



universität
wien

MASTER-THESIS

Titel der Master-Thesis

„The influence of U.S. law on European financial reforms“

verfasst von

Nathan de Arriba-Sellier, Bakk.iur., Maîtrise

angestrebter akademischer Grad

Master of Laws (LL.M.)

Wien, 2015

Universitätslehrgang:	ULG Europäisches und Internationales Wirtschaftsrecht
Studienkennzahl lt. Studienblatt:	A 992 548
Betreut von:	William F. Baxter-Visa International Professor of Law G. Marcus COLE (Stanford Law School)



universität
wien

MASTER THESIS

Title of the Master Thesis

„The influence of U.S. law on European financial reforms“

Author

Nathan de Arriba-Sellier

expected academic degree

Master of Laws (LL.M.)

Vienna, 2015

Postgraduate Program:

European and International Business Law

Program Code:

A 992 548

Supervisor:

William F. Baxter-Visa International Professor of Law
G. Marcus COLE (Stanford Law School)

In Memoriam Prof. emer. François Sellier (1918-2001)

“PMTC”

I would like to thank naturally my parents for their support, as well as my supervisor, Prof. G. Marcus Cole, and Prof. Siegfried Fina, Prof. Janet Martinez and Dr. Roland Vogl for the chance to benefit from a summer research fellowship at Stanford Law School and for their hospitality there.

Table of contents

List of abbreviations.....	5
I. Introduction	7
II. The E.U. financial reforms, as inspired from the law of the United States	11
1) Derivatives and credit rating agencies, two issues of financial regulation born with the crisis	11
2) Corporate governance as an issue of financial regulation	21
III. The U.S. law, a reference rather than a model for the European lawmakers	29
1) The regulation of investment funds	29
2) The transformation of the European landscape of financial supervision	31
3) Too big to fail and the banking supervision	32
4) The difficult exportation of the Volcker banking separation rule	35
IV. Influence of the extraterritoriality of the U.S. law on both European finance and law	44
1) Some aspects of the extraterritoriality of U.S. law	45
2) The existence of extraterritorial provisions in European financial reforms	46
Conclusion.....	48
Bibliography.....	50
Zusammenfassung.....	57
Abstract	59

Nathan de ARRIBA-SELLIER is born in 1991 in the suburb of Lyon (France). He began his legal studies with a Bachelor of public law at Université Jean Moulin of Lyon, where he served as student vice-president of the University. Then he completed a *Maîtrise* of European law in Erasmus at Universität Hamburg (Germany) before joining the LL.M. programme of the University of Vienna. During the summer 2015, he was granted a summer research fellowship at Stanford Law School for the preparation of this Master Thesis. From September 2015, he will study at Collège d'Europe of Bruges (Belgium) and begin simultaneously a PhD in Law. Professionally, he worked *inter alia* in a Parisian law firm as an intern during the summer 2013 and assisted for sixth months the General Consul of France in Hamburg.

List of abbreviations

AIFMD: Alternative Investment Fund Managers Directive

CFTC: Commodity Futures Trading Commission

CRA: Credit ratings agency

CRD: Capital Requirements Directive

EMIR: European Market Infrastructure Regulation

EBA: European Banking Authority

ECB: European Central Bank

EIOPA: European Insurance and Occupational Pensions Authority

EFSF: European Financial Stability Facility

ESM: European Stability Mechanism

ESMA: European Securities and Markets Authority

E.U.: European Union

G20: Group of Twenty (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States of America, European Union)

GDP: Gross domestic product

MiFiD II: Markets in Financial Instruments Directive II

MiFiR: Markets in Financial Instruments Regulation

NRSRO: Nationally Recognized Statistical Rating Organization

OTC: over-the-counter

SEC: Securities and Exchange Commission

SRM: Single Resolution Mechanism

SSM: Single Supervisory Mechanism

UCITS: Undertakings for Collective Investment in Transferable Securities Directive

U.S.: United States

I. Introduction

The financial regulation currently runs out of steam. After half a dozen years during which laws and implementation regulations rained down upon the financial and banking sectors, do the European Union and the United States assist to a new deregulation movement? The question is worthy of consideration, as the U.S. Congress under Republican control is attempting to unravel the Dodd-Frank Act² and the European Commission is thinking about the way to facilitate securitization³. Therefore, it is time to review the financial reforms of these last years and to explore the interconnection between U.S. and E.U. financial regulation.

The major financial and economic crisis of 2007-2009⁴, also called the Great Recession, did not reveal any new phenomenon. It was not the first time the financial industry crashed and brought in the fall a very large part of the economy; these crises are as old as capitalism is. Nor was it the first global crisis, the Internet crash of 2001 is famous in this regard. However, this crisis is widely considered the most important one since the Great Depression of 1929. And on the opposite of 1929, it emerged in a very interconnected and globalized world thanks to free trade and new technologies. Finance plays also a more important role today than in 1929, as it does not know borders any more. Financial services, from bank to insurance, contribute significantly to the economy. According to the U.S. agency SelectUSA, they represented 7,9% of American gross domestic product in 2012.⁵ It is not only an economic phenomenon but also impacts the society, as a study calculated that 15% of 1990 Harvard University graduates were

² See Philip Bump, 'How Dodd-Frank is becoming the new Obamacare' The Washington Post (Washington D.C., 30 October 2014) <<http://www.washingtonpost.com/news/the-fix/wp/2014/10/30/how-dodd-frank-is-becoming-the-new-obamacare/>> Accessed on 18 March 2015; also Peter Eavis, 'Wall St. Wins a Round in a Dodd-Frank Fight' DealBook – The New York Times (New York, 12 December 2014) <<http://dealbook.nytimes.com/2014/12/12/wall-st-wins-a-round-in-a-dodd-frank-fight/?module=Search&mabReward=relbias%3As&r=1>> Accessed on 18 March 2015; and Jonathan Weisman & Eric Lipton, 'In New Congress, Wall St. Pushes to Undermine Dodd-Frank Reform' The New York Times (New York, 13 January 2015) <http://www.nytimes.com/2015/01/14/business/economy/in-new-congress-wall-st-pushes-to-undermine-dodd-frank-reform.html?_r=0> Accessed on 18 March 2015

³ See James Crisp, 'EU law could boost "safe" securitization' Euractiv.com (Brussels, 18 February 2015) <<http://www.euractiv.com/sections/eu-priorities-2020/eu-law-could-boost-safe-securitisation-312232>> Accessed on 18 March 2015

⁴ The benchmark is controversial. Some economists consider that the beginning should correspond to the beginning of the subprime mortgage crisis in 2006, however some States, in Europe for instance, entered into recession only in 2009. I take 2007-2009 as a reference because the mortgage crisis really began to impact the economy in 2007 with the economic recession of the United States and the crisis had reached every developed economy in 2009. After this date, it decreased progressively. Nonetheless, it continued to have an impact in several regions of the world, Europe for instance is still affected by a deflation phenomenon due to late consequences of the crisis (notably massive unemployment in southern Member States and slow growth).

⁵ See SelectUSA, *The Financial Services Industry in the United States* <<http://selectusa.commerce.gov/industry-snapshots/financial-services-industry-united-states>> Accessed on 31 December 2014

working in the financial services in 2005, whereas the 1970 graduates were only 5% in such position in 1985⁶. It is important to remark that the recent financial and economic crisis affected primarily the United States and the European Union, much more than other countries that are less developed, have smaller economic structures or do not rely on finance as much as the United States and the European Union do⁷.

In both cases, in the thirties and today, these two major financial crises led to an important movement of regulation targeting the financial sector *largo sensu* (markets, banks, insurances). After many years of deregulation, the self-regulation was considered a failure. For the public opinion, it proved that the financial system was not able to regulate itself correctly and recalled the importance of these systemic crises. It opened the debate of (re)regulation to correct these defaults and to reassure the taxpayers, who required bold action. After economists and public opinion, lawmakers had to act by passing bills. Professor Hall S. Scott explains clearly the underlying reasoning of financial regulation: “*if the system breaks down – which it often does - the results can be catastrophic. So one of the main objectives of financial law and regulation is to mitigate the risk of breakdown.*”⁸ As finance is international, regulation should therefore also be international and this is precisely what happened, at least for the two biggest economies of the world: the United States of America and the European Union (and also for Brazil, Japan, Singapore, etc.). Hence, on the opposite of 1929, the crisis produced a global movement of financial regulation. This regulation movement is quite new for the European Union as it is, as a whole, a more recently integrated economy than the United States. Even for its Member states individually, the first European regulations were adopted quite late, in the second half of the 20th century. For instance, the first French financial markets authority, the Commission des opérations de bourse was created in 1967 and the first British law addressing the banking sector was the Banking Act 1969. On the contrary, the United States took a bold regulation turn since the thirties with the adoption by the Congress of the Glass-Steagall Act of 1933⁹.

