

## INSTITUTIONAL ANSWERS TO THE 2008 CRISIS IN THE US AND THE EU: A COMPARATIVE STUDY

GYÖRGY MARINKÁS

Senior lecturer, Department of European Law and International Private Law  
University of Miskolc  
marinkas.gyorgy@gmail.com

### 1. Introduction

The crisis of 2008 highlighted the existence of a regulation deficit in the field of the supervision of financial markets and institutes both in the US and the EU, or rather the nearly non-existent supervision in the case of the EU.<sup>1</sup>

Some economists even argue that the crisis of 2008 was caused only by the lack of sufficient supervision; a legacy of the deregulation process, which took place during the Reagan era. Although it cannot be stated that the majority of the economist completely share this point of view — moreover the relevant literature is rather heterogeneous regarding the causes of the crisis<sup>2</sup> —, the author in his earlier studies<sup>3</sup> accepted that the lack of proper supervision was of paramount importance and argued so.

Another issue, which gives rise to debates, is the role of 2008 crisis in eliciting the crisis of the *Economic and Monetary Union* (hereafter: EMU), namely that the crisis of 2008 was the basic cause or only the catalyst?<sup>4</sup> In this regard the literature seems to be more homogenous and the majority of the authors accept that the innate structural weaknesses of the EMU — namely its asymmetrical structure, the lack of proper control mechanism and the lack of political union — foreshadowed the crisis.<sup>5</sup> Thus the crisis of 2008 could only be the catalyst of the crisis of the EMU.

---

<sup>1</sup> ANGYAL Zoltán: A gazdasági és monetáris unió elsődleges jogi keretei Lisszabon után. *Európai tükkör*, Vol. 13 (2008), Issue 7–8, pp. 59–77.

<sup>2</sup> As Andrew Lo noted: the only thing the economist can agree is that they cannot agree. — LO, Andrew, Reading About the Financial Crisis: A Twenty-One-Book Review. *Journal of Economic Literature*, Vol. L (March 2012), pp. 151–178, p. 173.

<sup>3</sup> MARINKÁS György: A 2008-as válság lehetséges okai és a válságra adott amerikai és európai válaszok, különös tekintettel a törvényi szabályozásra. To be published in the 2019 issue of *Publicationes Universitatis Miskolcensis, Sectio Juridica et Politica*; MARINKÁS György: *Változó közgazdasági elméletek, avagy a keynesi-modell alkalmazhatósága napjaink gazdasági válságának kezelésére*. Szakdolgozat. Miskolci Egyetem Gazdaságtudományi Kar Gazdaságelméleti Intézet Posztgraduális képzés (2013), p. 104.

<sup>4</sup> The author is intends to seek an answer for this question in his next study to be written within the frameworks of the above mentioned project.

<sup>5</sup> SANDBU, Martin, *Europe's Orphan. The Future of the Euro and the Politics of Debt*. Princeton University Press, Princeton, 2015, 336.

Although it's beyond the scope of the current study to discuss these topics, one cannot evade the fiscal and monetary crisis management, when the crisis of 2008 and the crisis of EMU come into question. The author — referring to his earlier studies<sup>6</sup> — argues that, while as late as 2014 the crisis management of the US seemed to be more viable, starting from that year the economy of the EU 28 started to overtake the US economy in several indicators. This growth cannot be separated from the legal environment: as Kelleher and his fellow co-authors argue:<sup>7</sup> strong and prospering market economies need strict and consequent regulation.<sup>8</sup> Having regarded this, the author examines how the legislation of the US and the EU responded to the crisis.

## **2. The answer of the US legislation: The Dodd-Frank Act<sup>9</sup>**

The legislation of the US responded to the evident regulation deficit by enacting the Dodd-Frank Act, which is focused on the following: (i) the establishment of an independent and competent consumer protection authority and more generally (ii) creating a more effective oversight of the financial markets by reforming the rules on the Fed<sup>10</sup> and the financial institutions and eliminating the system-level risks. Furthermore (iii) ending the governmental bail-out of 'too big to fail'<sup>11</sup> institutions, so tax-payers would not pay the cheque instead of the great firms anymore. The latter provision of the Dodd-Frank Act, which is recorded in the Preamble<sup>12</sup> too, is one of the most debated parts of the Act.<sup>13</sup>

The author introduces the provisions of the act and the concerning critiques according to the three focal points. In order to reform the regulation, the act established the *Bureau of Consumer Financial Protection* (hereafter: BCFP), headed by a director appointed by the president and approved by the Senate. The BCFP has full autonomy,<sup>14</sup> its own budget and cannot be instructed by any other federal body. The BCFP has supervision powers and is entitled to apply coercing

---

<sup>6</sup> See footnote No. 3!

