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TOWARDS A EUROPEAN SUPERVISORY AUTHORITY

JAVIER VERCHER-MOLL¹

Regulation (EU) no. 1094/2010, which established a European Insurance and Occupational Pensions Authority, may involve a major change to the management and supervision of private insurance in Spain and in the European Union. Thus, this Article analyzes the evolution from the original Insurance Committee, which boasted only advisory functions, to this new Authority, which has been given decision-making functions in addition to its advisory ones. The Article concludes by suggesting that in the future, this new Authority will be the sole supervisory body operating in all Member States, demonstrating a progression towards a new conception of supervision and regulation of insurance or perhaps another step towards Community-wide integration.

Key Words: European Insurance and Occupational Pensions Authority.

I. INTRODUCTION

The ideals which inspired the realisation of a common market and the creation, thereby, of the European Economic Community, have meant that the principle of harmonization has been a constant in the drawing up of both national and Community regulatory frameworks in many sectors. The relationship between Community law and the internal laws of each Member State has made it possible to distinguish four functional principles, which constitute the common central feature of the various different legislative reforms carried out within the European Union. The relationships of substitution, harmonization, coordination and coexistence between internal national law and Community law have determined the shape and reach of a European standard, as translated into Treaties, Regulations, and Directives.²

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² See FERNANDO DIEZ MORENO, MANUAL DE DERECHO DE LA UNIÓN EUROPEA 299-321 (5th ed, 2009); NIAL FENNELLY, THE PAST AND FUTURE OF EU LAW 37-

Within the broad spectrum of sectors of economic activity, we can find in the insurance sector a well-ensconced and clear distinction in terms of private and public law. On the one hand, the private relationships that arise between insurers and policyholders, insured parties, consumers, or users in general, are based on private law. This, in turn, is subject to the corresponding legal restrictions governing contracts, which may be established for the benefit of the latter parties. On the other hand, there is regulation of the insurers themselves; standard principles of public law that regulate and supervise insurance activity, and finally, norms governing the mediation or distribution of insurance risk.

The harmonization of the norms relating to financial services that has been carried out to date (which include those governing insurance) has had as its single objective the achievement of a Single Market in Financial Services³ as an essential part of the common market. This harmonization has only affected the standards concerned with supervision and regulation, not only by the creation of positive legislation, but also through the creation of Community institutions. However, this should not lead us to think that such a combination of standards is ideal, since the set of standards relating to supervision still retains features that are specific to each Member State's own system.⁴

With the aim of overcoming this imperfect coordination between national standards,⁵ major efforts have been made in the direction of bringing together and unifying the codes. Out of one of these has emerged Regulation (EU) no. 1094/2010 of the European Parliament and of the European Council of 24 November 2010, which establishes a European Supervisory Authority (European Insurance and Occupational Pensions Authority) as the highest authority overseeing the regulation and supervision of private insurance at Community level.

85 (Miguel P. Maduro et al. eds., 2010); ANTONIO CALVO HORNERO, ORGANIZACIÓN DE LA UNIÓN EUROPEA 174-84 (3rd ed. 2008).

³ See RYM AYADI & CHRISTOPHER O'BRIEN, THE FUTURE OF INSURANCE REGULATION AND SUPERVISION IN THE EU: NEW DEVELOPMENTS, NEW CHALLENGES 53-60 (2006).

⁴ See LUIS FERNANDEZ DE LA GANDARA & ALFONSO-LUIS CALVO CARAVACA, DERECHO MERCANTIL INTERNACIONAL: ESTUDIOS SOBRE DERECHO COMUNITARIO Y DEL COMERCIO INTERNACIONAL 217-24 (2d ed. 1995).

⁵ See Juan Bataller Grau, *Un Mercado Europeo del Seguro: Claves para una Re-visión*, in DERECHO PRIVADO EUROPEO 747-49 (Sergio Cámara Lapuente ed., 2003).

We should emphasize that the European Commission has played a major role in the achievement of this shared standard. The mechanism employed has been the creation of Committees as consultative bodies in respect of insurance and occupational pension issues, and supervision. This has led to the creation of a very useful body of material for overseeing the Community's insurance market. Together with this, we should also not overlook the Lamfalussy process,⁶ which was initiated in 2001 and aimed to facilitate the coordination of individual national legislations in terms of supervision.

Our objective in this study is to set out the juridical significance of the creation of this Authority and to determine, or at least clarify, the resulting situation with respect to national legislations on insurance supervision. The Article starts out by providing a chronological account of the sequence of distinct stages of regulation in the Community that have led to the Regulation, which is the object of the present study. This is why we dwell on an analysis of the most important community standards, as well as on reports, briefings on political contexts, and situations in which there has been an oversight of insurance in the European Union, leading up to the establishment of the new regulatory regime.

II. ANTECEDENTS

The European Council,⁷ in the knowledge that the directives relating to the insurance market had to be implemented, decided that it was necessary to create an institution to support the European Commission.⁸ In this respect, the Council Directive of 19 December 1991⁹ established that “*Whereas implementing measures are necessary for the application of Council directives on non-life insurance and life assurance; whereas, in particular, technical adaptations may from time to time be necessary to take account of developments in the insurance sector.*” This led to the creation of the first institution whose task was to advise the Commission on

⁶ For discussion of the Lamfalussy process, see *infra* Section VI.

⁷ See JUAN MANUEL URUBURU COLSA, *HISTORIA DEL CONSEJO EUROPEO*, 163–224 (2009); GUY ISAAC, *MANUAL DE DERECHO COMUNITARIO GENERAL* 63–70 (4th ed. 1997).

⁸ See Council Decision 87/373, art. 2, 1987 O.J. (L 197) 33, 35 (EC) (presenting procedures for implementing powers conferred on the Commission).

⁹ Council Directive 91/675, 1991 O.J. (L 374) 32, 33 (EC).

developing legislation in the insurance sphere: appositely named, ‘the Insurance Committee.’¹⁰

The Insurance Committee was composed of representatives of the Member States and chaired by the representative of the Commission.¹¹ Its main function, beyond establishing its internal regulation, was to issue an opinion on the draft legislation that the Commission’s representative would submit to it. In brief, the procedure was as follows: where the European Council, in the acts which it adopts in the field of direct non-life insurance and direct life assurance, confers on the Commission powers for the implementation of the rules which it lays down,¹² the Commission presents a draft of the measures, for which the Committee must deliver its opinion within a time limit, which the chairman of the Committee may lay down.¹³

Furthermore, the Committee held powers, beyond those we have already seen, to examine any question relating to the application of Community regulations relating to the insurance sector and, in particular, directives concerning direct insurance.¹⁴ It could issue opinions on matters on which it was consulted by the Commission on the basis of the new proposals that it intended to present to the Council in relation to coordination in the sectors of direct life assurance and direct non-life insurance. It had no powers, at any time or in any circumstances, to consider particular problems in connection with individual insurance companies, with the result that the Committee’s direct intervention in the insurance market, through reports or recommendations, was precluded.¹⁵

The Commission Communication of 11 May 1999,¹⁶ entitled “Action Plan for a Single Financial Market,” established a series of objectives and specific measures for improving the single market in

¹⁰ See JAVIER CAMACHO DE LOS RIOS, *ARMONIZACIÓN DEL DERECHO DE SEGURO DE DAÑOS EN LA UNIÓN EUROPEA* 38-39 (1996).

¹¹ Council Directive 91/675, art. 1, 1991 O.J. (L 374) 32, 33 (EC).

¹² *Id.* at art. 2.1.

¹³ *Id.* at art. 2.2.

¹⁴ The expression “direct insurance” is usually used to refer to the premiums obtained through direct contracting with the insured. It must be distinguished of reinsurance contract, because the reinsurance is based in giving protection between insurers. In the reinsurance, an insurer gives protection to another insurer if it cannot cover the risk assumed in the insurance contract with the insured.

¹⁵ Council Directive 91/675, art. 3, 1991 O.J. (L 374) 32, 33 (EC).