This recent change in the attitude of the lawmaker concerning finance *modus* is very interesting. For the first time, on both sides of the Atlantic, numerous and bold reforms were adopted to regulate the financial industry and counter the systemic risks for the economy its crises may cause. These recent reforms transform extensively the legal framework of the

⁶ See Claudia Goldin & Lawrence F. Katz, *Transitions: Career and Family Life Cycles of the Educational Elite* (2008) 98 *American Economic Review* 363

⁷ See John C. Coffee Jr, *Extraterritorial financial regulation: why E.T. can't come home* (2014) 99 *Cornell Law Review* 1266

⁸ See Hall S. Scott, *International Finance: Law and Regulation* (3rd edition, Sweet & Maxwell, 2012), viii

⁹ See Banking Act of 1933 (Pub.L. 73–66, 48 Stat. 162, enacted on 16 June 1933)

financial sector. They have also a deep impact on international finance, as Europe and the United States are the two most developed economies in the world, contributing together to almost the half of the global GDP, according to the data of the World Bank¹⁰. Financial regulation is also a current issues as it is affected by the recent free trade surge and should be treated in the current negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union¹¹.

A postulate originated this thesis. To influence E.U. law, it is presumed that U.S. law came first and was bold enough to have such effect on the European lawmaker. This presumption is largely based on the early adoption of the Wall Street Reform and Consumer Protection Act (further referred as the Dodd-Frank Act)¹². Together with the Glass-Steagall Act of 1933, the Dodd Frank Act of 2010 is largely considered as the deepest reform in the U.S. financial regulation, with more than 800 pages and 600 provisions, even if implementation regulations came later or are still not released. Then came the European reforms. The plural is intentional as the European regulation movement is much more fragmented than its American counterpart: the European Commission (the E.U.'s executive body) itself lists around 40 legislative initiatives in different areas to regulate the financial system since the crisis¹³. To give only some examples, the Alternative Investment Fund Managers Directive (AIFMD) was enacted in 2011, the European Market and Infrastructure Regulation (EMIR) in 2012, the Markets in Financial Instruments Directive II (MiFiD) and Regulation (MiFiR) in 2014, the structural banking reform is still under negotiation. This does not even take into account national reforms: *loi de régulation bancaire et financière* (Banking and financial regulation law) of 2010 and *loi de separation et de régulation des activités bancaires* (Banking separation and regulation law) of 2013 in France, Banking Act 2009 and Financial Services Act 2012 in the United Kingdom, *Gesetz zur Abschirmung von Risiken und zur Planung der Sanierung und Abwicklung von Kreditinstituten und Finanzgruppen* (Law of Compartmentalization of Risks and Restructuring and Winding-Up of Credit Institutions and Financial Groups) of 2013 in Germany. Indeed, the more fragmented nature of the European Union implies that both national and European institutions passed (sometimes contradictory) bills to reform the financial and banking sector.

¹⁰ See World Bank, *GDP (current US\$)* <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>> Accessed on 21 July 2015

¹¹ See Brett Bickel, *Harmonizing Regulations in the financial services industry through the Transatlantic Trade and Investment Partnership* (2015) 29 *Emory International Law Review* 557

¹² See Wall Street Reform and Consumer Protection Act of 2010 (Pub.L. 111–203, H.R. 4173, enacted on 21 July 2010)

¹³ See European Commission, *Progress of financial reforms* <http://ec.europa.eu/finance/general-policy/policy/map_reform_en.htm#row15> Accessed on 18 April 2015

The aim of this study is to examine, whether and, if so, to what extent did the U.S. law, and particularly the Dodd-Frank Act, create a substantive precedent that influenced the European lawmakers in drafting and adopting the new law of the European Union related to financial regulation. The Dodd Frank Act did not only precede the European reforms, it cleared the way for a reform of international finance. These new rules introduced by the United States were very discussed on both sides of the Atlantic, and therefore it is interesting to examine in what extent the recent developments of U.S. law affected the laws and regulations adopted by the European Union following the crisis. The thesis will try to analyze European financial reforms since the financial crisis in the light of the American reforms and, more precisely, to assess the influence of U.S. Law in European law, through preparatory works, institutional documents and legal analyzes. If the thesis will focused on the Dodd-Frank Act, however, previous laws should not be excluded, as they may be relevant in certain areas of financial law. Financial reforms encompass in this thesis reforms of both financial markets and banking sector. Insurance regulation does not fall within the scope, as it is a state competence and not a federal one under the U.S. constitutional law, and the E.U. adopted only limited regulations in this field¹⁴. It should also be noted that, among the E.U. financial reforms, some are specific to the form of the European Union and will not be subject to our analysis. The reforms following the sovereign debt crises (creation of the European Stability Mechanism, for instance) aim mainly at strengthening the economic integration of the different national Member States composing the European Union. Even if the European institutions have partly a different agenda, the European Commission outlining for instance the need of the creation of a capital markets union in its annual work program for 2015¹⁵, many reforms have still to deal with post-crisis financial regulation. Finally, a last remark, it should be underlined that the influence of U.S. law does not exclude another influence. For instance, the recommendations of the Group of Twenty (G20) played a key role in the international movement of financial regulation after the economic and financial crisis¹⁶. If the G20 gave the impulsion for a number of reforms, the U.S. law created such a precedent that it was deliberately used to design European financial law and this is what this thesis is about.

¹⁴ With the notable exception of the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (2009) OJ L 335/1 (Solvency II Directive)

¹⁵ See European Commission, *Commission Work Programme 2015 – A new start*, COM(2014) 910 Final <www.ec.europa.eu/atwork/pdf/cwp_2015_en.pdf> Accessed on 19 December 2014; see also European Commission, *Green Paper - Build the Capital Markets Union*, COM(2015) 63 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:63:FIN&from=EN>> Accessed on 20 March 2015

¹⁶ Sungjoon Cho, Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20* (2012) 12 Chicago Journal of International Law 491

The present paper looks in a second part (II) at the rules adopted by the European lawmaker, which were directly inspired by the Dodd-Frank Act or where the European Union aligned with U.S. law. Then, in a third part (III), it examines the influence of U.S. law on the European law but leading to the adoption of quite different, sometimes opposite, rules to the American ones. Due to the character of the thesis, it could not be exhaustive, I will therefore focus in both parts on certain aspects of the financial reforms adopted since the end of the 2000s, such as the banking structural changes, the protection of whistleblowers, the regulation of credit rating agencies, etc. These aspects may be representative of the different influences of the U.S. law on European financial reforms. Finally, the present thesis will treat briefly in a fourth part (IV) the question of the extraterritoriality of U.S. law affecting Europe. It is a real issue because, even if, as such, U.S. law does merely influence the European lawmaker, it has a direct and substantial influence on the European financial sector, and therefore, the subject should not be avoided.

II. The E.U. financial reforms, as inspired from the law of the United States

In key issues, the European lawmakers have drawn inspiration from the law enacted in the United States, both in areas of “pure” financial regulation and corporate organization. Regulation of derivatives, credit rating agencies, remuneration policies and whistleblowing have been adopted by the U.S. Congress, mostly in the Dodd-Frank Act, and have *a posteriori* spread to the European continent. It generated the interest of the co-lawmakers of the European Union in such extent that these have largely taken over the same principles and introduced them into E.U. law.

1) Derivatives and credit rating agencies, two issues of financial regulation born with the crisis

The Credit Rating Agencies were not spared from the regulation movement born after the financial and economic crisis; actually they were even quickly regulated. They were accused of conflict of interests, lack of transparency and inadequate methodology after having over-graded asset-backed securities and other financial instruments that led to the subprime mortgage crisis and its repercussions¹⁷. Evidently, the U.S. law has some influence in this matter, not only because the three major credit rating agencies are American, but above all because many provisions of U.S. financial law mentioned ratings and that it has organized a genuine legal status of credit rating agencies through the concept of Nationally Recognized Statistical Rating Organization (NRSRO)¹⁸. Even so, these agencies’ activities were mainly unregulated. Both U.S. and European law preferred, until the crisis, self-regulation.

However, this time, the European lawmaker was quicker to react first than the U.S. Congress. After having refused to act on this matter in 2006, because it was “*unproven*”

¹⁷ See U.S. Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* (U.S. Government Printing Office, 2011) 209-210 <http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf> Accessed on 15 February 2015; quoted by Margot Sève, *Les agences de notation: de la dérégulation à la ré-régulation* (Credit rating agencies: from deregulation to reregulation) (n16)

¹⁸ See Jan Oster, *Who rates the raters? The regulation of credit rating agencies in the EU* (2010) 17 Maastricht Journal of European and Comparative Law 353, 360

that an initiative in this area was “*strictly necessary*”¹⁹, the European Commission sang a different tune two years later by proposing a new regulation in a first anti-crisis package²⁰. This regulation was adopted in 2009, almost one year before Dodd-Frank Act was signed into law²¹. But quick action does not mean that it was free of any American influence. On the opposite, several reports of international organisms and above all the U.S. Credit Rating Agency Reform Act of 2006 were decisive in the drafting the regulation’s proposal²². The Commission’s goal was therefore to adopt a proposal consistent with the U.S. law by “*setting up a regulatory framework in the EU comparable to that applied in the US and based on the same principles.*”²³ For instance, Article 4(1) and 14 of the Regulation of 2009 create a registration mechanism similar to the NRSRO of U.S. law: financial undertakings “*may use credit ratings for regulatory purposes only if they are issued by credit rating agencies*” duly registered in the EU and, hence, complying with E.U. law. E.U. law contains some substantial requirements for a rating agency to comply with, such as rules on conflicts of interests, transparency and quality of the rating. Another example is the methodology provision of the Regulation of 2009 contained in article 8(2), which imposes the agencies to base their ratings on correct analyses but article 23(1) provides explicitly that: “*neither the competent authorities nor any other public authorities of a Member State shall interfere with the content of credit ratings or methodologies.*” The Section 15E(c)(2) of the amended Securities Exchange Act²⁴ contains a very similar provision, providing that: “*neither the (SEC) nor any State (or political subdivision thereof) may regulate the substance of credit ratings or the procedures and methodologies by which any nationally recognized statistical rating organization determines credit ratings.*” However, this regulation of 2009 was subject to criticism and after the first strikes of the