<sup>7</sup> KELLEHER et al.: The Dodd-Frank Act is Working and Will Protect the American People If It Is Not Killed before Fully Implemented. *North Carolina Banking Institute*, 20 (2016), pp. 145–147.

<sup>8</sup> Even if President Trump surely disagrees with this, as introduced in the second chapter.

<sup>9</sup> Public Law 111–203 (July 21, 2010), H.R. 4173 (hereafter: Dodd-Frank Act).

<sup>10</sup> The Federal Reserve System, the US central bank.

<sup>11</sup> The “too big to fail” refers to the phenomenon that leaders of the great financial institutions — being aware of the significance of their firms and that the government cannot let them down due to their weight in the economy — behave reckless and bare too much risk. The costs of the bail-outs are paid by the tax-payers in the end. — KELLEHER, op. cit. p. 142.

<sup>12</sup> To [...] end “too big to fail”, to protect the American taxpayer by ending bailouts [...] — The Preamble of the Dodd-Frank Act.

<sup>13</sup> *Martin Sandbu* argues that it is a key element in the US regulation and, which in his view makes it better than the regulation of the EU: instead of keeping alive the so called ‘sick enterprises’ it is more advisable to liquidate them before they cause more serious problems and let the market fill in the gap. Although the EU too, started to liquidate these enterprises in 2014, it was late and half-hearted. — SANDBU, op.cit. p. 313.

<sup>14</sup> This wide-scale autonomy served as a ground for criticism and a constitutional supervision, which is to be introduced in the following parts.

measures if needed. Its discretionary power to issue decrees<sup>15</sup> allows the implementation of effective measures to protect the consumers.

In order to foresee and to react to any potential threats, the Act established the *Financial Stability Oversight Council* (hereafter: FSOC). Its membership is constituted by members with and without voting rights. Without being exhaustive, the Secretary of the Treasury — holding the position of the FSOC president at the same time —, the chairman of the *Board of Governors of the Federal Reserve System* — namely the president of the Fed<sup>16</sup> —, and the president of the BCFP. The task of the FSOC is to hinder the development of ‘too big to fail’ firms, by issuing recommendations for the Fed and to determine the permissible maximum extent of the gearing<sup>17</sup> — or leverage according to the terminology of the Dodd-Frank Act.

The regulation closed the back doors for the hedge funds — the principle institutions of the *shadow banking system* — by extending the supervision scope of the *Securities and Exchange Commission* (hereafter: SEC) over the above mentioned banking system.<sup>18</sup>

Another focal point of the Dodd-Frank is cutting the licences of the Fed as the lender of last resort (hereafter: LLR). As the preamble of the Act stipulates, it cannot occur again, that taxpayers shall pay the cheque instead of the top managers of financial enterprises. According to the provisions of the act the shareholders and investors shall bear the losses — as it should be according to the rules of capital economy — moreover the managers exhibiting shall bear criminal liability in case of attributable behaviour.

The new regulation — just the Act established the Fed — prohibits any occasional lending to insolvent firms, which fall outside the bank system. As a progress however, it regulates the neutralisation of the threat that these firms mean to the financial system. These firms may ask the *Orderly Liquidation Authority* (hereafter: OLA) for a bail-out in case they fulfil the criteria set-out in the law. Should the firm fail to fulfil them, its liquidation shall be ordered. In order to facilitate the liquidation, every firm shall prepare and refresh its liquidation plan; this enables the oversight authority to understand the functioning of the given firm and to easily liquidate the firm if it remains the only option.<sup>19</sup>

Having regarded that the Dodd-Frank applies crisis management tools, which are unfamiliar with the mind-set of a casual American entrepreneur — e.g. strong central regulation, privileges to smaller market actors — its enactment was encompassed by heated debates. As *Alain Sherter* wrote: ‘Loved by Few, Hated by

---

<sup>15</sup> Dodd-Frank Act, Title X, § 1001–1100.

<sup>16</sup> The Board of Governors of the Federal Reserve System is the collective leadership of the Fed. For more details, please visit: <http://www.federalreserve.gov/aboutthefed/bios/board/default.htm> (05/12/2018).

<sup>17</sup> Dodd-Frank Act, Title I–II., § 101–217.

<sup>18</sup> Dodd-Frank Act, Title XIV, § 1400–1498.

<sup>19</sup> Dodd-Frank Act, Title II, § 201–217.