¹⁶ *Financial Services Commission Proposed Action Plan for Single Financial Market*, COM (1999) 327 final (May 11, 1999).

financial services.¹⁷ Strategic measures aimed to create a single market in wholesale financial services, the development of open, secure, retail financial service markets, to guarantee the stability of EU financial markets by using best practices in the matter of preventative and supervisory regulation, and finally, to eliminate the fiscal obstacles to financial market integration. One of the Commission's main objectives was to achieve conformity with the Framework for Action¹⁸ that the Commission itself had presented in October 1998, given that the introduction of the Euro was one of the main foundations on which the single market would be built. However, in addition, there was also the key matter of restructuring the financial services sector, since the conflicting national legislations did not provide a stable legal framework.¹⁹

Leading on from this, one of the immediate consequences of these was the harmonization of the different national legislations in those areas that, although not specifically concerned with financial services, were intrinsically related, since they affected the clients of these services. In effect, adaptation, specialisation, and technical and legal improvements have consistently characterized developments in consumer and user protection legislation right up to the present day.

III. THE CREATION OF NEW COMMITTEES

Continuing the historical progress, on 17 July 2000, the European Council set up the so-called Committee of Wise Men on the Regulation of European Securities Markets. In its final report, the Committee of Wise Men called for the establishment of a four-level regulatory framework in order to make the regulatory process for Community securities legislation more flexible, effective, and transparent.²⁰ In its Resolution, the Stockholm European Council of 23 and 24 March 2001 welcomed the report of the Committee of Wise Men and called for a four-level approach to be

¹⁷ *Id.* at 1 (quoting Mario Monti, the Financial Services Commissioner: it is “crucial that the Single Market for financial services delivers its full potential for consumers, in terms of a broad range of safe, competitive products, and for industry, in terms inter alia of easier access to a single deep and liquid market for investment capital, as well as for financial service operators themselves”).

¹⁸ *Financial Services Commission Proposed Framework for Action*, COM (1999) 941 final (Oct. 28, 1998).

¹⁹ See PAUL P. CRAIG & GRAINNE DE BURCA, *E.U. LAW. TEXT, CASES AND MATERIALS* 604–35 (4th ed. 2008).

²⁰ For discussion of the Lamfalussy process, see *infra* Section VI.

implemented.²¹ The object of postulating these four levels was none other than to establish an integrated securities market which required action on legislation, on implementation measures, implantation in national law, and measures to ensure compliance with the laws issued by the competent Community authorities.

The organizations created by the European Commission were set up to establish appropriate teams of staff with the technical resources to carry out the task of producing recommendations and advice as to how the convergence of the national laws should be achieved. The gradual construction of this network of supranational institutions continued, and it was in June 2001 that the Commission adopted new Decisions,²² which established the Committee of European Securities Regulators and the European Securities Committee, respectively. Both Committees were designed to function as independent entities to reflect upon, debate, and provide advice about issues relating to securities for the Commission. They were also to contribute to the coherent, exact, and timely application of Community legislation in the Member States, ensuring more effective cooperation between national supervisory authorities, and carrying out evaluations with respect to consistency and good practice. They were to organize their own operating systems, and maintain close operating links with the Commission and the European Securities Committee. Finally, they were to set up their own internal regulations and fully respect both the institutional prerogatives and the institutional balance established by the Treaty.²³ Furthermore, in particular, the Committee of European Securities Regulators was charged with consulting widely and at an early date, with parties active in the market, the consumers and ultimate users, in an open and transparent manner.²⁴ As to their composition, with the aim of

²¹ For a more thorough discussion of the legal reasons in favor of establishing a new organizational structure for financial services committees, see Council Directive 2005/1, ¶ 1–4, 2005 O.J. (L 79) 9 (EU).

²² Commission Decision 2001/527, 2001 O.J. (L 191) 43, 44 (EC); Commission Decision 2001/528, 2001 O.J. (L 191) 45, 46 (EC).

²³ Compare Treaty on European Union, Feb. 7, 1992, 2010 O.J. (C 83) 1 with, Treaty of Nice, Feb. 25, 2001, 2001 O.J. (C 80) 1.

²⁴ Commission Decision 2001/527, (8)–(12), 2001 O.J. (L 191) 43 (EC) (“(8) The Committee of European Securities Regulators should serve as an independent body for reflection, debate and advice for the Commission in the securities field. (9) The Committee of European Securities Regulators should also contribute to the consistent and timely implementation of Community legislation in the Member States by securing more effective cooperation between national supervisory

facilitating regulatory convergence, the Commission indicated in both Decisions that membership of these organizations should consist of high-level representatives from the national public authorities competent in the field of securities.

As we can see, both the European Council and the Commission were of the view that the establishment of Committees made up of qualified national representatives represented a significant element in promoting the regulatory convergence of the different national bodies of legislation. The objective was clear: to smooth away difficulties with the aim of creating regulatory uniformity, and of drawing up a single text applicable in all Member States.

IV. THE GRADUAL CONSTRUCTION OF A SINGLE MARKET

The European Parliament has also pointed out, on numerous occasions, that the creation of a single market in financial services, consistent with an open market and free competition, is crucial for increasing economic growth and for the creation of employment in the Community. In 2002, it approved Resolutions for each,²⁵ which defined the regulatory framework for the four level approach concerning the regulation of European securities markets, and sought to broaden certain aspects of this approach to apply to the banking and insurance sectors, following the clear commitment on the part of the European Council to guarantee an appropriate institutional balance.

authorities, carrying out peer reviews and promoting best practice. (10) The Committee of European Securities Regulators should organise its own operational arrangements and maintain close operational links with the Commission and the European Securities Committee. It should elect its chairperson from among its members. (11) The Committee of European Securities Regulators should consult extensively and at an early stage with market participants, consumers and end-users in an open and transparent manner. (12) The Committee of European Securities Regulators should draw up its own rules of procedure and fully respect the prerogatives of the institutions and the institutional balance established by the Treaty.”). Commission Decision 2001/528, (9)–(10), 2001 O.J. (L191) 45 (EC) (“(9) The European Securities Committee should serve as a body for reflection, debate and advice for the Commission in the field of securities. (10) The European Securities Committee should adopt its own rules of procedure.”).

²⁵ See generally Resolution on Prudential Supervision in the European Union, EUR. PARL. DOC. (2001/2247 (INI)); EUR. PARL. DOC. (2002/2061(INI)).

The Resolution dated 5 February 2002, was extremely important in terms of legislative procedure, of transparency for the different parties operating in the financial services market,²⁶ and in the right of supervision. The Parliament itself urged, with a view to speed up the establishment of an integrated securities market, that the deadlines for the transposition of Community acts into national law should be reduced. Furthermore, in relation to transparency²⁷ it considered it essential that the general public should be able to access, particularly via the Internet, as much information as possible about all the legislative initiatives and activities of the committees, in particular those of the market regulators committee.

Regarding the second European Parliament Resolution, of 21 November 2002, this put forward the view that the series of financial scandals in the United States evidenced the failure of the United States' regulatory network to eliminate the risk of sudden and unexpected financial crises. Consequently, they concluded that there was absolutely nothing to suggest that Europe was immune to these dramatic crises, especially considering that Europe was in a transitional stage while in the process of moving from a fragmented system of individual national markets to a single unified financial market; a transition that today, with the first decade of the twenty-first century already in the past, is still not complete.

The Parliament understood that the supervision of insurance companies and pension funds should be brought together, without prejudicing the distinct characteristics of each, while respecting the national structures that were already optimal, since the ability of national banking and insurance systems to survive – or not – in the enormously volatile climate of those years would provide a useful indication of the relative efficiency of the national supervisory systems. Furthermore, with regard to the subject of the present study, the Parliament required that national supervisory agencies should focus on “real time supervision” of financial organizations but without succumbing to the temptation to constantly interfere with the business actually at hand, since this would both create obstacles to innovation and would place risks of an ethical nature before the senior executives of the institutions under supervision.

²⁶ See generally José Miguel Rodríguez Fernández, *Los Conglomerados Financieros y su Supervisión: Una Perspectiva en el Contexto de la Unión Europea*, 31 REVISTA DE ESTUDIOS EUROPEOS 71, 75–96 (2002), available at <http://uvadoc.uva.es/handle/10324/232>.

²⁷ See Commission Regulation 1049/2001, 2001 O.J. (L 145) 43 (EC).

Finally, on December 3, 2002, the European Council invited the Commission to apply these agreements in the areas of banking, insurance and occupational pensions, and to create new committees with a consultative remit in relation to these areas of activity as soon as possible. Subsequently, on 5 November 2003, the Commission adopted Decision 2004/9/EC,²⁸ which established the European Insurance and Occupational Pensions Committee. However, its implementation was also dependent on a Directive deleting the purely consultative functions of the Insurance Committee.²⁹

In conclusion, coupled with the creation of the Committees, it was imperative to acquire a firm commitment on the part of the Member States. In effect, overcoming the fragmentation of the market and promoting convergence by respecting transition deadlines, for example, were unconditional obligations. As we can see, the first years of the twenty-first century represent an important milestone on the way to the achievement of the single market, but also show insufficient progress to date in the field of financial services.