¹⁹ See European Commission, *Communication on Credit Rating Agencies*, Communication 2006/C 59/02 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:059:0002:0006:EN:PDF>> Accessed on 9 June 2015

²⁰ See European Commission, *Commission adopts proposal to regulate credit rating agencies* (Press Release, 12 November 2008) <http://europa.eu/rapid/press-release_IP-08-1684_en.htm> Accessed on 11 June 2015; and European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies*, COM(2008) 704 final <http://ec.europa.eu/finance/securities/docs/agencies/proposal_en.pdf> Accessed on 11 June 2015

²¹ Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (2009) OJ L 302/1

²² See Oster, *Who rates the raters? The regulation of credit rating agencies in the EU* (n17), 362

²³ See European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies*, COM(2008) 704 final, 3 <http://ec.europa.eu/finance/securities/docs/agencies/proposal_en.pdf> Accessed on 10 June 2015

²⁴ Securities Exchange Act of 1934 as amended through P.L. 112-158, approved on 10 August 2012

sovereign debt crisis, a new and bolder regulation was adopted in 2011 after having been proposed mid-2010.²⁵

Countering the former self-regulation of the sector, the U.S. Congress entrusted in 2008 the well-established Securities and Exchange Commission (SEC) to supervise the credit ratings agencies²⁶. In adopting the Dodd-Frank Act, it extended the prerogatives of the SEC by creating new duties upon the agencies that have to comply with the law to be registered as a NRSRO. The SEC got the power to sanction with the faculty of withdrawing a NRSRO license²⁷. The European lawmaker imitated its counterpart, in a Regulation of 2011 amending the already outdated Regulation of 2009, by entitling for the first time a European authority, the new European Securities and Markets Authority (ESMA)²⁸, to supervise directly a financial activity, i.e. the activity of credit ratings. ESMA monitors both the registration of credit rating agencies and their compliance with European law, it may, in coordination with national authorities, impose sanctions. It has already used this last new power in 2014. It sanctioned Standard & Poor's for infringement of the Regulation of 2009 for having released mistakenly a statement, which announced the downgrade of French sovereign bonds²⁹. Like the SEC, it may withdraw the registration of a credit rating agency in the European Union if it does not fulfill the requirements of E.U. law anymore or in case of serious infringement³⁰. ESMA has also the competence to adopt implementation regulations. Its role is therefore, similar to the U.S. Securities and Exchange Commission's under the amended Securities and Exchange Act of 1934 and the Dodd-Frank Act, even if it still lacks some of its powers and attributions.

In the proposal of the Commission leading to the Regulation of 2011, the introduction presents an amendment to the title on the issuance of credit ratings, concerning in particular the potential conflicts of interests existing between credit rating agencies and

²⁵ Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies (2011) OJ L 145/30

²⁶ See Sève, *Les agences de notation: de la dérégulation à la re-régulation* (Credit rating agencies: from deregulation to reregulation) (n16)

²⁷ *ibid*; also European Parliament, *Banking Union: The Single Resolution Mechanism* (Compilation of notes, 2013) 28

<<http://www.europarl.europa.eu/document/activities/cont/201304/20130422ATT64861/20130422ATT64861EN.pdf>> Accessed on 12 March 2015

²⁸ cf. *infra* III. 2)

²⁹ See European Securities and Markets Authority, *ESMA censures Standard & Poor's for internal control failings* (Press release, 3 January 2014) <<https://www.esma.europa.eu/news/Press-Release-ESMA-censures-Standard-Poor%E2%80%99s-internal-control-failings>> Accessed on 7 July 2015

³⁰ See European Parliament, *Banking Union: The Single Resolution Mechanism* (n26) 28

their clients. This amendment proposes that agencies and their clients may give access to the information they exchanged vis-à-vis the rated instruments. Detailing this important part of its proposal, the Commission referred explicitly to the corresponding rule adopted at the time by the U.S. Securities and Exchange Commission (SEC), and explained its will to ensure “*that similar rules are applied to CRAs operating in multiple jurisdictions in order to maintain a level playing field and a sufficient level of competition between CRAs.*”³¹ Leveling the playing field (and avoiding regulatory arbitrage), either among E.U. Member states or, concerning this thesis, between the United States and the European Union, is indeed a constant preoccupation of the European government. It was already a motivation of the content of its first proposal on credit rating agencies in 2008.³²

Under the previous legal regime, the credit rating activity was considered as a demonstration of the freedom of speech protected by the 15 December 1791 First Amendment to the Constitution of the United States³³. The Section 933(a) of the Dodd-Frank Act reversed the presumption by extending the liability regime of public accounting firms and financial analysts to credit rating agencies. Besides, Section 933(b) creates an obligation for these agencies to “*conduct a reasonable investigation*” and “*obtain reasonable verification*” of the facts basing the rating. Similar rules were transposed in E.U. law, also reversing the recent regime of Regulation of 2009. The new Regulation of 2013³⁴, the third in four years on the credit ratings agencies, considers that: “*Credit ratings, unlike investment research, are not mere opinions about a value or a price for a financial instrument or a financial obligation*”. And very like the Section 933 of the Dodd-Frank Act, it extends the liability of credit rating agencies by providing for a “*right of redress for investors who have reasonably relied on a credit rating issued in breach of Regulation (of 2009)*”. Therefore, the Regulation of 2013 introduces a new title IIIa, dedicated to civil liability of the credit rating agencies, in the Regulation of 2009.

The Regulation of 2013 seeks also to avoid over-reliance of financial institutions, either private or public, to credit ratings agencies. Previous to the crisis, number of regulations and laws, on both sides of the Atlantic, relied to the credit ratings for the implementation

³¹ See European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies*, COM(2010) 289 final, 6
<http://ec.europa.eu/finance/securities/docs/agencies/100602_proposal_en.pdf> Accessed on 12 June 2015)

³² See Oster, *Who rates the raters? The regulation of credit rating agencies in the EU* (n17) 363, 375

³³ See Frédéric Schneider *Les agences de notation et les pouvoirs publics* (Credit rating agencies and public authorities) (2015) 2015 *Revue de droit public et de la science politique en France et à l'étranger* 83

³⁴ Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies (2013) OJ L146/1

of public policies or as requirements in the private sector's activities, it created a special status of regulatory ratings, entrusting the sole private sector of this task. For instance, in the United States, the Section 2a-7 of the Investment Company Act of 1940 obliged the public monetary funds to invest only in short term assets of high quality³⁵. Like the Term Asset-back securities Loan Facility (TALF) established in 2008 allowed only the funding of securities graded AAA (or Aaa)³⁶, the post-crisis Solvency II Directive³⁷ relies significantly to credit ratings. The Solvency II Directive discourages also private investors to conduct their own ratings³⁸. The ratings of NRSROs were used as public benchmarks. In the European Union, the Capital Requirements Directive of 2006 (CRD I)³⁹ refers explicitly to credit ratings as official assessors of the quality of the financial instruments. Similarly to the SEC, the European Central Bank relied to credit ratings in its monetary operations, requiring a minimal "*credit quality threshold*"⁴⁰. To reverse this situation of regulatory ratings, the Regulation of 2013 adds a new article 5a to the Regulation of 2009 to avoid the overreliance of financial markets to credit ratings. The E.U. law itself is also targeted, as the new article 5c obliges the European institutions to review E.U. law in order to remove by 2020 any "*mechanic reliance on credit ratings*". Prior to the Regulation, the three European financial supervision authorities, the EBA, ESMA and the EIOPA promised to remove every reference to credit ratings agencies from their respective regulations⁴¹. In an opinion of 2 April 2012, the European Central Bank affirmed equally its participation to the effort of reduction of the excessive dependence to credit ratings⁴².