Many.<sup>20</sup> Those who criticized the act can be divided into two groups: the *first group* consists of those, who attacked or attack the act on an ideological basis — since it is incompatible with pure-blooded Republican mind-set<sup>21</sup> —, without weighting long-run effects of the Act. The second group is consists of those, who agree with the necessity of the regulation and the aims of the act, but would welcome a more radical shift in the regulation. That is to say the Act became exposed to cross-fire.

Instead of grouping the critiques as pro and contra, the author introduces the critiques grouped into two categories: *firstly* those, which concern the reform of the regulation and *secondly*, those which concern the new regulations on the Fed as the lenders of last resort.

As mentioned above, those critiques, which find the reforms insufficient or on the contrary and believe it to be overgrown and self-contained. First of all it is a rather common critique that the act does not provide a real solution to the problem caused by ‘too big to fail’ firms: the Dodd-Frank only restricts the growth of the firms by fusion and fails to regulate the inner growth of financial firms. Having regarded the fact that the five biggest financial institutions of the US grew by 20% since the outbreak of the crisis, this insufficiency in the provisions can be regarded as grave, and critiques — which state that the otherwise avoidable risks still exist — are as well grounded.<sup>22</sup> Cary M. Shelby argues that the regulation on the hedge funds too, cannot be regarded as satisfactory, while a wider sphere of authority and more serious tools for the SEC could solve the problem in her opinion.<sup>23</sup>

Other authors argue that the reforms grant too wide-authority for the regulating bodies: J. V. Verrett,<sup>24</sup> Iain Murray<sup>25</sup> and Arielle Rabinovitch criticise the wide-scope of authority of the BCFP, the FSOC and the FDIC and the unheard immunity of their

<sup>20</sup> SHERTER, Alain: *Dodd-Frank Financial Reform: Loved by Few, Hated by Many, Essential to All*. CBS, 22 July 2011.— Online available at: [http://www.cbsnews.com/8301-505123\\_162-43554955/dodd-frank-financial-reform-loved-by-few-hated-by-many-essential-to-all/\(5/12/2018\)](http://www.cbsnews.com/8301-505123_162-43554955/dodd-frank-financial-reform-loved-by-few-hated-by-many-essential-to-all/(5/12/2018)); The webpage of the BCFP [http://www.consumerfinance.gov/\(5/12/2018\)](http://www.consumerfinance.gov/(5/12/2018)).

<sup>21</sup> The Republican economic policy is based on the presumption that the market can solve everything better and more effectively, while regulation — being a self-contained thing by its very nature — only hinders development. They brought up these arguments against the Dodd-Frank Act too, passing over the fact that, while the economy was soaring in the 1930s — despite the strict regulation unprecedented earlier —, this cannot be said in the case of the post 1980s deregulation. One should remember the words of Kelleher and his fellow co-authors: strong and prospering market economies need strict and consequent regulation. — KELLEHER op. cit. p. 134.

<sup>22</sup> GREEN, Edward F.: *Dodd-Frank and the Future of Financial Regulation*. *Harvard Business Law Review Online* (11 October 2011), Chapter V. — Online available at: [http://www.hblr.org/2011/10/greene-symposium-dfa/\(6/06/2018\)](http://www.hblr.org/2011/10/greene-symposium-dfa/(6/06/2018)).

<sup>23</sup> SHELBY, Cary M.: *Closing the Hedge Fund Loophole: The SEC as the Primary Regulator of Systemic Risk*. *Boston College Law Review*, Vol. 58 (2017), pp. 639–701.

<sup>24</sup> VERRETT, J. V.: *About The Dodd-Frank Act, George Washington Would Be Turning Over In His Grave*. *Forbes*, 2 July 2012 — Online available at: [http://www.forbes.com/sites/realspin/2012/07/02/about-the-dodd-frank-act-george-washington-would-be-turning-over-in-his-grave/\(15/06/2018\)](http://www.forbes.com/sites/realspin/2012/07/02/about-the-dodd-frank-act-george-washington-would-be-turning-over-in-his-grave/(15/06/2018))

<sup>25</sup> MURRAY, Iain: *Rethinking the Consumer Financial Protection Bureau*. *Competitive Enterprise Institute*, 16 August 2017 — Online available at: [https://cei.org/shrinkinggov/cfpb\(14/06/2018\)](https://cei.org/shrinkinggov/cfpb(14/06/2018)).