²⁸ Commission Decision 2004/9, 2004 O.J. (L 3) 34 (EC). The reader has to distinguish the Decision 2004/9/EC and the Decision 2004/6/EC. The first one refers to the “European Insurance and Occupational Pensions Committee,” and the second one refers to the “Committee of European Insurance and Occupational Pensions Supervisors.”

²⁹ *Id.* at (5) (“The Commission has proposed a Directive modifying, *inter alia*, Directive 91/675/EEC, First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (4) as amended, Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (5), and 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 and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and the Council (6), to delete the advisory functions of the Insurance Committee.”).

V. THE EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS COMMITTEE PURSUANT TO COMMISSION DECISION 2004/9/EC OF 5 NOVEMBER 2003

Moreover, we should remember that the European Insurance and Occupational Pensions Committee did not begin to function³⁰ until a Directive repealing the purely consultative functions of the Insurance Committee came into force. With respect to this, Directive 2005/1/EC³¹ of the European Parliament and of the Council of 9 March 2005 fulfils that mandate.

Article 5 of this latter Directive amended Directive 91/675/EEC, with regard to the powers assumed by the Insurance Committee, and renamed it the European Insurance and Occupational Pensions Committee. This more elaborate denomination for the new incarnation of the Insurance Committee had the purpose of clarifying its sphere of activity in relation to the old Insurance Committee.

A. LEGAL AUTHORITY

Reading the text of the articles of Decision 2004/9/EC, I deduce that the European Insurance and Occupational Pensions Committee has two types of legal authority. The first covered its own organization and dealt with its internal structure and procedural regime while the second dealt with its actual substantive functions, which were meant to establish, in addition to the actual attributed powers themselves, the objectives that it should pursue.

In relation to the first type of legal authority, in its Decision the Commission lays down that the Committee shall be composed of high-level representatives of Member States, and chaired by a representative of the Commission. But the Decision does not specify who these high level representatives shall be, or the method of their appointment, leaving this at the discretion of the Committee itself. On the other hand, the Decision did

³⁰ See *id.* at art. 5.

³¹ See Commission Decision 2009/79, (2), 2009 O.J. (L 25) 28 (EC) (referring to “Directive 2005/1/EC of the European Parliament and of the Council, of 9 March 2005, amending Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC of the Council and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC, in order to establish a new organisational structure for financial services committees”).

take away from the Committee the power to appoint its own secretariat, since this was incumbent on the Commission itself. As per its rules of procedure, the Decision empowered the Committee to draw up its own internal rules of procedure, but it also imposed an obligation to meet both at regular intervals and impulsively whenever the situation demanded. Furthermore, the Commission had the power to convene an emergency meeting if it considered that the situation so required.³²

With regards to its substantive functions, the Committee was authorized to advise the Commission, at the latter's request, "on policy issues relating to insurance, reinsurance and occupational pensions as well as Commission proposals in these fields," and to examine "any question relating to the application of Community provisions concerning the sectors of insurance, reinsurance and occupational pensions, and in particular Directives on insurance, reinsurance and occupational pensions." The Decision denied the Committee decision-making powers relating to specific matters concerned with, or affecting, the Community's business organizations and citizens. In effect, the Committee could not consider specific problems relating to individual insurance or reinsurance undertakings, nor to occupational pensions institutions, nor could it address labour and social law aspects such as the organization of occupational regimes, in particular compulsory membership and the results of collective bargaining agreements.³³

B. RELATED CONCEPTS

It is important to avoid confusing the different Committees operating at that time within the European Commission. In effect, and quite distinct from the European Insurance and Occupational Pensions Committee, which is the subject of this Article, at that time was the Committee of European Insurance and Occupational Pensions Supervisors, which was instituted on 5 November 2003. The confusion of the two even affected the wording of Decision 2004/9/EC itself, as evidenced by the reference to the Committee of Supervisors, when Article 3.2 mentions the European Insurance and Occupational Pensions Committee.

According to Article 2 of Decision 2004/6/EC, the functions of the Committee of European Insurance and Occupational Pensions Supervisors

³² See Commission Decision 2004/9, art. 3, 4, 2004 O.J. (L 25) 28, 30–31 (EU).

³³ See *id.* at art. 2.

are first to advise the Commission, either at the Commission's request, within a time limit which the Commission may lay down according to the urgency of the matter, or on the Committee's own initiative, in particular regarding the preparation of draft implementing measures in the fields of insurance, reinsurance, and occupational pensions. Secondly, it shall contribute to the consistent implementation of Community Directives, and to the convergence of Member States' supervisory practices throughout the Community. Finally, it shall constitute a forum for supervisory cooperation, including the exchange of information on supervised institutions.

Besides, the Article 4 of Decision 2004/6/EC established that "the Committee of European Insurance and Occupational Pensions Supervisors shall maintain close operational links with the Commission and with the Committee established by Decision 2004/9/EC"; which is to say, with the European Insurance and Occupational Pensions Committee. This meant that there were two institutions with similar titles, practically identical functions, and the power to report on the same matters.³⁴ This state of affairs was later changed with the publication of Commission Decision 2009/79/EC, broadening the powers of the Committee of Supervisors.

From a reading of the articles contained in both Decisions, we can draw the conclusion that there are no major differences in terms of their functions. It is certainly the case that Decision number 9 creates a Committee whose purpose is to advise on insurance policy and to scrutinize Community standards in this area. By contrast, Decision number 6 also addresses insurance, but from a supervisory perspective. In our view, there is no substantial difference between the two bodies because there is no demarcation of any clear division of powers between them. It was unnecessary to establish two Committees, since their functions could have been brought together in one, thereby avoiding the misunderstandings that might arise in the dealings between the two organizations.

On the other hand, it could be argued that there is a point to creating two separate Committees, if we consider that the European Committee of Supervisors establishes the basis of what would later constitute the supervisory institutions that are the subject of the present study. In effect, Decision 2004/6/EC was repealed by Commission Decision 2009/79/EC, and the latter, in turn, by the Regulation whereby a European Insurance and Occupational Pensions Authority was created. What is certain is that, if we analyze the three regulations mentioned, we

³⁴ *Id.* at art. 3.2.

see that each organization takes on the responsibilities of its predecessor, and increases its powers. This is demonstrated by the fact that the new European Authority has the previous Committees' consultative functions and, as we shall see, in a new development it is given certain powers of decision, which enable us to glimpse the likely shape of a future Financial Services Supervisory Authority.

VI. THE LAMFALUSSY PROCESS³⁵

The Lamfalussy process³⁶ began in 2001, with the intention of establishing an effective mechanism to enable European supervisory practices to begin to converge, and to ensure that Community financial services legislation would be able to adapt, rapidly and flexibly, to the evolution of the internal market. A consequence of this was the issuing of Commission Decision 2004/6/EC which, as we have already seen, established a Committee of European Insurance and Occupational Pensions Supervisors, in the guise of an “independent body for reflection, debate and advice for the Commission in the insurance, reinsurance and occupational pensions' fields.”³⁷

Within this process, in 2004 when the legislative phase of the Financial Services Action Plan (“FSAP”) was almost complete, the Commission decided to carry out an evaluation of the integration of European financial markets and to instigate a general consultation, based on the reports of four high level groups of experts. The Green Paper on Financial Services Policy, with which a public consultation was launched on May 3, 2005, was fundamentally centered on the application of existing measures and in cooperation, rather than in putting forward proposals for new laws. The Green Paper on Financial Services Policy (2005-2010)³⁸ set forth the general policy objectives³⁹ for financial services for the period 2005 to 2010. The purpose of this Paper was none other than to

³⁵ See generally Duncan Alford, *The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan-European Regulation?*, 25 ANN. REV. BANKING & FIN. L. 389, 389–416 (2006).

³⁶ It takes its name from the President of the advisory committee that set it up in March 2001, Alexandre Lamfalussy.

³⁷ See Commission Decision 2004/6, (4), 2004 O.J. (L 3) 31 (EU).

³⁸ *Commission Green Paper on Financial Services Policy 2005-2010*, COM (2005) 177 final (May 5, 2005).