³⁵ See SEC, *Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets, As required by Section 702(b) of the Sarbanes-Oxley Act of 2002* (2003)

<<https://www.sec.gov/news/studies/credratingreport0103.pdf>> Accessed on 17 July 2015, quoted by Sève, *Les agences de notation: de la dérégulation à la re-régulation* (Credit rating agencies: from deregulation to reregulation) (n16)

³⁶ See Amadou N. R. Sy, *The Systemic Regulation of Credit Rating Agencies and Rated Markets* (2009) International Monetary Fund, WP/09/129 <<https://www.imf.org/external/pubs/ft/wp/2009/wp09129.pdf>> Accessed on 17 July 2015, quoted by Sève, *Les agences de notation: de la dérégulation à la re-régulation* (Credit rating agencies: from deregulation to reregulation) (n16)

³⁷ Directive 2009/138/EC (n13)

³⁸ See Sève, *Les agences de notation: de la dérégulation à la re-régulation* (Credit rating agencies: from deregulation to reregulation) (n16), 4

³⁹ Directive (EC) No 2006/49 of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (2006) OJ L 177/201

⁴⁰ See Sève, *Les agences de notation: de la dérégulation à la re-régulation* (Credit rating agencies: from deregulation to reregulation) (n16) 4

⁴¹ See European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1060/2009 on credit rating agencies*, COM(2011) 747 final

<http://ec.europa.eu/internal_market/securities/docs/agencies/COM_2011_747_en.pdf> Accessed on 12 June 2015; see also Sève, *Les agences de notation: de la dérégulation à la re-régulation* (Credit rating agencies: from deregulation to reregulation) (n16)

⁴² Regulation (EU) No 462/2013 (n33), rec. 5

These new European rules follow the initiative of the U.S. Congress contained in Section 939 of the Dodd-Frank Act removing statutory reference to credit ratings and, in Section 939A, obliging each federal agency to review any requirement or reference to credit ratings and to modify them in order to remove the reliance on credit ratings⁴³.

In 2006, the Credit Ratings Agency Reform Act sought to enhance the competition in the very concentrated market of credit ratings agencies⁴⁴. Indeed, the “Big Three” (Moody’s, Standard & Poor’s and Fitch) control 98% of the global market of credit ratings, according to some estimates⁴⁵. To pursue the same goal, the European Regulation of 2013 finally includes several provisions to strengthen competition in the sector, particularly by introducing new competitors and lowering the barriers of entry⁴⁶. For instance, it obliges in some cases the investors to ask for complementary ratings from an agency possessing less than 10% of the market shares⁴⁷.

Derivatives financial products⁴⁸, especially credit default swaps, were also largely accused to have worsened, if not provoked, the last financial and economic crisis⁴⁹. The collapse of the biggest insurance company of the United States, the American International Group (AIG), was demonstrative in this regard. Indeed, AIG collapsed mainly because of its significant reliance on uncovered credit default swaps carrying important risks⁵⁰. Their lack of transparency and great complexity were particularly targeted, making investors unable to correctly appreciate the risks underlying such products⁵¹.

⁴³ See European Parliament, *Rating Agencies – Role and Influence of their Sovereign Credit Risk Assessment in the Euro Area* (Compilation of notes, 2011), 29, 61

<<http://www.europarl.europa.eu/document/activities/cont/201203/20120323ATT41788/20120323ATT41788EN.pdf>> Accessed on 12 March 2015; see also Oster, *Who rates the raters? The regulation of credit rating agencies in the EU* (n17)

⁴⁴ Credit Rating Agency Reform Act of 2006, Pub.L. 109–291, 120 Stat. 1327 enacted on 29 September 2006

⁴⁵ See European Parliament, *Rating Agencies – Role and Influence of their Sovereign Credit Risk Assessment in the Euro Area* (n42), 25

⁴⁶ *ibid.* 30

⁴⁷ Regulation (EU) No 462/2013 (n33), rec. 10

⁴⁸ According to the Black’s Law Dictionary (9th edition, 2009), a derivative is “a financial instrument whose value depends on or is derived from the performance of a secondary source, such as an underlying bond, currency, or commodity”; details, other definitions and clear examples may be found in Mauricio Salazar, *Swapping more than Regulations: Reexamining the goals of the Dodd-Frank Act and the European Market Infrastructure Regulation on the over-the-counter derivative markets* (2014) 21 Southwestern Journal of International Law 217

⁴⁹ See Robert S. Bloink, *Does the Dodd-Frank Wall Street Reform Act Rein In Credit Default Swaps? An EU Comparative Analysis* (2011) 89 Nebraska Law Review 587

⁵⁰ See Coffee Jr, *Extraterritorial financial regulation: why E.T. can’t come home* (n6) 1262

⁵¹ See Eddy Wymeersch, *Regulation and Case law relating to Financial Derivatives* (2013) 2013 Revue de droit bancaire et financier, dossier n°10

This issue was legislatively addressed both in the U.S. Wall Street Reform and Consumer Protection Act of 2010, particularly in the title VII Wall Street Transparency and Accountability Act, and in the E.U.'s Regulation on over-the-counter derivatives, central counterparties and trade repositories of 2012, also known as the European Market and Infrastructure Regulation (EMIR)⁵². The European Commission proposed the EMIR to the European co-lawmakers in September 2010. Particularly noteworthy, the proposal of the European Commission explicitly mentions the law of the United States as having directly influenced the text proposed to the European co-lawmakers. This case is the single one I encountered of such unequivocal mention of the influence of the Dodd-Frank in a European proposal. The terms of the text are self-explanatory: *"In this context, this proposal is consistent with the recently adopted US legislation on OTC derivatives, the so-called Frank-Dodd Act."* Moreover, the proposal is going into the details of the similarities of the proposal with the Dodd-Frank Act and the paragraph should be read in full: *"The Act has a broadly identical scope of application. It contains similar provisions requiring the reporting of OTC derivative contracts and the clearing of eligible contracts. Furthermore, it puts in place strict capital and collateral requirements for OTC derivatives that remain bilaterally cleared. Finally, it puts in place a regulatory framework for trade repositories and upgrades the existing regulatory framework for CCPs. Similarly to the Commission's proposal, the Act foresees the further elaboration of a number of technical rules."* It should be recalled that the proposal of the Commission was delivered in September 2010, i.e. two months after the President of the United States signed the Dodd-Frank Act into law; and it was definitively adopted in 2012. Furthermore, the Commission underlined in its proposal of regulation that it *"has engaged in frequent dialogue with non-EU authorities, in particular US authorities (the CFTC, the SEC, the Federal Reserve Bank of New York and the Federal Reserve Board and the US Congress)."*⁵³ Therefore, it is clear that the European Market and Infrastructure Regulation was directly inspired by the Dodd-Frank Act of 2010. This is not only the affirmation of the European Commission: the U.S. Commodity Futures Trading Commission (CFTC)⁵⁴ and private analyses corroborate the

⁵² Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (2012) OJ L 201/1

⁵³ For these three quotations: European Commission, *Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories*, COM(2010) 484 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010PC0484&from=EN>> Accessed on 14 April 2015

⁵⁴ One of the two U.S. regulatory authorities charged to implement the provisions of the Dodd-Frank Act related to derivatives.

influence of the Dodd-Frank Act on EMIR⁵⁵. It should also be noted that the same applies for the Markets in Financial Instruments Regulation, part of the so-called MiFiD II legislation⁵⁶, which contributes to the European regulation of financial derivatives products by amending the EMIR. Indeed, in its *“Frequently asked questions”* memo related to the MiFiD II, the European Commission underlines that *“As regards the US, MiFiD II covers areas addressed by various pieces of US financial markets regulation such as the Securities Exchange Act and the Commodity Exchange Act. Like the Dodd-Frank Act, which amends these texts, the review of MiFiD both amends provisions already in force and adds measures in light of the financial crisis and other market developments. The US and EU approaches and legislation are very much aligned in terms of achieving the same objectives. For example, the revised MiFiD complements the regulation on OTC derivatives, central counterparties and trade repositories (EMIR)”*⁵⁷. Thus, the Commission regards the MiFiD II legislation, enacted four years after the Dodd-Frank Act, as both the formal and substantial European counterpart of the U.S. law concerning financial derivatives products. It is obvious that the Dodd-Frank Act of 2010 in this regard largely inspired the new E.U. law. However, both laws are not completely identical⁵⁸ and it may be interesting, beyond the reference of the European Commission’s proposal, to quickly oversee the main similarities and differences.

The aims of both reforms are to increase transparency in the over-the-counter (OTC) derivatives market, as these markets were considered very opaque and therefore able to propagate systemic risks without real faculty of control for the regulatory authorities⁵⁹. They both provide for derivatives trade reporting, however the European Union requires reporting only within one day, while the U.S. Wall Street Transparency

⁵⁵ See European Parliament, *Derivatives, central counterparties and trade repositories* (Compilation of notes, 2011), 28 <http://www.europarl.europa.eu/RegData/etudes/note/join/2011/451488/IPOL-ECON_NT%282011%29451488_EN.pdf> Accessed on 12 March 2015; also Bloomberg Brief, *EMIR Special Issue* (Financial Regulation, 2014), 2 <http://www.bloomberg.com/professional/content/uploads/sites/4/2015/02/Financial_Regulation_EMIR_Special_Issue_2014.pdf> Accessed on 7 July 2015

⁵⁶ The package MiFiD II (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (2014) OJ L 173/349 and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 OJ L 173/84) was enacted on 12 June 2014

⁵⁷ See European Commission, Markets in Financial Instruments Directive (MiFiD II): Frequently Asked Questions, MEMO/14/305 (2014) <http://europa.eu/rapid/press-release_MEMO-14-305_en.htm?locale=en> Accessed on 19 June 2015)

⁵⁸ See European Parliament, *Derivatives, central counterparties and trade repositories* (n54), 26

⁵⁹ *ibid.* 21

and Accountability Act of 2010 provide for real-time reporting⁶⁰ (thirty seconds, according to the recent implementation regulations!⁶¹). In this regard, they create data repositories of derivatives products: the Swap data repository in the United States and the Trade repository in the European Union⁶². The Dodd-Frank Act and the EMIR require that central counterparties assume the risk, as intermediaries⁶³. They require mandatory clearing for derivatives, even though the respective regulatory agencies are in charge of determining the ones effectively subject to these requirements and these agencies should review the notified mandatory clearings⁶⁴. If they are not subject to mandatory clearing, derivatives may be subject to additional requirements to mitigate risks, including higher capital (for the European Union, this requirement is provided under a different legislation, the CRD IV)⁶⁵. Position limits exist under both laws, however under European legislation, the MiFiD II is concerned in this regard and imposes position limits only to physically delivered contracts⁶⁶. Both laws include extraterritorial provisions, in article 4(2) of the EMIR and Sections 722 and 772 of the Dodd-Frank Act, for derivatives having a significant link or effect with their respective territories or that may be motivated by evading the rules provided in EMIR and Dodd-Frank⁶⁷. However, the European extraterritorial provisions may be more limited⁶⁸ and mutual recognition is also not insured⁶⁹.

