position: some preferred self-regulation, others a stronger cooperative approach, while a third group agreed with the European Commission's Proposal for a Regulation and another view favoured the creation of a European Securities Agency.[114]

A final point of criticism can be made with regard to the lack of full harmonisation. The Regulation still takes recourse to national law.[115] The European legislator recognised this and expressly states in the Recitals that further reforms are highly needed to tackle current shortcomings.[116]

---

[112] Art. 15(4)(2) Regulation on credit rating agencies, *supra* n. 74.

[113] Art. 24(3)(2) ibid.

[114] See CESR, CESR/08-671, *supra* n. 104, at para. 3.

[115] Arts. 36, 23(3) and 24(1)(f) Regulation on credit rating agencies, *supra* n. 74.

[116] See Recital 5 ibid.: 'The current supervisory architecture should not be considered as the long-term solution for the oversight of credit rating agencies.' This evaluation is not shared by positive voices in the legal literature, for example, M. Richter, 'Regulierung und Beaufsichtigung von Ratingagenturen', in S. Grieser and M. Heemann, eds., *Bankaufsichtsrecht – Entwicklungen und Perspektiven* (Frankfurt am Main, Frankfurt School Verlag 2010) p. 519, at p. 540: '… erscheint daher das Regulierungs- und Aufsichtsregime ausgewogen gestaltet.' ['the regulation and supervision regime therefore appears to be designed in a well-balanced manner']; Deipenbrock,

2.2.2 *Increased importance of transnational elements*

With the college of competent authorities the Regulation for the first time introduces a clearly structured forum for cooperation between the Member States. This is to be assessed positively. The Regulation also prescribes deadlines as short as ten days in order to ensure quick decision-making processes.[117] It moreover creates the role of facilitator, who has to assist in the settlement of disagreements between the competent authorities of different Member States.

The role of the CESR has also gained significantly more importance. Prior to the Regulation, the influence of the CESR's guidelines and recommendations was unclear.[118] It is now clear that the CESR advises the competent authorities and should issue guidance on the registration process and coordination arrangements by 7 June 2010[119] and on the enforcement practices and activities to be conducted by competent authorities under the Regulation by 7 September 2010.[120] While the competent Member State can ultimately make its own decisions, it must consult with the competent authorities of other Member States as well as with the CESR prior to doing so. Alongside the facilitator, the CESR also takes on an important role as mediator.[121]

2.2.3 *Recommendations as statutory examples for secondary sources of law*

Most importantly, the CESR offers its expert advice. It can issue recommendations regarding both the registration process and supervisory measures, in particular in case of diverging opinions. If a Member State's competent authority wants to deviate from the advice provided by the CESR, its decision must be fully reasoned.[122]

Until now, the choice of words in European literature on the sources of law seems to contradict itself: according to Article 288(5) TFEU (ex Article 249(5) TEC), recommendations and policy statements of the Council and the European Commission are not binding. They appear, as such, to have no binding legal effect on their addressees.

However, the Court of Justice of the European Union has to a large extent ignored this result and has interpreted their non-binding character narrowly. Member States, as addressees, may not simply act irrespective of these recommendations, but

---

supra n. 80, at p. 1174: '… hat das Potential, ein homogenes Aufsichts- und Regulierungregime … zu schaffen.' ['has the potential to create a homogenous regime of regulation and supervision.']

117 See, for example, Arts. 24(2)(a) and 25(2), clause 5, Regulation on credit rating agencies, *supra* n. 74.

118 See *supra* at 1.3.

119 Art. 21(2)(a) Regulation on credit rating agencies, *supra* n. 74.

120 Art. 21(3)(a) ibid.

121 Expressly mentioned in Art. 31 ibid.

122 Arts. 16(7), clause 2; 24(3)(2); and 25(3), clause 2, ibid.

are obliged to examine them closely and to either conform with them or, where appropriate, to deviate from them only with sufficient explanation.[123] This flows from the general duty of loyalty in Article 4 TEU (formerly Article 10 TEC).[124] Conversely, private citizens can make no appeal to the direct effectiveness of a recommendation.[125]