³⁹ *Id.* at 3 (indicating that the Paper merely sets out “preliminary views of the Commission for its financial services policy priorities”).

consolidate the progress towards an integrated, open, competitive, economically efficient European financial market, and to remove any remaining economically significant barriers to it. It sought to stimulate the development of a market in which financial services and capital could circulate freely throughout the EU at the lowest possible cost (with adequate and effective levels of prudential control, financial stability, and strong consumer protection). Further, it would apply, enforce, and carry out continuous evaluation of the existing legislative framework, rigorously implement the optimal regulatory agenda for any future initiatives, further supervisory convergence, and consolidate Europe's influence in global financial markets.

The White Paper that emerged from it was designated for integrating the financial services market as its highest priority. In the White Paper on Financial Services 2005-2010⁴⁰ of December 1, the Commission established the key objectives of its policy for the following five years, namely, consolidating progress achieved to date, completing unfinished business, enhancing supervisory cooperation and convergence, and removing the remaining barriers to integration. But more than this, in the document the following priorities were laid down: to continue to improve the efficiency of pan-European markets for long-term savings products, to establish the retail internal market, and improve the efficacy of the risk capital market.

The dynamic consolidation of financial services was based on the principle of producing better legislation by mandatory open consultation, and of impact analyses for new legislative proposals as central procedural features, as well as the ex-post evaluation of all legislative measures. Furthermore, the EC regulatory and supervisory structures were subject to review with the aim of improving their effectiveness in achieving convergence. Finally, taking into account the international context in which today's regulation on accounting practice, audit, and capital and reserves is set, the EU was of the view that it was essential for it to undertake a major role in the worldwide process of standardization and, specifically, in favor of opening up world markets for financial services. The Commission at this time proposed a dialogue between the EU and US financial markets, and to broaden the cooperation to include other countries, such as Japan, China, Russia, and India. The EU was desired to be very visibly represented in international organizations, and was to speak

⁴⁰ *Commission White Paper on Financial Services Policy 2005-2010*, COM (2005) 629 final (Dec. 1, 2005).

with a single voice on complex matters such as money laundering, the financing of terrorism, and tax fraud.

In accordance with this new approach, financial regulation was initially passed in two levels. But subsequent to the major reform introduced by Directive 2005/1/EC, the Lamfalussy process envisioned EU financial regulation as unfolding in four distinct levels or phases.

At Level 1, framework legislation setting out the core principles and defining implementing powers would be adopted by co-decision by European Parliament and the European Council,⁴¹ after a full and inclusive consultation process in line with the best regulatory practices.

At Level 2, the technical details of the legislation would be adopted after a vote of the competent regulatory Committee (the European Securities Committee, the European Banking Committee, and the European Insurance and Occupational Pensions Committee).⁴²

At Level 3, these three Committees would have an important role to contribute to consistent and convergent implementation of EU directives by securing more effective cooperation between national supervisors and the convergence of supervisory practices.

Finally, in Level 4, the Commission would enforce the timely and correct transposition of EU legislation into national law level.⁴³

VII. REVIEW OF THE LAMFALUSSY PROCESS

In line with the aforementioned Directive 2005/1/EC of the European Parliament and of the Council of 9 March 2005 amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC, and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organizational structure for financial services committees, the Commission carried out a review of the Lamfalussy process in 2007 and presented its assessment in a

⁴¹ Nowadays, that process is known as “Ordinary Legislative Procedure.”

⁴² See Commission Decision 2001/527, 2001 O.J. (L 191) 43 (EC) *amended by* Commission Decision 2004/6, 2004 O.J. (L 3) 32 (EU); Commission Decision 2004/5, 2004 O.J. (L3) 28 (EU); Commission Decision 2004/6, 2004 O.J. (L3) 30 (EU).

⁴³ See *Communication from the Commission to the Council and European Parliament*, at 1–2, COM (2007) 722 final (Nov. 20, 2007) (indicating where the Lamfalussy process is reviewed through the mandate established in Directive 2005/1/EC).

Communication of 20 November 2007, entitled “Review of the Lamfalussy process — Strengthening supervisory convergence.”

The Communication of 20 November 2007 detailed the current situation in terms of the four levels, and determined individual measures to mitigate the defects affecting each of the levels in Annex III. The measures were calculated to improve both the legislative process itself and the application of the legislation. This is why it was stated that Member States must refrain from adopting any additional national measures in those areas which, because of the legislative level of the Community regulation in question, transposition was required on the part of the Member States. The fundamental objective was to increase transparency insofar as transposition was concerned. This was based on levels 1 and 2 that we have already detailed.

The measures contained in Annex III of the Communication were also designed to improve supervisory cooperation and convergence. What was essential was the strengthening of the level 3 Committees – the European Securities Committee, the European Banking Committee, and the European Insurance and Occupational Pensions Committee. From a political perspective, the Committees were expected to deliver more results, and the national supervisors were expected to expand their missions to include a cooperation and convergence requirement at European level. The hope was that reducing the practical obstacles at European and national levels would strengthen mutual trust and the implementation of the measures. Decision-making, especially of the Committees of Regulators, would also be facilitated and carry more authority (even if non-binding) in relation to the national regulators and supervisors.⁴⁴

While reviewing the functionality of the Lamfalussy process, the European Council⁴⁵ invited the Commission to clarify the role of the Committees of Supervisors and consider all different options to strengthen the working of those Committees, without upsetting the current institutional structure or reducing the accountability of supervisors.

During its meeting of March 13 and 14, 2008, the European Council called for swift improvements to the functioning of the Committees of Supervisors.

⁴⁴ *See id.* at 6.

⁴⁵ *See, e.g.*, Press Release 15698/07, Council of European Union, Emp’t, Soc. Policy, Health and Consumer Affairs (Dec. 4, 2007), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/97420.pdf.

On May 14, 2008, the European Council invited the Commission to revise the Commission Decisions establishing the Committees of Supervisors to ensure coherence and consistency in their mandates and tasks as well as strengthen their contributions to supervisory cooperation and convergence. The Council noted that specific tasks could be explicitly given to the Committees to foster supervisory cooperation and convergence, and their role in assessing risks to financial stability.⁴⁶

To summarize, the idea of broadening the Committees' powers was clear. The Commission itself called for the political will that was inherent in the Committees' development, and this already showed signs of the changes in responsibility and function that these institutions would undergo.

VIII. THE COMMITTEE OF EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS SUPERVISORS PURSUANT TO COMMISSION DECISION 2009/79/EC OF 23 JANUARY 2009

Article 16 of Decision 2009/79/EC repealed Decision 2004/6/EC and defined a new configuration for the Committee of Insurance and Occupational Pensions Supervisors by broadening its powers and responsibilities, starting from the premise that it was not a decision-making body, since it had no regulatory powers at Community level. All in all, its function was to carry out peer reviews, to promote best practices, and to issue non-binding guidelines, recommendations and standards in order to increase convergence across the Community, contributing to the common and uniform day-to-day implementation of Community legislation and its consistent application by the supervisory authorities.

The Committee of Insurance and Occupational Pensions Supervisors was constituted as an independent advisory group of the Commission in the insurance, reinsurance, and occupational pensions fields – although, in this latter case, the Decision made it clear that it should not address labour and social law aspects, such as the organization of occupational regimes, and in particular, issues relating to compulsory membership (affiliation) or collective agreements.

⁴⁶ See Commission Decision 2009/79, (4)–(6), 2009 O.J. (L 25) 28 (EU).

On the other hand, the Committee's mandate should cover the supervision of financial conglomerates.⁴⁷ To avoid duplication of work, to prevent any inconsistencies, to keep the Committee abreast of progress, and to give it the opportunity to exchange information, the Committee was instructed to work with the Committee of European Banking Supervisors in the supervision of financial conglomerates, to be exercised through the Joint Committee on Financial Conglomerates.⁴⁸

Financial systems in the Community are closely linked and events in one Member State can have a significant impact on financial institutions and markets in other Member States. The continuing emergence of financial conglomerates and the blurring of distinctions between the activities of firms in the banking, securities, and insurance sectors give rise to additional supervisory challenges at the national and Community level. In order to safeguard financial stability, a system is needed at the level of the Committee of Insurance and Occupational Pensions Supervisors, the Committee of European Banking Supervisors, and the Committee of European Securities Regulators in order to identify potential risks, across borders and across sectors, at an early stage and where necessary, to inform the Commission and the other Committees. Furthermore, it is essential that the Committee keep finance ministries and national central banks of the Member States informed. The Committee has its role to play in this respect by identifying risks in the insurance, reinsurance, and occupational pension sectors and regularly reporting on the outcome to the Commission. The Council should also be informed of these assessments.