⁶⁰ See Linklaters, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank Wall-Street Reform and Consumer Protection Act* (2012) <http://www.linklaters.com/pdfs/mkt/london/EMIR_DFA_Comparison_Chart.pdf> Accessed on 1 January 2015

⁶¹ See Bloomberg Brief, *EMIR Special Issue* (n54), 5

⁶² See Salazar, *Swapping more than Regulations: Reexamining the goals of the Dodd-Frank Act and the European Market Infrastructure Regulation on the over-the-counter derivative markets* (n47)

⁶³ *ibid.*

⁶⁴ See Linklaters, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank Wall-Street Reform and Consumer Protection Act* (n59)

⁶⁵ See Linklaters, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank Wall-Street Reform and Consumer Protection Act* (n59). The complete reference for the CRD IV may be found n96.

⁶⁶ See Bloomberg Brief, *EMIR Special Issue* (n54), 5

⁶⁷ See Linklaters, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank Wall-Street Reform and Consumer Protection Act* (n59)

⁶⁸ See Clifford Chance, *Dodd-Frank Act v. EMIR, Confirmation, reconciliation, compression and documentation rules* (Client briefing, 2012) <http://www.cliffordchance.com/briefings/2012/10/dodd-frank_act_vemirconfirmation.html> Accessed on 1 January 2015; also Linklaters, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank Wall-Street Reform and Consumer Protection Act* (n59)

⁶⁹ See Linklaters, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank Wall-Street Reform and Consumer Protection Act* (n59)

Among major differences, the European definition of derivatives has a much broader scope than the U.S. one, which focuses on swaps⁷⁰. The European derivatives, subject to the provisions of EMIR, encompass options, futures, swaps and any most derivative contracts⁷¹. Markets participants are divided in the EMIR between financial counterparties (investment and insurance companies and credit institutions) and non-financial counterparties (other companies and entities), while the Dodd-Frank Act extended its categories of markets participants from security-based swap dealers and major participants to two new categories of swap dealers and major participants⁷². Under EMIR, there is no requirement for registration of counterparties/market participants, but European law, through the Markets in Financial Instruments Directive, provided already for registration requirements. The markets participants, under U.S. law, are required to registration⁷³. Thus, major differences remains between U.S. and E.U. laws, although some commentators consider the two legal regimes as close from one another⁷⁴.

One of the differences between both laws was finally the requirement of the Dodd-Frank Act to trade derivatives only on electronic platforms, whereas the EMIR remained silent on the issue. This difference should be however largely removed with the new Markets in Financial Instruments Regulation⁷⁵.

The regime of short selling should finally be briefly mentioned. In September 2010, the European Commission submitted a proposal for a regulation on short selling. In the explanatory document of the proposal⁷⁶, the European Commission recalls extensively the legislation of the United States, including new elements introduced by the Dodd-Frank Act of 2010 (the Proposal seems to have been also influenced by the law of the Honk-Kong as it is mentioned in the explanatory document). To get into the detail, the document mentions the temporary emergency rules adopted by the SEC during the crisis, i.e. a “pre-

⁷⁰ See Mauricio Salazar, *Swapping more than Regulations: Reexamining the goals of the Dodd-Frank Act and the European Market Infrastructure Regulation on the over-the-counter derivative markets* (n47)

⁷¹ *ibid.*

⁷² See Linklaters, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank Wall-Street Reform and Consumer Protection Act* (n59)

⁷³ See Linklaters, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank Wall-Street Reform and Consumer Protection Act* (n59)

⁷⁴ See Bloomberg Brief, *EMIR Special Issue* (n54), 6

⁷⁵ See Wymeersch, *Regulation and Case law relating to Financial Derivatives* (n50)

⁷⁶ See European Commission, Proposal for a Regulation on Short Selling and Credit Default Swaps - Frequently asked questions (2010) Memo/10/409 <http://europa.eu/rapid/press-release_MEMO-10-409_fr.htm?locale=EN> Accessed on 5 March 2015

borrow” requirement on short selling of shares of some of the most systematically important financial institutions and a temporary ban of short sales of thousand issuer. The explanatory document mentions these rules along with long-lasting requirements such as the SEC’s Regulation SHO of 2004, which imposes a locate rule (restricting naked short selling) and a flagging regime⁷⁷. It refers also naturally to the new rules provided by the Dodd-Frank Act. These last ones include disclosure to the public of the amount of transactions concerned by short selling done by institutional investors. Furthermore, the Commission explains in the same document that: *“The Commission considers that the adoption of its proposals on short selling (...) would increase the convergence of the EU’s regulatory framework with that of the United States and Hong Kong.”* It is therefore clear that the provisions of the newly enacted Regulation were adopted to converge particularly with the law of the United States. Therefore, the new European legal regime provides for a locate rule, a flagging regime and disclosure of the daily volume of transactions (the Dodd-Frank Act let the SEC adopt a regulation for an at least-monthly disclosure). It gives also the power to act on short selling to the ESMA in situations of exceptional threat reaching a regional level, like the powers used by the SEC during the crisis; otherwise these powers are given to national authorities⁷⁸.

2) Corporate governance as an issue of financial regulation

The reregulation movement following the crisis focused primarily on the regulation of financial markets and banking entities. However, there are also other aspects that have interested lawmakers on the way of financial regulation. Thus, the corporate governance was affected these last few years by the new laws enacted on both sides of the Atlantic. Indeed, excessively risky business conducts and particularly short-term strategies adopted by very well paid CEOs were seen as having contributed to the crisis and shed light upon the regulation of executive compensation⁷⁹. The most discussed aspect of corporate governance in this regard

⁷⁷ According to the Memo/10/49 of the European Commission (cf. n73), a flagging regime means that *“all share orders on trading venues would be marked as 'short' by persons executing orders if they involve a short sale, so that regulators can obtain additional information about short selling volumes.”*

⁷⁸ Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (2012) OJ L 86/1

⁷⁹ See Stephanie Greene, Marisa Anne Pagnatarro, *“Say on Pay”: The Movement to Reform Executive Compensation in the United States and European Union* (2011) 31 Northwestern Journal of International Law and Business 597, 598

concerns the so-called “Say on Pay”⁸⁰. It means that the shareholders are given a right to say, and sometimes to vote, on the remuneration of the managers and directors⁸¹.

The “Say on Pay” in general corporate law is a more ancient issue than the crisis is. Early forms of say on pay may be found in the XIXth century, and the Securities Act of 1933⁸² and Securities Exchange Act of 1934 imposed transparency on executives’ pay⁸³, but it really emerged in the early 2000s in corporate law⁸⁴. National lawmakers in Australia, United Kingdom and France, Sweden enacted Say on pay provisions. However, the recent financial and economic crisis highlighted this issue and led the United States to introduce specific provisions into law, followed closely by the European Union. Say on Pay was first introduced into U.S. law through the Emergency Economic Stabilization Act of 2008 requiring the government bailout (Trouble Asset Relief Program) recipients to give shareholders a consultative vote on the remuneration of their companies’ executive body⁸⁵. The Section 951 of the Dodd-Frank Act extended this consultative Say on Pay (and golden parachutes⁸⁶) to every public company with a minimum equity float of \$75 million. Every six years, shareholders have to vote to define the frequency of the consultative Say and pay within the corporation⁸⁷. Besides, Section 953 of the Dodd-Frank Act also introduced another provision related to corporate governance into law to question the link between performance and remuneration. Under this Section, companies are annually required to release documents on their

⁸⁰ More marginally, the legislative corpuses on corporate governance were also modified with regard to proxy access and CEOs. Section 971 of the Dodd-Frank Act imposed the SEC to facilitate proxy access for shareholders in order to enable them to vote for the nomination of the directors, whereas the European Commission focused on the reliance of proxy advisory firms in a recent proposal (see n94 below for complete reference). Section 972 introduces a Section 14B within the Securities Exchange Act of 1934 requiring companies to explain the reason why the functions of chairman and CEO are combined or not. In this regard, the European CRD IV (see n96 below for complete reference) prohibits the combination of these two functions by credit institutions. *See also* Ivan Tchotourian, *Gouvernance d’entreprise et rémunération à l’aune de la nouvelle régulation financière américaine* (Corporate governance and remuneration in the lights of the new American financial regulation) (2010) 2010 Bulletin Joly Bourse 376. Finally, the E.U. decided to align financial accountability on the U.S. Generally accepted accounting principles, *see* E.U. High-level group on Financial Supervision in the EU, *Report* (Brussels, 2009) <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf> Accessed on 3 March 2015 (de Larosière Report); and Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (2013) OJ L 182/19

⁸¹ *See* Thomas S. Randall, Christoph van der Elst, *Say on Pay around the world* (2015) 92 Washington University Law Review 653

⁸² Securities Act of 1933, Pub. L. 73-22, 48 Stat. 74, enacted on 27 May 1933, codified at 15 U.S.C. § 77a et seq.