decisions from judicial review. Based on Article and III of the US Constitution the sole legislator is the Congress and the judicial branch shall exercise control over the executive branch.<sup>26</sup> Not surprisingly the first petition<sup>27</sup> aiming to annul these provisions of the act as unconstitutional<sup>28</sup> was submitted to the *District of Columbia Court* (hereafter: D.D.C.) very soon after the act was enacted. The D.D.C. suspended<sup>29</sup> the case until the very same court delivered judgement in the *PHH Corp. v. Consumer Financial Protection Bureau* case in 2016. The courts stated that the wide-scope of authority of the one-person managed authority and its endowments paid out automatically by the Fed and without the approval of the Congress constitute an infringement of the Constitution.<sup>30</sup> On the other hand, the Court pointed out that in case these problems are remedied, the Act would be in conformity with the constitution. The judgement — which was delivered in the finish of the 2016 presidential election —, received politically overheated reactions from both sides: while the Republicans interpreted it as a proof of the Obama administration's unsuccessful crisis management, the Democrats were afraid of losing the efforts already achieved.<sup>31</sup> The BCFP filed an appeal against the judgement the appellate court held its first hearing on the 24 May 2017. The democrats rang the storm-bells: when Donald Trump became the president of the US, the transformation of the BCFP into a collective body — with Republican majority — and its subordination to the Congress and the President became a possible scenario.<sup>32</sup> To state it bluntly: the Trump administration strives to take the sting out of the BCFP,<sup>33</sup> in order to please the Wall-Street, which prefers deregulation.<sup>34</sup>

This process was accelerated by the resignation of the first director of the BCFP, *Richard Cordray* – a man with a Democrat attitude –, who chose to run for the governor's seat in Ohio as he claimed in his resignation letter of November

<sup>26</sup> RABINOVITCH, Arielle: Constitutional Challenges to the Dodd-Frank. *The Antitrust Bulletin*, Vol. 58 (2013), No. 4, pp. 635–649.

<sup>27</sup> D.D.C., *State National Bank of Big Spring et. al vs. BCFP et al.* (2012).

<sup>28</sup> SIMON, Ammon: Dodd-Frank Is Unconstitutional. *National Review Online*. – Online available at: <http://www.nationalreview.com/bench-memos/303812/dodd-frank-unconstitutional-ammon-simon#> (14/06/2018)

<sup>29</sup> D.D.C., MEMORANDUM OPINION re 53 59 parties' cross-motions for summary judgment. Signed by Judge Ellen S. Huvelle on July 12, 2016.

<sup>30</sup> D.D.C., *PHH Corp. v. Consumer Financial Protection Bureau*, Case No. 15–1177 (October 11, 2016), pp. 99–100.

<sup>31</sup> LAMBERT, Lisa–RAYMOND, Nate: U.S. Court Rules CFPB Structure Unconstitutional, Bureau Can Still Operate. *Reuters*, October 11, 2016. – Online available at: <http://www.reuters.com/article/us-usa-court-cfpb-idUSKCN12B1TN> (15/06/2018)

<sup>32</sup> EDER, Steve–SILVER–GREENBERG, Jessica–COWLEY, Stacy: Republicans Want to Sideline This Regulator. But It May Be Too Popular. *The New York Times*, 13 August, 2017 — Online available: <https://www.nytimes.com/2017/08/31/business/consumer-financial-protection-bureau.html?mcubz=3> (05/12/2018).

<sup>33</sup> HSIEH, Lawrence, U.S. consumer bureau faces fateful test in U.S. appeals court. *Reuters*, May 18, 2017. Online available at: <http://www.reuters.com/article/bc-finreg-cfpb-structure-idUSKCN18D2EU> (05/12/2018).

<sup>34</sup> KELLEHER op.cit. pp. 143–144.

2017. — Obviously he has ran out of friends as the director of the BCFP<sup>35</sup> — President Trump acting within his discretionary powers vested on him by the *Federal Vacancies Reform Act*<sup>36</sup> appointed *Mick Mulvaney* as acting director. A debate rose regarding the act of the president: the Dodd-Frank Act provides that the resigned director shall be succeeded automatically by his deputy, which renders the presidential appointment unnecessary.<sup>37</sup> Nevertheless, the D.D.C. — deciding on the matter — ruled in favour of *Mulvaney* on the 28 November 2017,<sup>38</sup> who could take his chair. The new director — who earlier stated in public that the BCFP should be eliminated<sup>39</sup> — did not waste time: in January 2018 he filed an application for a zero dollars (sic!) budget for the Bureau. He argued that it was necessary to cut the federal debt.<sup>40</sup> Furthermore he terminated several proceedings, which concerned great financial firms. — Including proceedings against ‘payday’ lenders, which provide loans with an interest rate of 900%<sup>41</sup> for people in necessity and without choice.<sup>42</sup>