A. FUNCTIONS OF THE COMMITTEE OF EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS SUPERVISORS

From reading the articles in the Decision, we can identify three main functions of the Committee of European Insurance and Occupational Pensions Supervisors. First, the Decision established a list of the Committee's functions in relation to multilateral cooperation between national supervisory authorities, which it developed in great detail. Second, the Committee is invested with powers of technical advice. The

⁴⁷ Council Directive 2002/87, 2003 O.J. (L 35) 1 (EU) (defining financial conglomerates as "financial groups which provide services and products in different sectors of the financial markets").

⁴⁸ See Commission Decision 2009/79, (7)-(10) 2009 O.J. (L 25), 25-26 (EU).

final function concerns the nature of the relationship between the Committee and the other supervisory Committees.

Outside of these three functions, in accordance with Article 13, the Committee was to establish an annual work program and transmit it to the European Council, the European Parliament and the Commission by the end of October each year. The Committee was to periodically and at least annually inform the Council, the European Parliament, and the Commission on the achievement of the activities set out in the work program.

1. Cooperation Between Supervisory Authorities

With respect to the first function, the review of the Lamfalussy process established that the Member States also have a key role to play in guaranteeing the full implementation of the standards and guidelines in relation to proposals designed to strengthen cooperation between home and host regulators. The action of the Commission is intended to raise awareness, and evaluate and adopt measures (delegation of functions, protocol for multilateral agreements, functioning of the principal supervisory authority, etc.).

On this basis, Article 4 of the Decision charged the Committee with one of its most important functions, which is to enhance cooperation between national supervisory authorities in the insurance, reinsurance, and occupational pensions fields and foster the convergence of Member States' supervisory practices and approaches throughout the Community. To this effect, it shall carry out the following tasks:

a) mediate or facilitate mediation between supervisory authorities in cases specified in the relevant legislation or at the request of a supervisory authority;

b) provide opinions to supervisory authorities in cases specified in the relevant legislation or at their request;

c) promote the effective bilateral and multilateral exchange of information between supervisory authorities, subject to applicable confidentiality provisions;

d) facilitate the delegation of tasks between supervisory authorities, in particular by identifying tasks can be delegated and by promoting best practices;

e) contribute to ensuring the efficient and consistent functioning of colleges of supervisors, in particular through setting guidelines for the operational functioning of colleges, monitoring the coherence of the practices of the different colleges and sharing good practices; and

f) contribute to developing high quality and common supervisory reporting standards;

g) review the practical application of the non-binding guidelines, recommendations and standards issued by the Committee.

Additionally, within this same principle of convergence, the Committee was charged with reviewing the Member States' supervisory practices and assess their convergence on an ongoing basis. The Committee was to report annually on progress achieved and identify the remaining obstacles.

The Committee was also charged with developing new practical convergence tools to promote the common supervisory approaches. This is an extremely important role, calculated to compensate for any deficiencies in Directives, since these cannot prevent the existence, on occasion, of differences between the final legislations in the different Member States.

Finally, it should be mentioned that the Decision emphasizes that the exchange of information between the supervisory authorities is fundamental to their functions. This exchange is central to the efficient supervision of insurance groups and for financial stability. While insurance legislation imposes clear legal obligations on supervisory authorities to cooperate and exchange information, the Committee was to facilitate practical day-to-day exchange of information between them, subject to relevant confidentiality provisions set out in applicable legislation.⁴⁹

2. The Committee's Typical Function: Advising

With respect to the second function, in Article 4, the Decision charges the Committee with a broad range of responsibilities for technical advice, in particular, with respect to the preparation of draft implementing measures in the fields of insurance, reinsurance, occupational pensions and financial conglomerates. In this case, the Commission has the power to lay down the time limit within which the Committee shall provide such advice.

Moreover, according to Articles 3 and 5, under the principle of convergence, the Committee shall contribute to the common and uniform implementation and consistent application of Community legislation by issuing guidelines, recommendations and standards. In pursuit of this, it is given a power of active oversight, monitoring, and assessing developments in the insurance, reinsurance, and occupational pensions sector. It is also to

⁴⁹ See Commission Decision 2009/79, (15), (18), (19), 2009 O.J. (L 25) 29 (EU).

ensure that the finance ministries and national central banks of the Member States are informed about potential or imminent problems.

The Committee shall, at least twice a year, provide to the Commission assessments of micro-prudential trends, potential risks, and vulnerabilities in the insurance, reinsurance, and occupational pensions sector.

3. Relationship Between Related Supervisors

With respect to the third function, the Decision charged the Committee, not only with coordinating with the national supervisory authorities, but also with cooperating with the various institutions that carry out a similar task to that of the Committee in matters related to the financial framework. In effect, Articles 5, 6, and 9 of the Decision state that the Committee shall cooperate closely with the Committee of European Securities Regulators, the Committee of European Banking Supervisors, and the Banking Supervision Committee of the European System of Central Banks, and contribute to the development of common supervisory practices in the field of insurance, reinsurance, and occupational pensions as well as on a cross-sectoral basis.

To this effect, it was in particular to establish sectoral and cross-sectoral training programmes to facilitate personnel exchanges and to encourage competent authorities to intensify the use of secondment schemes, joint inspection teams, and supervisory visits and other tools.

B. COMPOSITION

The Decision, in Article 7, states that the Committee shall be composed of high-level representatives from the national public authorities competent in the field of supervision of insurance, reinsurance, and occupational pensions. Each Member State shall designate a high level representative from its competent authorities to participate in the meetings of the Committee. The Decision does not define what is meant by a high level representative, which could lead to differences in interpretation on the part of the different Member States, and the consequent attendance of representatives with different levels of technical expertise, despite their all being “high level.” The Chair shall be elected from among the Committee members.

The members are enjoined not to disclose information covered by the obligation of professional secrecy. All participants in the discussions shall be obliged to comply with the applicable rules of professional

secrecy. Whenever the discussion of an item on the agenda should entail the exchange of confidential information concerning a supervised institution, participation in that discussion may be restricted to members directly involved.

The Committee, according to Article 14, shall operate by consensus of its members. If no consensus can be reached, a qualified majority shall make decisions. The votes of the representatives of the Members of the Committee shall correspond to the votes of the Member States as laid down in Articles 205(2) and (4) of the Treaty.⁵⁰ Finally, the Committee shall adopt its own rules of procedure, and organize its own operational arrangements.

IX. REGULATION (EU) NO. 1094/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 24 NOVEMBER 2010, ESTABLISHING A EUROPEAN SUPERVISORY AUTHORITY (EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY), AMENDING DECISION NO. 716/2009/EC AND REPEALING COMMISSION DECISION 2009/79/EC⁵¹

The financial crisis that we are presently undergoing has exposed weaknesses in cooperation, coordination, and consistency in the application of Community law, and in the mutual confidence between national supervisors.

The Commission, the Parliament, and the Council have always been aware that the Committees that have been established up to the present day have been no more than consultative bodies, with undoubted importance in relation to the quality of their technical advice, but without the power to take decisions. However, the effort made in Decision 2009/79/EC to set up the Committee as a body with a major impact in the field of insurance and occupational pensions supervision is praiseworthy.

⁵⁰ Articles 205.2 and 205.4 should be read according to the amendments introduced by the Act of Accession of 2003, which introduces amendments to Primary Law, as a result of the Accession of the Republic of Bulgaria and of Romania to the European Union. Consolidated Version of the Treaty on the European Union, Dec. 29, 2006, 2006 O.J. (C 321) 327.

⁵¹ Commission Regulation 1092/2010, 2010 O.J. (L 331) 48–83.

On 25 February 2009, a group of experts, under the chairmanship of J. de Larosière, published a report⁵² at the behest of the Commission. The report concluded that the supervisory framework needed to be strengthened, and recommended the creation of a European System of Financial Supervisors, consisting of three European Supervisory Authorities: one in the insurance and occupational pensions sector, one in the banking sector, and the third in the securities sector, as well as a European Systemic Risk Board.

The European Council, in its conclusions dated 19 June 2009, recommended the creation of a European System of Financial Supervisors, consisting of three new European Supervisory Authorities. This system should focus on improving the quality and cohesiveness of national supervision, strengthening control over transnational business groups, and establishing a single EU rule book applicable to all financial institutions in the single market. The European Council emphasized that the European Supervisory Authorities should also have supervisory powers for credit ratings agencies. The Council invited the Commission to present concrete proposals as to the manner in which the European System of Financial Supervisors⁵³ would be able to take firm action in critical situations, making the point that the decisions adopted by the European Supervisory Authorities should not have any effect on the budgetary responsibilities of the individual Member States.