⁸³ *See* Greene, Pagnatarro, “Say on Pay”: *The Movement to Reform Executive Compensation in the United States and European Union* (n78) 599

⁸⁴ *See* S. Randall, van der Elst, *Say on Pay around the world* (n80) 653

⁸⁵ *ibid.* 653; *see also* Greene, Pagnatarro, “Say on Pay”: *The Movement to Reform Executive Compensation in the United States and European Union* (n78) 601

⁸⁶ *See* Greene, Pagnatarro, “Say on Pay”: *The Movement to Reform Executive Compensation in the United States and European Union* (n78) 598, 602

⁸⁷ *ibid.* 602

remuneration policies and on the relationship between the performance of the company and the executive remuneration⁸⁸. Furthermore, Section 956 provides for additional transparency requirements on financial institutions⁸⁹. The new law obliges also public companies to establish independent compensation committees and risk management committees, along with other rules for pay transparency⁹⁰. This wide range of remuneration requirements was enacted by the U.S. Congress to reconnect pay with shareholders interests. Thus, the new U.S. legislation shed light upon this issue and showed a link between financial regulation (the primary object of the Dodd-Frank Act) and post-crisis Say-on-pay, which inspired the European Union⁹¹.

Until recently, the European Union merely acted through European Commission's non-binding recommendations to encourage the Member states to enact laws related to this issue⁹², notably promoting in 2009 strong links between remuneration and performance and trying to diminish the financial incentives for taking risks⁹³. The issue was first treated as a legislative matter in the proposal for a new capital requirements directive in July 2009. However, the European Commission proposed only vague requirements subject to national supervision and sanctions. The financial institutions became obliged to promote in their remuneration policies "*sound and effective risk management*"⁹⁴. In June 2010, one month before the Dodd-Frank Act was signed into law, the European Commission finally decided to take bolder actions to treat the question of remuneration as part of the legislative process, specifically in order to ensure "*a global level playing field*"⁹⁵. As a result, and due to the amendments of the European co-lawmakers, the capital requirements directive of 2009 was the first one to be significantly impacted by the new strategy. The final CRD III Directive of 2010

⁸⁸ See Greene, Pagnatarro, "*Say on Pay*": *The Movement to Reform Executive Compensation in the United States and European Union* (n78) 606

⁸⁹ *ibid.* 609

⁹⁰ Section 952(a); see Greene, Pagnatarro, "*Say on Pay*": *The Movement to Reform Executive Compensation in the United States and European Union* (n78) 611

⁹¹ The European Commission took particularly a close look on financial services remuneration in its post-crisis recommendations, as it is specified in the Report on the application by Member States of the EU of the Commission 2009/384/EC Recommendation on remuneration policies in the financial services sector, COM(2010) 286 final <http://ec.europa.eu/internal_market/company/docs/directors-remun/com-2010-286-2_en.pdf> Accessed on 12 July 2015; see also Stéphane Rousseau *Le Say on Pay: l'expérience nord-américaine* (Say on Pay: The North-American experience) (2014) 2014 *Revue trimestrielle de droit commercial* 461

⁹² See Greene, Pagnatarro, "*Say on Pay*": *The Movement to Reform Executive Compensation in the United States and European Union* (n78) 615

⁹³ *ibid.* 622

⁹⁴ Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitizations, and the supervisory review of remuneration policies (2010) OJ L 329/3 (CRD III), first recital; see also Greene, Pagnatarro, "*Say on Pay*": *The Movement to Reform Executive Compensation in the United States and European Union* (n78) 627, 628

⁹⁵ See European Commission, Green Paper, Corporate governance in financial institutions and remuneration policies, COM(2010) 284 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0284:FIN:EN:PDF>> Accessed on 24 June 2015

imposes the payments of remuneration to be connected with the performance of the earner, establishes within the financial institutions an independent remuneration committee and enhances transparency requirements⁹⁶. The CRD III provides also for particular obligations upon companies that benefited from governmental bailouts. The CRD IV took over these provisions and went even further, e.g. by obliging financial institutions to have a risk management committee, provision identical to the Section 165 of the Dodd-Frank Act⁹⁷. These substantial changes in the E.U. legislation appear to be very similar to the requirements provided by the recently enacted U.S. law. It is in this regard particularly interesting to note that the same day it voted the CRD III, the European Parliament recommended to the European Commission to submit legislative proposals to extend to public companies the new remuneration requirements and to limit golden parachutes, similarly to what the U.S. Congress voted in the Dodd-Frank Act shortly before⁹⁸. In this regard, the European Commission finally submitted a proposal in 2014⁹⁹. This proposal aims at introducing real American-style Say on pay for public companies¹⁰⁰, i.e. a consultative vote on the remuneration policy and the relationship between remuneration and performance. Thus, this proposal, currently discussed by the European co-lawmakers, almost copied the U.S. Say on pay provisions.

⁹⁶ See Benoît Lecourt, *Rémunération des dirigeants de sociétés cotées et politique de remuneration dans le secteur des services financiers: vers l'adoption de normes contraignantes* (Executive compensation of public listed companies and remuneration policy in the sector of financial services: towards the adoption of binding standards) (2010) 2010 *Revue des sociétés* 607

⁹⁷ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (2013) OJ L 176/338 (CRD IV); see S. Randall, van der Elst, *Say on Pay around the world* (n80) 653; also Benoît Lecourt, *La directive "CRD IV" du 26 juin 2013 et les mesures ayant trait au gouvernement d'entreprise* (The CRD IV directive of 26 June 2013 and the provisions relating to corporate governance) (2013) 2013 *Revue des sociétés* 654; and Kristin N. Johnson, *Macroprudential regulation: A sustainable approach to regulating financial markets* (2013) 2013 *University of Illinois Law Review* 881

⁹⁸ See European Parliament, Resolution of 7 July 2010 on remuneration of directors of listed companies and remuneration policies in the financial services sector, TA(2010)0265; see also Lecourt, *Rémunération des dirigeants de sociétés cotées et politique de remuneration dans le secteur des services financiers: vers l'adoption de normes contraignantes* (Executive compensation of public listed companies and remuneration policy in the sector of financial services: towards the adoption of binding standards) (n95) 607

⁹⁹ See European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, COM(2014) 213 final <http://eur-lex.europa.eu/resource.html?uri=cellar:59fccf6c-c094-11e3-86f9-01aa75ed71a1.0003.01/DOC_1&format=PDF> Accessed on 22 June 2015

¹⁰⁰ See Stéphane Rousseau, *Le Say on Pay: l'expérience nord-américaine* (Say on Pay: The North-American experience) (n90) 461

Less oriented to pure governance, whistleblowing may be an ancient issue of relative importance for the United States with regard to the last financial and economic crisis. Legislation on whistleblowing, to protect whistleblowers, is enforced for a while in the United States and already existed in the XIXth century¹⁰¹. The issue is however a bit more recent in the field of financial regulation. The Securities Exchange Act of 1934¹⁰² defined for the first time the concept of whistleblowing and set in Section 21F of the Act the protection of whistleblowers employed in the financial sector¹⁰³. More well known, the Sarbanes-Oxley Act of 2002 focused on this particular issue after the ENRON and Worldcom scandals¹⁰⁴. Section 301 aims at ensuring protection for whistleblowers through reporting systems and reinstatements of whistleblowers. However, no financial incentives were created at this time. In particular, Section 806 of the Act establishes a liability regime for retaliatory employers against whistleblowers¹⁰⁵. This attracted particular attention from the European Union, as the provisions of the Sarbanes-Oxley Act were applied to European transnational corporations through extraterritorial effects. But until the crisis, it did not provoke a legislative reaction from the European lawmakers and the only real legal debate it caused was focused on the coexistence of such provisions with the very protective European data protection¹⁰⁶. In particular, the implementation of corporate hotlines to report infringements to the regulations was the most debated aspect of this newly enacted U.S. law. Whistleblowing was largely ignored from European law before the financial and economic crisis, with regard to financial law¹⁰⁷.