The literature discusses the lawmaking *contra legem*.[126] The fact that the European legislature in the Regulation on credit rating agencies has now given statutory recognition to the duty to take cognisance of such recommendations and to a subsidiary duty to conform reinforces, on the one hand, its acceptance of the ECJ's opinion. On the other hand, statutory examples now demonstrate that there is no longer a dichotomy, but a trichotomy in our taxonomy of law: besides hard law and soft law, we also have a third secondary source of law ('hoft law')*.*[127]

---

[123] ECJ, Case C-322/88 *Salvatore Grimaldi* v. *Fonds des maladies professionnelles* [1989] *ECR* 4407, para. 18: 'However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions'; M. Nettesheim, in E. Grabitz and M. Hilf, *Das Recht der Europäischen Union* (Munich, C.H. Beck 2010) Article 249, para. 214; W. Schroeder, in R. Streinz, *EUV/EGV* (Munich, C.H. Beck 2003) Article 249, para. 142; H. Hetmeier, in C.-O. Lenz and D. Borchart, *EU- und EG-Vertrag*, 4th edn. (Cologne, Bundesanzeiger 2006) Article 249, para. 21. For a corporate law case, see T.M.J. Möllers and D. Christ, 'Selbstprüfungsverbot und die zweijährige Cooling-off-Periode beim Wechsel eines Vorstandsmitglieds in den Aufsichtsrat nach dem VorstAG', 30 *ZIP* (2009) p. 2278.

[124] Nettesheim, in Grabitz and Hilf, *supra* n. 123, Article 249, para. 214.

[125] ECJ, Case C-188/91 *Deutsche Shell AG* v. *Hauptzollamt Hamburg-Harburg* [1993] *ECR* I-363, para. 18: 'Although the recommendations of the Joint Committee cannot confer upon individuals rights which they may enforce before national courts, the latter are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them, especially when, as in this case, they are of relevance in interpreting the provisions of the Convention.'

[126] M. Ruffert, in C. Callies and M. Ruffert, *EUV/EGV*, 3rd edn. (Munich, C.H. Beck 2006) Article 249, para. 126. On the extent of such lawmaking by the ECJ, see T.M.J. Möllers, 'Doppelte Rechtsfortbildung contra legem?', 1 *EuR* (1998) p. 20.

[127] Regarding the duty to take cognisance and the subsidiary duty to conform, see *supra* at 1.3.4.

3. THE DE LAROSIÈRE REPORT AND THE PROPOSALS FOR REGULATIONS CREATING A EUROPEAN SYSTEM OF FINANCIAL SUPERVISORS (ESFS)

3.1 The Proposal for a Regulation establishing a European Securities and Markets Authority (ESMA)[128]

At the time of the Proposal, the European Central Bank,[129] the Committee on Economic and Monetary Affairs of the European Parliament[130] and the de Larosière Report[131] deemed the supervisory scheme laid out by the Proposal for a Regulation on credit rating agencies too complicated and proposed instead to confer authority on the CESR to handle the registration and supervision, including the power to levy sanctions.[132]

In its Communication on European financial supervision, the European Commission proposed a supervisory scheme built around three European supervisory authorities.[133] By now, Proposals for Regulations were published: a European System of Financial Supervisors (ESFS) comprises national supervisory authorities in the Member States as well as three new European Supervisory Authorities (ESAs).[134] The latter are a European Banking Authority (EBA),[135] a European Insurance and Occupational Pensions Authority (EIOPA)[136] and a European Securities and Markets Authority (ESMA).[137] The ESMA cooperates with the European Systemic Risk Board (ESRB).[138] The Proposal for a Regulation expressly mentions Article 95 TEC (now Article 114 TFEU) as the head of power from which the European legislature derives its competence.[139]

---

[128] Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority, Brussels, 23 September 2009, COM(2009) 503 final.

[129] H. Kafsack and H. Paul, 'Ein Frühwarnsystem für die Finanzmärkte', *Frankfurter Allgemeine Zeitung* of 26 February 2009, p. 11.

[130] Committee on Economic and Monetary Affairs, Report on the Proposal for a Regulation on credit rating agencies, *supra* n. 104, amendments 7, 21, 23 and 25.

[131] de Larosière Group, Report of the High-Level Group on Financial Supervision in the EU of 25 February 2009, at para. 67 and Recommendation 3: '… within the EU, a strengthened CESR should be in charge of registering and supervising CRAs.' The Report is available online at: <http://ec.europa.eu/commission_barroso/president/pdf/statement_20090225_en.pdf>.