The European Supervisory Authorities are intended to replace the Committee of European Banking Supervisors established by Commission Decision 2009/78/EC, the Committee of European Insurance and Occupational Pensions Supervisors established by Commission Decision 2009/79/EC, and the Committee of European Securities Regulators established by Commission Decision 2009/77/EC, and assume all the tasks and powers of those Committees.⁵⁴

⁵² THE DE LAROSIÈRE GROUP, THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU (Feb. 25, 2009).

⁵³ See A.J. Tapia Hermida, *La Nueva Estructura Centralizada de Supervisión de los Mercados Financieros en la Unión Europea: Las Propuestas Regulatorias de la Comisión 23 de Septiembre de 2009 para la Creación del Consejo Europeo de Riesgo Sistémico y del Sistema Europeo de Supervisores Financieros*, 116 REVISTA DE DERECHO BANCARIO Y BURSÁTIL 209, 296–97 (2009).

⁵⁴ See Commission Regulation 1094/2010, 2010 O.J. (L 331) 58 (EU). (“The Authority (EIOPA) shall form part of a European System of Financial Supervision

A. UNDERLYING LEGAL AUTHORITY

At the outset, it is necessary to consider the legislative approval process under which this new EIOPA is established. Article 95 of the EC Treaty⁵⁵ was chosen as the underpinning of its creation. The purpose of this precept is to facilitate the actions of the Council, the Commission, and the Parliament, within their respective competences, with the objective of

(ESFS). The main objective of the ESFS shall be to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services. The ESFS shall comprise the following: the European Systemic Risk Board (ESRB) for the purposes of the tasks as specified in Commission Regulation (EU) 1092/2010 and this Regulation; the Commission Authority (EIOPA); the European Supervisory Authority (European Banking Authority) established by Commission Regulation (EU) 1093/2010 and the European Parliament and of the Council; the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) 1095/2010 of the European Parliament and of the Council; the Joint Committee of the European Supervisory Authorities (Joint Committee) for the purposes of carrying out the tasks as specified in Articles 54 to 57 of this Regulation, of Commission Regulation (EU) 1093/2010 and of Regulation (EU) No 1095/2010; the competent or supervisory authorities in the Member States as specified in the Union acts referred to in Article 1 of this Regulation, of Regulation (EU) No 1093/2010 and of Regulation (EU) No 1095/2010. The Authority shall cooperate regularly and closely with the ESRB as well as with the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Securities and Markets Authority) through the Joint Committee, ensuring cross-sectoral consistency of work and reaching joint positions in the area of supervision of financial conglomerates and on other cross-sectoral issues. In accordance with the principle of sincere cooperation under Article 4 of the Treaty on European Union, the parties to the ESFS shall cooperate with trust and full mutual respect, in particular in ensuring the flow of appropriate and reliable information between them. Those supervisory authorities that are party to the ESFS shall be obliged to supervise financial institutions operating in the Union in accordance with the acts referred to in Article 1”).

⁵⁵ Today it is known as Article 114 in the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, as well as their Protocols and Annexes, resulting from the amendments introduced by the Treaty of Lisbon, signed on 13 December 2007 in Lisbon, that took effect on 1 December 2009. Commission Regulation 1094/2010, 2010 O.J. (C 83) 94 (EU).

assimilating the different national systems of legislation.⁵⁶ The new Authority is established in accordance with the aforesaid, and by means of co-decision.

However, the most important question is if the European Commission, Council, and Parliament have enough powers to create the EIOPA. As an introduction, the Commission mentions in Legal Reason 16 of the Proposal for a Regulation that the Court of Justice of the European Communities, in its Judgment of 2 May 2006 in case C-217/04⁵⁷ (*United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*), acknowledges that Article 95 of the EC Treaty, relating to the adoption of measures for the assimilation of laws with a view to the establishment and functioning of the internal market, constitutes a sufficient legal basis for the creation of “a Community body responsible for contributing to the implementation of a process of harmonisation.” Therefore, the purpose and tasks of the Authority – assisting competent national supervisory authorities in the consistent interpretation and application of Community rules and contributing to financial stability necessary for financial integration – are closely linked to the objectives of the Community *acquis*⁵⁸ concerning the internal market for financial services. The European Parliament and the European Council adopted this legal proof in Legal Reason 16 of the Regulation.

⁵⁶ See T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN LAW COMMUNITY LAW* 114–18 (5th ed. 2003).

⁵⁷ Case C-217/04, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, 2006 O.J. (C 143) 8 (EU).

⁵⁸ The Community *acquis* is the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving and comprises: the content, principles and political objectives of the Treaties; the legislation adopted in application of the treaties and the case law of the Court of Justice; the declarations and resolutions adopted by the Union; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Unions’ activities. Applicant countries have to accept the Community *acquis* before they can join the Union. Derivations from the *acquis* are granted only in exceptional circumstances and are limited in scope. To integrate into the European Union, applicant countries will have to transpose the *acquis* into their national legislation and implement it from the moment of their accession.

The same precept introduces extremely comprehensive authorization for assimilating the legal, regulatory and administrative regulations of the Member States,⁵⁹ with the exception of certain matters such as tax regulations, those covering the free movement of people, and those affecting employees. This authorization has served, except where specific prohibitions or limitations are in force, as one of the most important mechanisms in the extension of Community law. In addition to this, the development has also been based on the jurisprudential doctrine of *direct effect*,⁶⁰ whereby, except when exercising competences conceded under the Treaty, the European Union is empowered to go beyond the explicit competences.

This mechanism, which is also known as the *principle of subsidiarity*, implies overriding and going beyond the rigid concept of competence by direct attribution, and achieving maximum applicability in all those areas that do not fall either within the domain of national sovereignty, or within the exclusive competence of the Community.⁶¹

Through in-depth analysis of that question, then we must ask ourselves if there is a sufficient basis of statutory approval to create the EIOPA according to the aforementioned Article 95. In effect, the Judgment of 2 May 2006, attempted to resolve the question of whether the creation of the European Network and Information Security Agency

⁵⁹ See E. LINDE PANIAGUA, *POLÍTICAS DE LA UNIÓN EUROPEA* 51, 52 (3rd ed., 2006).

⁶⁰ See Case 22/70, *Comm'n v. Council*, 1971 E.C.R. 263. The direct effect of European law has been enshrined by the Court of Justice in the judgment of *Van Gend en Loos* of 5 February 1963. See Case 26/62, *Van 198en den Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1. In this judgment, the Court states that European law not only engenders obligations for Member States, but also rights for individuals. Individuals may therefore take advantage of these rights and directly invoke European acts before national and European courts. However, it is not necessary for the Member State to adopt the European act concerned into its internal legal system. There are two aspects to direct effect: a vertical aspect and a horizontal aspect. Vertical direct effect is of consequence in relations between individuals and the State. This means that individuals can invoke a European provision in relation to the State. Horizontal direct effect is consequential in relations between individuals. This means that an individual can invoke a European provision in relation to another individual.

⁶¹ See MARTIN A. MANGAS & LINAN D.J. NOUGUERAS, *Instituciones y Derecho de la Unión Europea* 326–30 (1996).

(“ENISA”)⁶² contravenes the EC Treaty, or if Article 95 possesses sufficient legislative power to establish such a body. According to that judicial decision, ENISA is a body that does not have the broad powers similar to those conferred by the Regulation that created EIOPA. Instead, the legal powers of ENISA are very similar to those of the Committee of European Insurance and Occupational Pensions Supervisors, which was abolished by the new Regulation. ENISA’s functions only extend to providing information and advice, cooperation, and assistance. In this regard, the European Parliament Legislative Resolution of 22 September 2010, in which the first or simple reading of the Proposal for a Regulation⁶³ for setting up the Authority that is the subject of the present study is published, does not elaborate on this question, but rather avoids alluding to the justification on which the creation of the Authority is based. It would seem that, in light of this frame of mind, perhaps the Court of Justice of the European Communities should rule on the issue.