The Dodd-Frank Act did not really shake the issue, nor it identified whistleblowing as a top priority¹⁰⁸. However, the U.S. Congress considered during the legislative process of the Dodd-Frank Act that better whistleblowing would have limited the scale and the impacts of the

¹⁰¹ See Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010* (2012) 43 Loyola University Chicago Law Journal 427; also Vincent Rebeyrol, *La réception du "whistleblowing" par le droit français (The receipt of whistleblowing in French law)* (2012) 2012 La Semaine Juridique Entreprise et Affaires 1386

¹⁰² Securities Exchange Act of 1934, Pub.L. 73–291, 48 Stat. 881, enacted on 6 June 1934, codified at 15 U.S.C. § 78a et seq.

¹⁰³ See Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010* (n100)

¹⁰⁴ See Gerlind Wisskirchen, *The Introduction of Whistleblower Systems in the European Union* (2010) 77 Defense Counsel Journal 366; also Peter Hauser, *Whistleblowing: chance or risk? – new tendencies in Europe* (2013) 2013 European Insurance Law Review 51; and Eric Alt, *Lanceurs d'alerte: un droit en tension (Whistleblowers: a tensioned right)* (2014) 2014 La Semaine Juridique Edition Générale 1092

¹⁰⁵ See Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010* (n100)

¹⁰⁶ See Rebeyrol, *La réception du "whistleblowing" par le droit français (The receipt of whistleblowing in French law)* (n100)

¹⁰⁷ However, a whistleblowing program (so-called "Leniency policy") exist for a long time in E.U. competition law, see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006) OJ C 210/2

¹⁰⁸ See Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010* (n100)

last financial and economic crisis¹⁰⁹. Later, the Madoff case contributed to highlight the issue¹¹⁰. Therefore, the U.S. Congress reopened the debate and included several provisions to reaffirm the protection against retaliation and particularly improve the financial incentives of whistleblowers. To this end, it created a whistleblowing bounty program to attribute awards to whistleblowers¹¹¹. Moreover, the lawmakers sought to enhance the effectiveness of the principles adopted by the U.S. Congress in previous laws¹¹².

As a result, protection of whistleblowing was newly considered a solution in Europe and executive bodies and lawmakers attempted to address at last this issue within the financial regulation corpus. The Council of Europe addressed first this issue. Even if it has no real legislative power¹¹³, both its Parliamentary Assembly in 2010 and Council of Ministers in 2014 recommended successively to the Member states to create a legislative framework to protect whistleblowers¹¹⁴. The European Commission issued also several recommendations to the Member states to enact laws on whistleblowing¹¹⁵. The E.U. biannual anti-corruption report of 2014 calls also for protective measures for whistleblowers, considering it as a ‘background’ and a “key” issue¹¹⁶.

Beyond international politics and soft law, the European Union addressed also this issue through legally binding texts. The European Parliament included in 2013 protection of whistleblowers in a criminal law package, asked the European Commission for submitting legislation proposals on this issue and for establishing a European whistleblower program, a proposition similar to what already exists in the United States¹¹⁷. In the last Undertakings for Collective Investment in Transferable Securities Directive (UCITS V)¹¹⁸, the European

¹⁰⁹ *ibid.*

¹¹⁰ See Rebeyrol, *La réception du “whistleblowing” par le droit français* (The receipt of whistleblowing in French law) (n100)

¹¹¹ See Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010* (n100)

¹¹² See Alexandra Webster, *Developments in Whistleblowing* (2015) 16 Business Law International 65; also Hauser, *Whistleblowing: chance or risk? – new tendencies in Europe* (n103); and Rebeyrol, *La réception du “whistleblowing” par le droit français* (The receipt of whistleblowing in French law) (n100)

¹¹³ The Council of Europe is an international organization, founded in 1949. It may only have a binding effect on its 49 Member states through the ratification and implementation of the European Convention on Human Rights (ECHR) and the respect due to the judgments of the European Court on Human Rights (ECtHR).

¹¹⁴ See Webster, *Developments in Whistleblowing* (n111); also Hauser, *Whistleblowing: chance or risk? – new tendencies in Europe* (n103)

¹¹⁵ See Webster, *Developments in Whistleblowing* (n111)

¹¹⁶ *ibid.*; European Commission, Report from the Commission to the Council and the European Parliament, E.U. Anti-corruption report, COM(2014) 38 final <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf> Accessed on 28 April 2015

¹¹⁷ See Webster, *Developments in Whistleblowing* (n111)

¹¹⁸ Directive of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective

lawmakers enacted that each national regulatory authority should establish a hotline dedicated to whistleblowing¹¹⁹, extending after the Madoff case the regime existing for alternative investment funds managers to individual investors of these funds and taking over the Section 301 existing since the enactment of the Sarbanes-Oxley Act¹²⁰. Still concerning investors, the Markets in Financial Instruments Directive (MiFiD II)¹²¹ applied the requirement of internal and autonomous processes to collect alerts from the staff to all providers of investment services. Similar requirements for reporting systems were made in the amending Directive about supplementary supervision on finance conglomerates¹²², applying the regime of whistleblowing to the financial holdings. This directive imposes Member states to take protective measures for whistleblowing employees, included the protection of their identities¹²³. Lawmakers had therefore to include in E.U. law numerous provisions that have been introduced and enacted by the U.S. Congress in the Sarbanes-Oxley Act of 2002. The work is not achieved yet and it is important to underline that the E.U. authorities keep in mind this issue. For instance, the currently discussed proposal of directive protecting trade secrets includes a safe harbor provision for whistleblowers disclosing a trade secret necessary “*for the purpose of revealing an applicant’s misconduct, wrongdoing or illegal activity*”¹²⁴. Even with regard to financial incentives, European lawmakers came forward, with direct references to the Dodd-Frank Act, notably article 32 of the Directive on market abuse of 2014 that Member states are encouraged to grant financial incentives to whistleblowers¹²⁵; and the E.U. authorities are considering to go further with introducing financial incentives in E.U. law, again with

investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (2014) OJ L 257/186 (UCITS V)

¹¹⁹ See Webster, *Developments in Whistleblowing* (n111)

¹²⁰ See Hauser, *Whistleblowing: chance or risk? – new tendencies in Europe* (n103)

¹²¹ Directive 2014/65/EU (n54)

¹²² See Hauser, *Whistleblowing: chance or risk? – new tendencies in Europe* (n103); Directive 2011/89/EU of the European Parliament and of the Council of 16 November 2011 amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC as regards the supplementary supervision of financial entities in a financial conglomerate (2011) OJ L 326/113

¹²³ See Hauser, *Whistleblowing: chance or risk? – new tendencies in Europe* (n103)

¹²⁴ See European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, COM(2013) 813 final

<http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com%282013%290813_/com_com%282013%290813_en.pdf> Accessed on 28 April 2015

¹²⁵ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (2014) OJ L 173/1; see Holg Fleischer, Klaus Ulrich Schmolke, *Financial Incentives for Whistleblowers in European Capital Markets Law? Legal Policy Considerations on the Reform of the Market Abuse Regime* (2012) ECGI – Law Working Paper No. 189/2012

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2124678> Accessed on 22 July 2015

references to the U.S. law¹²⁶. Finally, this new European legal framework gives inquiry powers to regulatory authorities, which have a duty to protect the whistleblowers¹²⁷.

Even shy, these first legal innovations proved that the wind shifted direction and that the European debate on whistleblowing is no more merely reduced to a data protection issue, but really considered as a corporate governance one. Within a few years, the European lawmakers copied and applied the main provisions of the U.S. Sarbanes-Oxley Act of 2002¹²⁸.

However, the European lawmakers did not only copy or adapted U.S. law to the European continent, they have also enacted proper legislation, more adequate to the political and economic structure of Europe and responding to concerns arising there. Although, it did not prevent the lawmakers to often refer in their legislative activity to the Dodd-Frank Act and other laws of the United States. Thus, U.S. law has also influenced the E.U. law, whereas the European Union maintained or adopted provisions that differ from the other side of the Atlantic.

¹²⁶ See Jan Keuchel, 'EU-Kommission will Whistleblower-Prämie einführen' (EU Commission wants to introduce whistleblowers rewards) Handelsblatt (Düsseldorf, 25 October 2012) <http://www.handelsblatt.com/politik/international/wirtschaftskriminalitaet-eu-kommission-will-whistleblower-praemie-einfuehren/7301992.html>, quoted by Hauser, *Whistleblowing: chance or risk? – new tendencies in Europe* (n103); also European Parliament, *Tax: warm welcome for whistleblowers and investigative journalists* (Press Release, 11 May 2015) <http://www.europarl.europa.eu/news/en/news-room/content/20150511IPR54731/html/Tax-warm-welcome-for-whistleblowers-and-investigative-journalists>

¹²⁷ See Arut Kannen, Jean-Baptiste Pouille, *MIF II: la protection des investisseurs* (MiFiD II: Protection of investors) (2014) 2014 *Revue de Droit bancaire et financier*, dossier 61; Directive MiFiD II cf. supra n55

¹²⁸ See Hauser, *Whistleblowing: chance or risk? – new tendencies in Europe* (n103)

III. The U.S. law, a reference rather than a model for the European lawmakers

Even without having imported the law of the United States to Europe, the European lawmakers have regularly been influenced in the adoption of the legislation by the Dodd-Frank Act of 2010 and the legislative corpus enforced in the United States. This influence is particularly focused on banking issues, such as the structural banking rules and the implementation of the Basel Committee's recommendations. However, the influence of the U.S. law is reflected also in the more general financial supervision or in the regulation of investment funds, this one being in a more nuanced position in this regard.