On the other hand, the BCFP achieved a victory on the 31 January 2018: the appellate court of the D.D.C. found the structure and the director’s wide-scope of powers constitutional.<sup>43</sup> However the Supreme Court of the US will have the final word on the matter, the BCFP desperately needed this moment of ease in an

<sup>35</sup> BARRETT, Paul: The Head of the Consumer Financial Protection Bureau Isn’t Going Down Without a Fight. *Bloomberg*, 20 July 2017 — Online available at: <https://www.bloomberg.com/news/articles/2017-07-20/the-head-of-the-consumer-financial-protection-bureau-isn-t-going-down-without-a-fight> (06/06/2018).

<sup>36</sup> Federal Vacancies Reform Act of 1998, S. Rept. 105–250; 105<sup>th</sup> Congress (1997–1998).

<sup>37</sup> ROGERS, Katie–BERNARDNOV, Tara Siegel: President Wins Round in the Battle for the Consumer Bureau. *The New York Times*, 28 November 2017 — Online available at: <https://www.nytimes.com/2017/11/28/us/politics/mick-mulvaney-leandra-english-consumer-bureau.html> (05/12/2018)

<sup>38</sup> D.D.C. *Leandra English v. Donald Trump, et al.*, No. 1:17-cv-02534 (D.D.C. 2017).

<sup>39</sup> KOLHATKAR, Sheelah: The Steady, Alarming Destruction of the Consumer Financial Protection Bureau. *The New Yorker*, 7 February 2018. — Online available at: <https://www.newyorker.com/news/news-desk/the-steady-alarming-destruction-of-the-consumer-financial-protection-bureau> (05/12/2018).

<sup>40</sup> HAYASHI, Yuka: CFPB Requests \$0 Budget, Will Draw Down Reserves Instead. Acting Director Mick Mulvaney says move will cut the federal deficit. *The Wall Street Journal*, 18 January 2018 — Online available at: <https://www.wsj.com/articles/cfpb-requests-0-budget-will-draw-down-reserves-instead-1516291949> (14/06/2018).

<sup>41</sup> ARNOLD, Chris: Under Trump Appointee, Consumer Protection Agency Seen Helping Payday Lenders. *National Public Radio*, 24 January 2018 — Online available at: <https://www.npr.org/2018/01/24/579961808/under-trump-appointee-consumer-protection-agency-seen-helping-payday-lenders> (05/12/2018).

<sup>42</sup> The typical customers of these payday lenders are people below the poverty line, who are denied to have access to credit cards at commercial banks.

<sup>43</sup> The court argued that while the president may hold any official accountable, the constitution can be interpreted in a way to allow the quasi legislators and quasi-judicial bodies or persons to act independently in certain cases. — Court of Appeals for the D.D.C., *PHH Corp. v. Consumer Financial Protection Bureau*, Case No. 15–1177 (January 31, 2018), pp. 21–22.

unfriendly political environment,<sup>44</sup> which still threatens its very existence. — One should only mention the acting-director of the Bureau, who openly opposed its creation.

*Edward F. Green* criticized the regulation as a whole in his study: he believes that the act renders the already complicated system of regulation even harder to comprehend.<sup>45</sup> New regulating authorities mean bigger state apparatus, which — as a legacy of American history<sup>46</sup> — is opposed by most of the American people, as the growing administrative burdens can reduce the competitiveness of the country.<sup>47</sup> At this point the classic Wall Street pet subject arises: the cost-effectiveness analysis, or rather the lack of it in case of the Dodd-Frank. The *Batkins–Brannon* co-authors claimed that based on their calculations, the execution of the act cost 20 billion USD only until 2013.<sup>48</sup> It is worth mentioning that the crisis caused damage worth 20 trillion (sic!) USD, and without a proper regulation it's beyond guarantee that it will not happen again. In the light of this fact Kelleher and his fellow co-authors ask whether it is fairer to make the financial institutions pay for the regulation or — in case of another crisis — the multiple of that will be 'charged' on the society.<sup>49</sup>

The latter question is the so called moral dilemma, which occurred concerning the bail-out of the 'too big to fail' enterprises. The legislation decided that by cutting the licences of the Fed as the LLR. — The second group of critiques concerns this issue. — Green argues that the government cannot let the great financial institutions go down — independent from the behaviour of their leader — otherwise the economic actors would have to face unforeseen consequences. Proper regulation is the key in his opinion.<sup>50</sup> *Eric Posner* illustrates the moral dilemma by an ample example:

*'As an analogy, imagine that a town is plagued by residential fires, caused by the carelessness of homeowners who do not install smoke detectors and store*

<sup>44</sup> PUZZANGHERA, Jim: Consumer Financial Protection Bureau's structure is constitutional, appeals court rules in a blow to agency's opponents. *The Los Angeles Times*, 31 January 2018 — Online available at: <http://www.latimes.com/business/la-fi-cfpb-court-ruling-20180131-story.html> (15/June/2018).