[132] Kafsack and Paul, *supra* n. 129.

[133] Communication from the European Commission on European financial supervision, *supra* n. 70, at p. 9.

[134] Art. 39(1) Proposal for a Regulation establishing the ESMA, *supra* n. 128.

[135] Proposal for a Regulation of the European Parliament and of the Council establishing a European Banking Authority, Brussels, 23 September 2009, COM(2009) 501 final.

[136] Proposal for a Regulation of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority, Brussels, 23 September 2009, COM(2009) 502 final.

[137] Proposal for a Regulation establishing the ESMA, *supra* n. 128.

[138] Art. 21(1) and (redundantly repeated in) Art. 21(2) ibid.

[139] Para. 4 ibid. Reference is made to ECJ, Case C-217/04: Judgment of the Court (Grand Chamber) of 2 May 2006: *United Kingdom of Great Britain and Northern Ireland* v. *European*

3.2 A comparison of the current powers of the CESR and the proposed powers of an ESMA

As the CESR has done in the past, the to-be-created ESMA is to develop technical standards, guidelines and recommendations in order to facilitate interpretation of harmonised European Union legislation. So too, the ESMA is to create dispute resolution mechanisms and to secure the consistent application of harmonised law through a peer review procedure.

The real novelties are rather hidden. They do, however, carry tremendous potential for debate as they significantly expand the powers on the European level. To ensure consistent application of European Union rules, the Proposal for a Regulation establishing the ESMA also significantly expands supervisory powers over national authorities compared to the Regulation on credit rating agencies. It introduces a three-step mechanism.[140] First, the ESMA adopts a recommendation for action addressed to the national authority considered to be diverging from the existing European Union legislation. Second, if the recommendation is not complied with, the European Commission may take a decision, requiring the national supervisory authority to either take specific action or to refrain from an action. Third, the ESMA may, as a last resort, adopt a decision addressed directly to financial institutions. To ensure healthy market competition or to guarantee the functionality and integrity of the financial system, quick intervention by the ESMA must be possible.[141] However, the prerequisites for such intervention are difficult to satisfy. The following diagram illustrates the relationship between the relevant bodies. The numbers used in the diagram refer to the mechanism's above-mentioned three steps.

3.3 Evaluating the powers and the doctrine of sources of law

3.3.1 *Guidelines and recommendations as secondary sources of law*

The fact that guidelines and recommendations are more than merely non-binding soft law is illustrated by the clear rules of the Proposal for a Regulation establishing the ESMA. While guidelines and recommendations will still not have immediate legal effect, the Regulation prescribes that 'the competent authorities shall make every effort to comply with [them]'.[142] Where a competent authority does not apply the guidelines or recommendations, it is to inform the ESMA of its reasons.[143] They

---

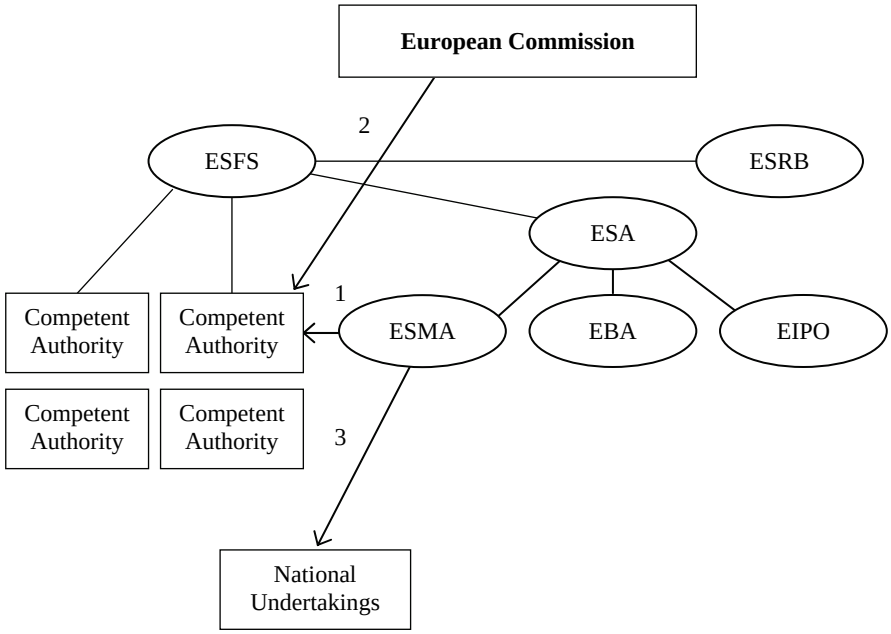
Parliament and Council of the European Union [2006] *ECR* I-3771, para. 44. Prior to this already: Communication form the European Commission on European financial supervision, *supra* n. 70, at p. 8.