B. FUNCTIONS

The Regulation is designed to overcome the disadvantages of the old Committee of Supervisors. The anomalous situation, in our view, in which the old Committee found itself, due to being a body with considerable technical potential, but with purely consultative functions, is resolved by the creation of the new Authority. In this way, then, it is entrusted, in areas defined by Community law, with the elaboration of draft regulatory technical standards, which do not involve policy choices. The Commission should endorse those draft regulatory technical standards in accordance with Community law in order to give them binding legal force. At the same time, the process of drawing up technical standards does not prejudice the Commission’s powers to adopt, on its own initiative, measures whose application is in accordance with the comitology⁶⁴

⁶² Regulation of the European Parliament 460/2004, 2004 O.J. (L 77) 1 (EU).

⁶³ *Proposal for a Regulation of the European Parliament and of the Council Establishing a European Insurance and the Occupational Pensions Authority*, COM (2009) 502 final (Sept. 22, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0334#BKMD-18>.

⁶⁴ Council Decision 1999/486, 1999 O.J. (D 0486) 2 (EC). In accordance with the Treaty on the Functioning of the European Union (TFEU), Member States implement European law by adopting measures for implementing legal acts into their national legislations. In accordance with the principles of subsidiarity and

procedures at level two of the Lamfalussy structure, that are laid down in the relevant Community legislation.

The new Authority is set up to be a body with legal personality, without usurping the Commission's powers, and being accountable to the

proximity, decisions shall be taken as close to the citizens as possible. Implementing powers may also be attributed to the Commission so that legislation is implemented uniformly in the Member States, or to the Council for implementing acts related to the Common Foreign and Security Policy. Consolidated Version of the Treaty on the European Union, Oct. 26, 2012 O.J. (C 326) 58–59. In exercising its implementing powers, the Commission is assisted by representatives of the Member States through committees, in accordance with the “comitology” procedure.

The committees are forums for discussion consisting of representatives from Member States and are chaired by the Commission. They enable the Commission to establish dialogue with national administrations before adopting implementing measures. The Commission ensures that measures reflect as far as possible the situation in each of the countries concerned.

Relations between the Commission and the committees are based on models set out in the Council “Comitology Decision.” This decision has been amended several times. In 1999, it accorded the European Parliament a “right to scrutiny” in implementing legislative acts adopted by co-decision. It also increased the transparency of the system by making committee documents more accessible to the Parliament and the public and by requiring the documents to be registered in a public register.

Council Decision 2006/512, 2006 O.J. (L 200) 11 (EU). The “Comitology Decision” was amended again in 2006. It introduced a new way of exercising implementing powers: the regulatory procedure with scrutiny.

Consolidated Version of the Treaty on the European Union, Oct. 26, 2012 O.J. (C 326) 58–59. The Treaty of Lisbon provides that the relationship between the Commission and its committees is henceforth organized on the basis of a regulation adopted by the European Parliament under the ordinary legislative procedure. Until such a regulation is adopted, the Council “Comitology Decision” adopted in 2006 is to apply. Committees may be formed in accordance with the following typology: advisory committees who give their opinions to the Commission, which must try to take account of them; management committees: they intervene when implementing measures relate to the management of programs and when they have budgetary implications; and regulatory committees: they are responsible when the implementing measures relate to legislation applicable in the whole of the European Union (EU). Regulatory committees with scrutiny must allow the Council and the European Parliament to carry out a check prior to the adoption of measures of general scope designed to amend non-essential elements of a basic instrument adopted by co-decision.

European Council and to the European Parliament.⁶⁵ Ensuring the correct and full application of Community law is a core prerequisite for the integrity, transparency, efficiency, and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial institutions in the Community, including protection for the consumer as the end-user.

1. Binding Decisions

Article 17 of the Regulation (EU) No. 1094/2010, establishes a mechanism, which allows the Authority to deal with cases of incorrect or insufficient application of Community law. For this purpose, a three-stage mechanism is created.

In the first stage, the Authority is empowered to investigate alleged incorrect or insufficient application of Community law obligations by national authorities in their supervisory practice, concluded by a recommendation, in which the action necessary to comply with Union law is set out. The national authority has the obligation to inform the Authority of the steps it has taken, or intends to take, as a result of the recommendation.

The second stage begins when the national authority fails to abide by the recommendation and it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system. The Authority may issue an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice. All of this is without prejudice to the powers of the Commission under Article 258 TFEU.⁶⁶

⁶⁵ This responsibility clause is introduced by Article 1.3 of European Parliament Legislative Resolution of 22 September 2010, in which the first or simple reading of the Proposal for a Regulation is published. *Proposal for a Regulation of the European Parliament and of the Council Establishing a European Insurance and the Occupational Pensions Authority*, COM (2009) 502 final (Sept. 22, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0334#BKMD-18>.

⁶⁶ This of course according to the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, and their Protocols and Annexes, resulting from the amendments introduced by the

Finally, the third stage begins when there are adverse developments which may seriously jeopardize the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union. The Authority may adopt individual decisions requiring competent authorities to take the necessary action, and requiring financial institutions to take the necessary action to comply with their obligations under Union law including the cessation of any practice.

2. The Conciliation and Arbitration Function

The Regulation also, in Article 19, endows the Authority with the function of carrying out arbitration, in order to ensure effective supervision, and a balanced consideration of the positions held by the national supervisory authorities of the different Member States. The procedure is divided into two phases. In the first, a conciliation phase should be provided for during which the national supervisory authorities may reach an agreement. At that stage, the Authority shall act as a mediator. If the authorities fail to reach an agreement, then the second phase is initiated. In the second, the Authority may take a decision requiring them to take specific action or to refrain from action in order to settle the matter, in accordance with Community law. This Decision is binding on the competent authorities in question in order to ensure compliance with Union law. The decisions adopted shall prevail over any previous decision adopted by the competent authorities on the same matter.⁶⁷

On the basis of this last paragraph, the Authority is to assess whether it is competent to make a ruling on the resolution of the particular case. If the Authority considers that it is competent to resolve the disagreement it will make a ruling. The ruling is binding since, if the supervisory authority does not conform to this resolution, then the Authority has the power to adopt an individual decision, addressed to the

Treaty of Lisbon signed on 13 December 2007 in Lisbon, that took effect on 1 December 2009. 2010 O.J. (C 38) 13.

⁶⁷ Regulation introduced in Art. 11.4.2 of European Parliament Legislative Resolution of 22 September 2010, in which is published the first or simple reading of the Proposal for a Regulation. *Proposal for a Regulation of the European Parliament and of the Council Establishing a European Insurance and the Occupational Pensions Authority*, COM (2009) 502 final (Sept. 22, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0334#BKMD-18>

financial entity, urging it to take the necessary action to comply with its obligations under Community law including the cessation of any practice.

Finally, from a reading of Article 19, there are two limitations on this power. In the first place, where there exists in Community law a remedy for the conflict, or a mechanism for resolving the type of conflict that falls outside the Authority's competence, it will refrain from settling the case and point out to the parties the proper place for the resolution of the disagreement. The second limitation arises when the Commission holds the power of resolution over the conflict.

3. Delegation of Tasks and Responsibilities

The Regulation also authorizes the delegation of tasks and responsibilities in order to reduce the duplication of supervisory tasks, to foster cooperation and thereby streamline the supervisory process, and to reduce the burden imposed on financial institutions. Delegation of tasks means that tasks are carried out by a supervisory authority other than the responsible authority, while the responsibility for supervisory decisions remains with the delegating authority. Through the delegation of responsibilities, a national supervisory authority, the authority delegated to, should be able to decide upon a certain supervisory matter in the name and stead of another national supervisory authority. On this basis, responsibility may be delegated to the Authority itself or to other authorities.

Delegations should be governed by the principle of allocating supervisory competence to a supervisor, which is best technically qualified to take action. In this respect, the Authority must be informed in order to issue a prior notice about it, should this in its view be necessary.

4. Regulatory and Implementing Technical Standards

The Authority is empowered to adopt regulatory technical standards and implementing technical standards under the provisions of Articles 10 and 15 of the Regulation.

Regulatory technical standards are designed to address technical issues, and shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based. Before submitting them to the Commission, the Authority shall conduct open public consultations on draft regulatory technical standards, and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the

draft regulatory technical standards concerned or in relation to the particular urgency of the matter.

It is important to note that when the Authority does not submit a draft regulatory technical standard to the Commission within the time limits, then the Commission may adopt a regulatory technical standard by means of a delegated act without a draft from the Authority.

As regards the second type, implementing technical standards shall be technical, shall not imply strategic decisions or policy choices, because those subjects are enacted by the European Council or the Commission, and their content shall be to determine the conditions of application of those acts. The Authority shall submit its draft implementing technical standards to the Commission for endorsement. The approval procedure is the same as that for the approval of regulatory technical standards.