<sup>45</sup> GREEN: op.cit.

<sup>46</sup> See: SUNDQUIST, James L.: *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States*. Brookings Institution Press, Washington D.C., 1983, p. 466.

<sup>47</sup> Verrett argues that the obligations, which the new regulation prescribes on the credit institution — among others the obligation to evaluate the financial situation of the potential borrowers —, may result in the exclusion of those who live under the poverty line or have low income. These people will not receive credit or only for a higher cost. Verrett took a critical standing point regarding the BCFP's jurisdiction over credit cards, granted by the so called *Durbin amendment* of the Act. Verrett argues that several leading companies of our times — like the Google, the Youtube — financed its start by credit card loans, when they started to operate in garages of their founders, who could not do the same under the current legislation. — See the study of Verrett, cited above!

<sup>48</sup> BATKINS, Sam–BRANNON, Ike: The Unknown Costs of Dodd-Frank. *Regulation*, Vol. 36 (2013), No. 4, pp. 4–5.

<sup>49</sup> KELLEHER, op.cit. p. 142.

<sup>50</sup> Green argues that — in the long-run — a rigid regulation will hinder the American firms in keeping their competitiveness. — GREEN: op.cit. Chapter IV/3.

*flammable materials in their basements. The town could sensibly address this problem by enacting a fire code that it enforces with inspections. It could also address this problem by directing the fire department to replace hoses with squirt guns and tanker trucks with horse drawn carriages. The second approach would certainly address moral hazard; residents, fearful that the fire department will not save their houses, would be more careful. But not all fires are caused by carelessness, and not all careless fires should be allowed to burn, since, by a process similar to financial contagion, fires may spread from house to house. The town does better with the fire code along with a modern fire department. And so with the LLR.*<sup>51</sup>

Posner argues that the bankruptcy of the Lehman-Brothers was the point of no return, where the fire could still have been extinguished: afterwards the crisis was out of control and the occurrence of another 1929 became a possible scenario. Although the Lehman-Brothers could have been saved with a financial aid, the hands of the Fed were tied. Subsequently — realizing how grave the crisis was, the Fed — circumventing the regulation — provided financial subsidies to several financial institutions. Its lag proved to be fatal, however.<sup>52</sup> *Buchanan and Dorf* also argue that tying the hands of the Fed as LLR is a bad idea: as they point out, the Fed did a great job managing the crisis, which was possible due to its political independence,<sup>53</sup> which is under fire at the moment.<sup>54</sup>

### 3. The institutional answers of the EU

As a response to the crisis and in order to prevent the possible risks threatening the stability of the European Financial System, in 2011 the EU established the *European System of Financial Supervision* (hereafter: ESFS), which is built-up as follows:

The European Parliament and the Council created the *European Systemic Risk Board* (hereafter: ESRB) — by adopting Regulation No. 1092/2010<sup>55</sup> — and vested special spheres of authority on the *European Central Bank* (hereafter: ECB)

<sup>51</sup> POSNER, Eric A.: What Legal Authority Does the Fed Need During a Financial Crisis? *Minnesota Law Review*, Vol. 101 (2017), pp. 1529–1578, p. 1576.

<sup>52</sup> POSNER: op.cit. p.1530.

<sup>53</sup> BUCHANAN–DORF: op.cit. pp. 83–85.

<sup>54</sup> WORSTALL, Tim: President Trump, Keep The Federal Reserve Independent — It’s Too Expensive Not To. *Forbes*, 13 February 2017 — Online available at: <https://www.forbes.com/sites/tim-worstall/2017/02/13/president-trump-keep-the-federal-reserve-independent-its-too-expensive-not-to/#27f3078429d7> (19/06/ 2018); VINIK, Danny: What Trump could do to the Federal Reserve? His inner circle contains some radical monetary thinkers — and Wall Street bankers. Who will prevail? *Politico*, 15 March 2017 — Online available at: <http://www.politico.com/agenda/story/2017/03/donald-trump-remake-federal-reserve-monetary-policy-000360> (14/06/2018).