140 Para. 6.2.2 Proposal for a Regulation establishing the ESMA, *supra* n. 128.

141 Recital 18 and Art. 9(3), (4) and (6) ibid.

142 Art. 8(2) Proposal ibid.

143 Art. 8(3) Proposal ibid.



could hence be considered secondary sources of law, as the competent authorities must contemplate and – in the absence of better reasons – follow them.[144]

3.3.2 *Acts and decisions as hard law*

The fact that guidelines and recommendations are not hard law either, though, is illustrated by the rules which grant the European Commission the authority to adopt decisions against competent authorities in case they do not comply with recommendations and which allow the ESMA to adopt decisions addressed to the relevant market participants.

Decisions taken by the European Commission under Article 9(4) of the Proposal for a Regulation establishing the ESMA and decisions taken by the ESMA under Article 9(6) of the Proposal for a Regulation are legally binding and directly applicable.[145] The national authorities may seek a declaration from the Court of Justice of the European Union that a decision of the European Commission is of no legal effect, to prevent it prejudicing their rights.[146]

---

[144] See *supra* at 1.3.5 Ambiguously, Recital 18 of the Proposal for a Regulation establishing the ESMA, *supra* n. 128, still reads: 'non-binding recommendation'.

[145] Art. 288(4) TFEU (ex Art. 249(4) TEC). See, for example, Schroeder, in Streinz, *supra* n. 123, Article 249, para. 135 et seqq.

[146] Such action for annulment can be brought by natural and legal persons. See Art. 263(4) TFEU (ex Art. 230(4) TEC).

Technical standards will become binding law if they are adopted by the Commission by means of regulations or decisions and are published in the Official Journal of the European Union.[147]

4. SUMMARY AND OUTLOOK

4.1 **European financial supervision**

4.1.1 *Dismissing the concept of a single financial regulator (integrated financial supervision)*

(1) The idea of creating a European financial supervisory authority remains highly controversial.[148] Because of the high costs associated with complying with 27 different regulatory regimes, larger banks have repeatedly called for the establishment of a supra-national regulator for the European Union.[149] The German and British governments, on the other hand, are rather sceptical about establishing such an authority.[150] Valid arguments can be brought forward for both sides. It could be argued that were the Member States to remain competent, a generally favourable competition of legal systems would develop (regulatory competition).[151] On the other hand, one must ensure that this competition does not get out of hand and result in a 'race to the bottom,' a problem perhaps currently arising.[152]

(2) Dividing powers between three European authorities does not seem ideal, especially if one compares the situation to that in European antitrust law. However, a

---

147 Art. 7(2) Proposal for a Regulation establishing the ESMA, *supra* n. 128.

148 H. Merkt, 'Gutachten G: Empfiehlt es sich, im Interesse des Anlegerschutzes und zur Förderung des Finanzplatzes Deutschland das Kapitalmarkt- und Börsenrecht neu zu regeln?', in Standing Committee of the German Law Congress, ed., *Verhandlungen des 64. Deutschen Juristentages* (Munich, C. H. Beck 2002) p. 124 et seqq.; H. Binder and T. Broichhausen, 'Entwicklungslinien und Perspektiven des Europäischen Kapitalmarktrechts', 18 *ZBB* (2006) p. 97; C. Cruickshank, 'Cooperation and Convergence', in F. Oditah, ed., *The Future for the Global Security Market: Legal and Regulatory Aspects* (Oxford, Clarendon Press 1996) p. 267.