5. The Advisory Function

As we have seen thus far, the Regulation places emphasis on the creation of an Authority with powers of decision. But, its antecedents as a consultative body are not abolished and must be kept in mind; rather, those powers are broadened. In effect, with respect to the field of insurance and occupational pensions, the Authority functions as a consultative body, not only as advisor to the Commission, but now also to the European Parliament, and to the European Council.

Besides, and with the objective of ensuring full effectiveness of the functioning of the European Systemic Risk Board (“ESRB”)⁶⁸ and the

⁶⁸ The ESRB is responsible for the macro-prudential oversight of the financial system in the EU. One of its main objectives is to prevent and mitigate systemic risks which might prejudice the financial stability of the EU. In this regard, the ESRB must in particular: determine and collect the information necessary for its action; identify systemic risks and prioritize them; issue warnings and make them public if necessary; recommend measures to be taken once the risks have been identified. The ESRB is composed of: a General Board to ensure the performance of tasks; a Steering Committee which contributes to the decision-making process; a Secretariat responsible for day-to-day business; an Advisory Scientific Committee and an Advisory Technical Committee to provide advice and assistance. The President of the European Central Bank (ECB) shall chair the ESRB for a term of five years. The Chair will perform his duties assisted by two Vice-Chairs, the first of which shall be elected by and from the General Council of the ECB, while the second shall be the Chair of the Joint Committee. Members of the ESRB shall have an obligation to comply with the principles of impartiality and professional secrecy

follow-up to its warnings and recommendations, the Authority must provide it with all relevant information. Upon receipt of warnings or recommendations addressed by the European Systemic Risk Board to the Authority or a national supervisory authority, the Authority should ensure follow-up.

C. INTERNAL ORGANIZATION

Chapter III of the Regulation is entitled “Organisation,” and contains four sections describing the bodies that constitute EIOPA.

Section 1 authorizes the **Board of Supervisors**, presided over by the Chairperson, who is non-voting, and consisting of the heads of the competent national public authorities of each Member State. The Board’s function is to give guidance to the work of the Authority and to adopt the opinions, recommendations and decisions, and to issue the advice referred to in Chapter II, concerning the Authority’s tasks and responsibilities. The Board also adopts the Authority’s multi-annual work programme and exercises disciplinary authority over the Chairperson and Executive Director, including the power to remove them from office if necessary.

Section 2 creates the **Management Board**, which is presided over by the Authority’s Chairperson. The Management Board’s role is to ensure that the Authority carries out its mission, to propose an annual and multi-annual work programme, to exercise its budgetary powers in accordance with the Regulation, and to adopt the Authority’s staff policy plan.

Section 3 designates the **Chairperson**, who may be appointed by the Board of Supervisors, and who may be removed from office only by the Parliament, following a decision of the Board. The Chairperson’s term of

when performing their duties, including after their duties have ceased. Meetings of the General Board shall take place four times a year, preceded by meetings of the Steering Committee. The Chair of the ESRB may convene extraordinary meetings. The ESRB may also seek the advice of the private sector when necessary. Finally, The ESRB may issue warnings and make recommendations concerning remedial action to be adopted, or even legislative initiatives. Such recommendations may be addressed: to the EU; to one or several Member States; to one or several European supervisory authorities; to one or several national supervisory authorities. Recommendations relating to measures to be adopted shall be issued according to a color code which varies according to the level of risk. If the ESRB observes that its recommendations have not been followed, it shall, confidentially, inform the addressees, the Council and, where relevant, the European Supervisory Authority concerned.

office is five years and may be extended once. The Chairperson shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State, or from any other public or private body.

Section 4 creates the post of the **Executive Director**, who is appointed by the Board of Supervisors, on the basis of merit, skills, knowledge of financial institutions and markets, and experience relevant to financial supervision and regulation and managerial experience, following an open selection procedure. The Executive Director is in charge of the management of the Authority and prepares the work of the Management Board. The Executive Director is also responsible for implementing the annual work programme of the Authority, and shall take the necessary measures, notably the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Authority. Finally, each year the Executive Director shall prepare a draft report with a section on the regulatory and supervisory activities of the Authority and a section on financial and administrative matters.

D. BODIES SET UP BY THE REGULATION

Chapter IV, dealing with *Joint Bodies of the European Supervisory Authorities*, establishes in its Section 1 the **Joint Committee of European Supervisory Authorities** and in its Section 2 the **Board of Appeal**.

The purpose of the Joint Committee is to serve as a forum in which the Authority shall cooperate regularly and closely and ensure cross-sectoral consistency with the European Banking Authority and the European Securities and Markets Authority. It is composed of the Chairperson of the Authority and the Chairpersons of the Authorities aforementioned. Within the Committee there shall be a Sub-Committee on financial conglomerates and further Sub-Committees as may be deemed necessary.

The Board of Appeal shall be a joint body of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority. It shall be composed of six members and six alternates with a proven record of relevant knowledge and experience, excluding current staff of the competent authorities or other national or Community institutions involved in the activities of the Authority. Any natural or legal person, including competent authorities, may appeal a decision of the Authority. Such an

appeal shall not have suspensive⁶⁹ effect. Finally, decisions taken by the Board of Appeal may be contested before the Court of Justice of the European Union, in accordance with Article 263 TFEU.

X. CONCLUSION

The history of the succession Committees up to the present day, namely those concerned with the whole field of financial services is commendable for the attempts to achieve convergence between the different national standards. In effect, in the context of the multiplicity of standards and of the fragmented nature of the market within the Community, actually being able to find the point of inflection, where those regulations can coincide with a view to constructing a unified market, is no mean feat. In our opinion, developing the Committees for the purpose of promoting their technical advice was the source of the great profusion of working materials from which it has been possible to construct a common supervisory and regulatory body.

Along with all this material, the Lamfalussy process and its review have led to the amendment of a broad spectrum of directives aimed at unifying supervisory criteria as the *conditio sine qua non* for the attainment of this common market. The creation of a single supra-national Authority can be regarded as the high point of an entire process of unification of principles of finance that provides this body with the power to issue resolutions without having any destabilizing effect, both in Community and in national markets. Certainly, the different intra-community markets, in spite of their interconnections, and taking account of their particular individual nature and characteristics, cannot allow themselves to be affected by the decision of a supra-national body that upsets a given market and distorts the ends it is designed to serve. This is why the work of legislative convergence is a ceaseless task, and involves constant assessment of its consequences.

It is also the case that the Lamfalussy process constitutes a major challenge in supra-Community terms. The increasing globalization that we are experiencing today, makes easier the movement and investment of foreign capital, both to create new enterprises and to develop existing ones. This is why one of the objectives of the process has been to project to the outside world the image of a strong and solid Community market, which,

⁶⁹ It means that the Decisions enacted by the Authority can be implemented, and the appeals cannot stop the Decision's effects.

thanks to this appearance, is able to attract investors who are willing to participate in a business environment that is secure, both from the point of view of standards and of economic prospects. As a result, the regulation and supervision of insurance and of the other financial services needs to be developed in such a way as to simultaneously promote mutual confidence between the different supervisors, with a view to avoiding having investors perceive distortions or tensions concerned with legislation. In this respect, the creation of the Committee of Supervisors by the Decision of 23 January 2009 promoted the move towards convergence of the different national supervisors. That was in our view a very successful move, in that the Committee embodied the supra-national ethos that was needed to permeate supervisory practice in the nations. As we can see, that drawing together has not yet been achieved as fully as would be desired.

The reluctance, on the part of national authorities to relinquish competences in matters of financial market governance has been a constant factor, in spite of the aspiration towards integration. The European Council included in its conclusions of 19 June 2009 reference to the standstill in the financial market. The Council was of the view that it would be helpful to take a further step forward in this matter and to set up a supra-national supervisory body that would at least draw together the functions of the national supervisors, even if this were initially in a somewhat tentative manner.

The new European Insurance and Occupational Pensions Authority is constituted as a joint body, because of the disparity of the tasks attributed to it by the Proposal for a Regulation. The advisory function, the oversight of the incorrect or insufficient application of Community law, the production of proposals, and the delegation of functions, all lead us to suspect that in the future this Authority will be the sole supervisory body operating in all Member States. This is also likely true for the similar arrangements governing banking supervision and securities regulation. For sure, it seems likely that we are progressing towards a new conception as regards the supervision and regulation of insurance in our country, or perhaps what we are witnessing is another step towards Community-wide integration.