<sup>55</sup> Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15. 12. 2010, pp. 1–11).



concerning the ESRB by adopting Regulation No. 1096/2010/EU.<sup>56</sup> Second and third articles of the said regulation state that:

‘The ECB shall ensure a Secretariat, and thereby provide analytical, statistical, logistical and administrative support to the ESRB. [...] The ECB shall provide sufficient human and financial resources for the fulfilment of its task of ensuring the Secretariat.’<sup>57</sup>

Article 4 states that: ‘*The ESRB’s Chair and its Steering Committee shall give directions to the head of the Secretariat on behalf of the ESRB.*’<sup>58</sup>

Article 5 of the regulation states that:

‘*The ESRB shall determine the information necessary for the purposes of the performance of its tasks, as set out in Article 3 of Regulation (EU) No. 1092/2010. In view thereof, the Secretariat shall collect all the necessary information on behalf of the ESRB on a regular and ad hoc basis [...]*’<sup>59</sup>

The EU legislation created furthermore the *European Supervisory Authorities* (hereafter: ESAs), which consists of: the *European Banking Authority*<sup>60</sup> (hereafter: EBA) — which is responsible for contributing to the formulation of EU-wide regulation and supervision standards —, the *European Insurance and Occupational Pensions Authority*<sup>61</sup> (hereafter: EIOPA), which is also responsible for regulation and supervision and strives at enhancing the functioning of the internal market, and last, but not least, the *European Securities and Markets Authority*<sup>62</sup> (hereafter: ESMA).

The network based on the domestic supervisory authorities is also part of the ESFS.

In the following the author introduces the functioning of the ESRB and the ESMA in details, but with emphasis put on to the latter one. The task of the ESRB is to continuously monitor and evaluate the innate risks of the system. Furthermore the ESRB contributes to financial stability and suppresses the impacts arriving outside the internal market, which may have an effect on it or on the real

<sup>56</sup> Council Regulation (EU) No. 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (OJ L 331, 15. 12. 2010, pp. 162–164).

<sup>57</sup> Ibid, Article 2, 3.

<sup>58</sup> Ibid, Article 4.

<sup>59</sup> Ibid, Article 5.

<sup>60</sup> Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15. 12. 2010, pp. 12–47).

<sup>61</sup> Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15. 12. 2010, pp. 48–83).

<sup>62</sup> Regulation (EU) No. 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15. 12. 2010, pp. 84–119).

economy.<sup>63</sup> Although the ESRB is independent from the ECB, it is seated in the ECB headquarter and its secretariat is also provided by the ECB.

The aim of the ESMA is the contribution to the stability and effectiveness of the financial system, including the protection of the interests of the citizens of the union and the enterprises seated in the union. In order to achieve this, the ESME strives to assure the transparency and the regular functioning of the financial markets and to enhance the international supervision cooperation. The sphere of authority of the ESMA was widened by the Regulation No. 236/2012 of the European Parliament and of the Council on short selling<sup>64</sup> (hereafter: Regulation on short selling) which was adopted on the ground provided by Article 114 of the TFEU.<sup>65</sup> Article 28 of the said Regulation on short selling vested new intervention powers on the ESMA, which — among others — could:

‘Prohibit or impose conditions on, the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument other than financial instruments referred to in point (c) of Article 1(1) where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument.’<sup>66</sup>

The United Kingdom in its application submitted to the *Court of Justice of the European Union* (hereafter: CJEU) asked the Court to annul Article 28 of the Regulation on short selling.<sup>67</sup> The government of the UK argued that Article 28 actually authorizes the ESMA to adopt quasi-legislative measures of general application without any ground implied in Article 114 and that such power is contrary to the principle established in the Romano-case,<sup>68</sup> namely that legislative powers on the institutions shall only be vested by the founding treaties. The advocate general accepted only one legal basis — the one, which concerned the Article 114 of the TFEU — out of the four brought up by the government of the UK.<sup>69</sup> The CJEU in contradiction with the opinion did not state the infringement of the said principle,<sup>70</sup> moreover did not bother to disprove the opinion of the advocate general. — Although the CJEU is not obliged to do so, having regarded

<sup>63</sup> Regulation No. 1092/2010, Preamble, Section 10.

<sup>64</sup> Regulation (EU) No. 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps Text with EEA relevance (OJ L 86, 24. 3. 2012, pp. 1–24).

<sup>65</sup> Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26. 10. 2012, pp. 47–390).