149 Allen & Overy, *The Future Direction of Global Financial Regulation*, 12 November 2008, available online at: <http://www.allenovery.com/AOWeb/binaries/50581.pdf>. See also 'CFS-Umfrage in Frankfurt: Mehrheit für einheitliche Aufsicht', *Frankfurter Allgemeine Zeitung* of 17 July 2009, p. 23.

150 *Frankfurter Allgemeine Zeitung* of 7 July.2006, p. 12.

151 H. Jackson and E. Pan, 'Regulatory Competition in International Securities Markets: Evidence from Europe in 1999, Part I', 56 *Business Lawyer* (2001) p. 653; H. Jackson and E. Pan, 'Regulatory Competition in International Securities Markets: Evidence from Europe in 1999, Part II', 3 *Virginia Law & Business Review* (2008) p. 207; Köndgen (2002), *supra* n. 3, at p. 29 et seqq.

152 Also addressed by K. Hopt, 'Auf dem Weg zu einer neuen europäischen und internationalen Finanzmarktarchitektur', 36 *NZG* (2009) p. 1401.

better solution could not be found since, for political reasons, none of the three competing financial centres London, Paris and Frankfurt could be discriminated against. It is, as such, not likely that a single financial regulator will be created any time soon. The concept of integrated financial supervision recently enacted in Germany[153] and the United Kingdom[154] will thus not be followed.

4.1.2 *Further amendments to the Regulation on credit rating agencies*

(3) The Regulation on credit rating agencies has only recently been enacted. Yet, changes are already being discussed.[155] However, the European Commission has already proposed to give the ESMA 'the responsibility for the authorisation and supervision of certain entities with pan-European reach' in a Communication of May 2009.[156]

(4) When comparing the Regulation on credit rating agencies with the Proposal for a Regulation establishing the ESMA, one will find that the supervisory structure laid out by the Proposal for a Regulation establishing the ESMA is much less complex. Because capital markets require quick and unambiguous action, this structure seems more appropriate. Whether the supervisory structure that will be put into place by amendment of the Regulation on credit rating agencies will follow that of the Proposal for a Regulation establishing the ESMA, exceed it or maybe fall short of it cannot yet be said.[157]

---

153 The German BaFin supervises banks, financial service providers, insurance companies and securities trading. See <http://www.bafin.de>.

154 The British FSA regulates most financial services markets, exchanges and firms. Since November 2004 these include mortgage businesses, since January 2005 general insurance activities and since November 2009 banks' and building societies' conduct of business, including payments services. See <http://www.fsa.gov.uk>.

155 The Proposal for a Regulation establishing the ESMA does not address which specific rules of the Regulation on credit rating agencies are subject to reform but merely states that the latter will again be amended. Para. 6.6. Proposal for a Regulation establishing the ESMA, *supra* n. 128.

156 Communication from the European Commission on European financial supervision, *supra* n. 70, at 4.2, para. 4: 'The European Supervisory Authorities shall be given the responsibility for the authorisation and supervision of certain entities with pan-European reach, e.g., credit rating agencies and EU central counterparty clearing houses. These responsibilities could include such powers as those of investigation, on-site inspections and supervisory decisions. These responsibilities would be defined in sectoral legislation (e.g., the Regulation on Credit Rating Agencies). Apart from reinforcing the effectiveness of supervision, this could enhance efficiency by creating a "one-stop shop" for these supervised institutions. The European Supervisory Authorities could also be involved in the prudential assessment of European mergers and acquisitions throughout the financial sector.'

157 At its meeting of 2 December 2009, the Economic and Financial Affairs Council at least supported the general approach that the ESAs would be 'exercising full supervisory powers at European level with regard to credit rating agencies', see Press Release No. 16838/09 (Presse 352) of 2 December 2009, p. 8.

4.2 **Powers on the European level**

4.2.1 *Secondary sources of law and hard law*

(5) Of even higher importance than the question of how many European supervisory authorities will be put into place, is that of what powers will be vested in them. It is an important first step to stop considering the CESR's statements as non-binding soft law. Rather, they are to some extent granted legal effect. As a result, addressees of recommendations must take them into consideration and – absent valid reasons – comply with them (the so-called doctrine of subsidiary sources of law).[158]

(6) A duty to take cognisance along with a subsidiary duty of compliance were for the first time implemented in the Regulation on credit rating agencies and the Proposal for a Regulation establishing the ESMA.

(7) It is equally important that instruments are introduced which allow for the formal transformation of secondary sources of law into primary (binding) sources of law: technical standards, for example, can be adopted as regulations and recommendations can be enforced through decisions. While such rules were not yet included in the Regulation on credit rating agencies, they are found in the Proposal for a Regulation establishing the ESMA. One must also acknowledge that both the ESMA and the European Commission are granted distinct powers.

4.2.2 *A comparison with European antitrust law*

(8) Recently, voices in the legal literature have suggested that European capital markets law should follow the model of European antitrust law. Over the last 50 years, European antitrust law has proven to be effective in the international context, even when facing multinational companies.[159] The recent financial crisis proves that effective enforcement of European capital markets law is just as important.[160] While European capital markets law is still a long way from sanctioning mechanisms as effective as those available in European antitrust law where decisions addressed to

---

[158] Similar rules apply to the 'Erklärung zum DCGK gem. § 161 AktG', see BGH judgment of 16 February 2009, *BGHZ* 180, p. 9.

[159] Recently, the car glass cartel was fined a total of €1,383,896,000 – the largest fine imposed to that date. See N. Kroes, Car Glass Cartel (Opening Remarks at Press Conference, Brussels, 12 November 2008), available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/604&type=HTML>.

[160] Möllers, *supra* n. 76; T.M.J. Möllers, 'Regulierung von Ratingagenturen: Das neue europäische und amerikanische Recht – Wichtige Schritte oder viel Lärm und Nichts?', 64 *JZ* (2009) p. 861, at p. 871. European competition law was not 'renationalised', see Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, *OJ* 2002 L 1/1; but see de Larosière Report, *supra* n. 131, para. 218.

the individual infringer are everyday business,[161] it is certainly taking a step in the right direction.

(9) It is to be taken into consideration that ever since the Treaties of Rome, the European Union has had (exclusive) competence over antitrust matters. An express competence for capital markets law, however, cannot be found in the TFEU. Criticism of the current dysfunctional structure is justified: 'Banks act globally, but die nationally'.[162] Despite all efforts to create a harmonised supervisory scheme on the European level, the financial crisis has shown that the opposite is in place: whether banks are granted financial aid is decided at national and not European level – 'he who pays the piper calls the tune'.[163] The Proposal for a Regulation establishing the ESMA confirms this adage. It introduces a safeguard clause for cases where a Member State considers that a decision impinges on its fiscal responsibilities.[164] These legitimate reasons can be honoured.

(10) Politically, it is still debated whether the ESMA should also be able to address individual undertakings.[165] At a conference on 2 December 2009, the EU's finance ministers significantly cut the powers of the ESMA and the European Commission.[166] It remains to be seen whether this can be reversed in the upcoming lawmaking process. The European Parliament will play an important role in this process and must take up its responsibility. One can only hope that the race to the bottom will then, finally, become history and the much-desired 'common supervisory culture' for European financial markets will be created.

---

[161] See Arts. 4, 7-10 and 23 et seq. Regulation on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, *supra* n. 160; on this topic see, for example, V. Emmerich, *Kartellrecht*, 11th edn. (Munich, C.H. Beck 2008), at § 13.

[162] Hopt, *supra* n. 152.

[163] *Frankfurter Allgemeine Zeitung* of 6 April 2009, p. 11; B. Schulz, 'Der steinige Weg zu einer internationalen Bankenaufsicht', *Frankfurter Allgemeine Zeitung* of 26 May 2009, p. 23.

[164] Para. 6.2.11 Proposal for a Regulation establishing the ESMA, *supra* n. 128.

[165] According to newspaper articles, particularly Germany and the UK strongly oppose this idea, see R. Berschens, 'EU ringt heftig um Finanzaufsicht', *Handelsblatt* of 22 November 2009, p. 42, available online at: <http://www.handelsblatt.com/politik/international/etappensieg-fuer-deutschland-eu-ringt-heftig-um-finanzaufsicht;2487769>.

[166] R. Berschens, 'EU-Finanzminister schwächen eigene Behörde', *Handelsblatt* of 3 December 2009, available online at: <http://www.handelsblatt.com/politik/international/finanzaufsicht-eu-finanzminister-schwaechen-eigene-behoerde;2493697>; Hopt, *supra* n. 152, at p. 1406.