<sup>66</sup> Regulation (EU) No. 236/2012, Article 28, Section 1, Point (b).

<sup>67</sup> For more details please see: ANGYAL Zoltán: Jogvita az európai értékpapír-piaci hatóság rendkívüli körülményekkel kapcsolatos beavatkozási hatásköréről. *Publicationes Universitatis Miskolcensis. Sectio Juridica et Politica*, Tomus XXXIII (2015), pp. 129–143.

<sup>68</sup> C-98/80, *Giuseppe Romano v. Institut national d'assurance maladie-invalidité* case, the judgment of the CJEU, 12 May 1981.

<sup>69</sup> C-270/12, *United Kingdom vs. European Parliament and the Council of the European Union*, the opinion of advocate general Niilo Jääskinen, 12 September 2013, paras. 102–103.

<sup>70</sup> C-270/12. *United Kingdom vs. European Parliament and the Council of the European Union*, the judgement of the CJEU, 22 January 2014, paras. 119–120.

the significant differences in the interpretation of law, it should have done it. — As *Angyal Zoltán* wrote: the Court delivered an amicable decision for the EU in order to protect the authority of the ESMA, which is needed for the successful functioning of the European Banking Union in the future.<sup>71</sup>

In addition to creating the ESFS, the Council — as a transitional solution — called the *European Financial Stabilisation Mechanism*<sup>72</sup> (a hereafter: EFSM) into being. The aim of the creation of the EFSM was to grant credit to the member states, which struggle with problems. To draw in outline, the procedure starts, when a member state — after consulting with the ECB — submits its claim to the European Commission. The Council shall decide on granting the credit with a qualified majority and the European Commission shall supervise its investment.<sup>73</sup> The *European Stability Mechanism*<sup>74</sup> (hereafter: ESM) started to function in 2012.<sup>75</sup> The aim of its creation was to provide the EU with an LLR, which — in case of necessity — could grant credits to the member states and financial institutions facing crisis. Spain, Ireland, Portugal, The Republic of Cyprus and Greece have asked for credit so far.<sup>76</sup>

#### 4. Summary

In the introductory chapter the author of the current study argued that the lack of sufficient and proper regulation played an important role in inducing both crises. The US and the EU legislation realizing this fact started to create a stricter regulation, or in the case of the EU, remedy the lack of it.

Both legislations enhanced the supervision of financial markets and focused on monitoring and evaluating system-level risks in order to prevent any possible crisis in the future. There are differences too: while the EU created its own LLR for the first time, the US opted for cutting the powers of the Fed as LLR. *Martin Sandbu* argues that it is a key element in the US regulation, which — in his view — makes it better: instead of keeping alive the so called ‘sick enterprises’ it is more advisable to liquidate them before they cause more serious problems and let the market fill in the gap. Although the EU too, started to liquidate these enterprises in 2014, it was late and half-hearted.

<sup>71</sup> ANGYAL: 2015 op. cit. p. 143.

<sup>72</sup> Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12. 5. 2010, pp. 1–4); Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No. 407/2010 establishing a European financial stabilisation mechanism (OJ L 210, 7. 8. 2015, pp. 1–2).

<sup>73</sup> Regulation No. 407/2010, Article 3.

<sup>74</sup> ESM Treaty — Treaty Establishing the ESM (signed on 2 February 2012, entry into force: 27 September 2017).

<sup>75</sup> The EFSM, however, remains in place for specific tasks such as the lengthening of maturities for loans to Ireland and Portugal and providing bridge loans. — For further details please visit: [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/european-financial-stabilisation-mechanism-efsm\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/european-financial-stabilisation-mechanism-efsm_en) (06/12/2018)

<sup>76</sup> For further details please visit: <https://www.esm.europa.eu/financial-assistance> (06/12/2018)

Furthermore the EU lags behind the US in one aspect and it does not seem to change in the near future: the EU is still not in phase of political union, which is one of the greatest shortcomings of the EMU as several authors argue.<sup>77</sup> On the other hand, the supervising authorities of the US too, have to face some serious threats: the new president and his perception on economic policy hinder the results of the legislation achieved under the Obama administration. President Trump, as an entrepreneur and Republican opposes strict regulations and extensive financial market supervision. The case of the BFCP clearly demonstrates his attitude.

Thus the question is open: will the US regulation and supervising system remain as developed as the one of the EU, or the new administration will slowly, but steadily erode it and restore the era of deregulation. The latter one will surely lead to another crisis.

---

<sup>77</sup> The author intends to elaborate this matter in his next publication.