1) The regulation of investment funds

Prior to the financial and economic crisis, investment funds benefited from a situation of quasi-absence of regulation, in the United States, the Advisers Act of 1940 exempted them from any regulation¹²⁹. In the European Union, they were only subject to national laws¹³⁰. However, quick legislation from both sides of the Atlantic has radically changed the deal. Both the U.S. Private Fund Investment Advisers Registration Act included in the Dodd-Frank Act of 2010 and the E.U. Alternative Investment Funds Managers Directive of 2011 (AIFMD) aimed at mitigating the risks revealed by the crisis, notably because of the great reliance of investments funds on derivative financial products¹³¹.

Long prior to the adoption of the Dodd-Frank Act, and even before the Obama administration released its project of financial reform¹³², the Commission proposed the project of the directive. However, the text of the proposal already mentioned that: *"the Commission will continue to work with its international partners, in particular the United States, to ensure regulatory and supervisory convergence of the rules applying to AIFM and avoid regulatory overlap."* Finally, the E.U. legislation was adopted in June and came into

¹²⁹ See Lynn V. Dymally, Barbara C. George, *The end of an area of limited oversight: the restructured regulatory landscape of private investment funds through the U.S. Dodd-Frank Act and the E.U. Alternative Investment Fund Managers Directive* (2013) 25 Florida Journal of International Law 233

¹³⁰ *ibid.* 210

¹³¹ *ibid.* 212, 213, 215

¹³² See U.S. Department of the Treasury, *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation* (2009) < http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf >
Accessed on 2 April 2015

force in July 2011, one year later than the Dodd-Frank Act¹³³. As a result, it includes provisions similar to the newly signed U.S. law, although the AIFMD is more detailed and has a broader scope¹³⁴. It has however to be noted that the AIFMD did not only search for investment funds regulation but also for allowing them to freely provide services within the European Union (the European passport)¹³⁵. In the detail, Section 402 of the Dodd-Frank Act defines “*private investment funds*” as encompassing hedge funds, private equity and venture capital funds, whereas the AIFMD are also directed at all investment funds that are not falling within the scope of the *Undertakings for Collective Investment in Transferable Securities Directive*. “*Alternative investment funds*” shall be registered with a competent national authority to ensure compliance with E.U. law, while U.S. private investment funds had to be registered with the Securities and Exchange Commission. Both laws grant exemptions for small funds through the establishment of thresholds generally above 100 million of their respective currencies¹³⁶. However, the newly created European Securities and Markets Authority is entrusted of the regulations of the investment funds, similarly to the U.S. SEC¹³⁷. Under the Dodd-Frank Act, the private investment funds are subject to reporting and recordkeeping requirements¹³⁸. The AIFMD provides also for transparency and reporting requirements similar to the U.S. law¹³⁹. Reporting requirements include, for instance, reporting on leverage, risk management and liquidity¹⁴⁰. Nonetheless, E.U. law is much more detailed than the U.S. Dodd-Frank Act concerning requirements for business conducts, such as corporate governance, remuneration policies, and conflicts of interests¹⁴¹.

¹³³ The provisions of the Dodd-Frank Act were also much discussed within the U.S. Congress, see Dymally, George, *The end of an area of limited oversight: the restructured regulatory landscape of private investment funds through the U.S. Dodd-Frank Act and the E.U. Alternative Investment Fund Managers Directive* (n128) 232

¹³⁴ *ibid.* 258

¹³⁵ *ibid.* 253

¹³⁶ *ibid.* 260

¹³⁷ *ibid.* 238, 256, 257; the ESMA was created according to the Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (2010) OJ L 331/84

¹³⁸ *ibid.* 233

¹³⁹ *ibid.* 259

¹⁴⁰ *ibid.* 243, 261, 262; also Bertrand Gibeau, *AIFMD: entre obligations réglementaires et nouvelles opportunités business* (AIFMD: between regulatory obligations and new business opportunities) (2014) 2014 Bulletin Joly Bourse 34

¹⁴¹ See Dymally, George, *The end of an area of limited oversight: the restructured regulatory landscape of private investment funds through the U.S. Dodd-Frank Act and the E.U. Alternative Investment Fund Managers Directive* (n128) 260

2) The transformation of the European landscape of financial supervision

Before the financial and economic crisis, the European Union was a regulatory dwarf concerning financial supervision. Financial oversight was completely fragmented and dependent of the Member states' good will. From 2001, according to the Lamfalussy process¹⁴², European committees were created to assemble the different national regulators, according to their respective supervision fields: the Committee of European Securities Regulators was created in 2001, the Committee of European Insurance and Occupational Pensions Supervisors in 2003, the Committee of European Banking Supervisors in 2004. These committees had primary an advisory role. Since then, major changes were introduced into E.U. law. First, the roles of these committees were a bit strengthened in January 2009 to enhance cooperation and convergence among E.U. Member states. In September 2009, the Commission launched a proposal consistent with the recommendation of the De Larosi re Report to transformed financial supervision on the European level¹⁴³. Three European supervisory authorities replaced the three former committees: the European Banking Agency (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). Progressively throughout the post-crisis European financial regulation (MiFiD, EMIR, Banking Union, etc.), these authorities were granted the competences to adopt implementation regulations of the European legislation, ensure coordination and mediation between national supervisors, supervise directly certain types of financial institutions such as the credit rating agencies and impose sanctions for rules infringements. The European Central Bank was also granted new regulatory competences, particularly concerning the banking union and supervision¹⁴⁴.

As a result, the ESMA plays today a very close role to the one attributed to the U.S. Securities and Exchange Commission, with regard to regulation of credit rating agencies, derivatives, investment funds, etc.¹⁴⁵ The EBA endorses the role of European-style Federal

¹⁴² See The Committee of Wise Men on the Regulation of European Securities Market, Final Report (Brussels, 2001) <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf> Accessed on 10 June 2015 (The Lamfalussy Report)

¹⁴³ See the De Larosi re Report (n79)

¹⁴⁴ cf. supra III.1)

¹⁴⁵ See Dymally, George, *The end of an area of limited oversight: the restructured regulatory landscape of private investment funds through the U.S. Dodd-Frank Act and the E.U. Alternative Investment Fund Managers Directive* (n128) 257

Financial Institutions Examination Council¹⁴⁶. And the European Central Bank looks much more now like the Federal Reserve, than before the crisis. Finally, similarly to the creation of the Financial Stability Oversight Council by the Dodd-Frank Act¹⁴⁷, the European lawmakers established a macro-prudential supervisor, the European Systemic Risk Board bringing together the different European regulators under the same roof, analyzing information, preventing risks and issuing recommendations¹⁴⁸. Besides, the European Commission recognized in a communication of 2010 that, like the U.S. Dodd-Frank Act, the new European plan for better financial supervision aimed at increasing “*regulatory enforcement and remedies*”¹⁴⁹.

3) Too big to fail and the banking supervision

The influence of the U.S. law is not only present in the substance; it is also shown in the method. For the implementation of the Basel III Agreement, the European lawmaker, who had strictly respected and transposed the past Basel rules in E.U. law, decided to take some distance with the new ones. It has done that by not respecting parts of the requirements, such as reducing the capital requirements for the *bancassurance* sector (companies operating both banking and insurance activities), arguing that what matters was the spirit and not the letter of Basel III¹⁵⁰. Furthermore, the European lawmaker imposed additional requirements that are not part of the Basel III Agreement, considering that as a “*Basel III Plus*”. Hence, it imposed in the CRD IV of 2013 (4th Capital Requirement Directive and Regulation)¹⁵¹ new limits on bankers’ remuneration that do not figure in Basel III. This was the result of the disagreement European negotiators had in the process of adoption of Basel III. Although negotiators of the Group of Seven (G7) were the ones who adopted the Basel I and Basel II Agreements, the negotiating body of Basel III was extended after the crisis to officials of emerging economies part of the

¹⁴⁶ See Andrea Jennings, *Developments in Banking Law – Toward an EU Banking Union* (2012) 32 Review of Banking & Financial Law 17

¹⁴⁷ See Johnson, *Macroprudential regulation: A sustainable approach to regulating financial markets* (n96) 897

¹⁴⁸ See European Parliament, *fact sheet : European System of Financial Supervision (ESFS)* (2014) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.2.5.html> Accessed on 17 July 2015

¹⁴⁹ See European Commission, *Reinforcing sanctioning regimes in the financial services sector*, COM(2010) 716 final, 3 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0716:FIN:EN:PDF>> Accessed on 17 July 2015

¹⁵⁰ See Jeffery Atik, *EU implementation of Basel III in the shadow of Euro crisis* (2013) 33 Review of Banking and Financial Law 292, 295; also European Commission, *Statement on Basel Regulatory Consistency Assessment of Basel III implementation* (Press Release, 5 December 2014) <http://europa.eu/rapid/press-release_STATEMENT-14-2403_en.pdf> Accessed on 5 March 2015

¹⁵¹ Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements for Credit Institutions and Investment Firms (2013) OJ L 176/1 and Directive 2013/36/EU (n96)

Group of Twenty (G20). Therefore, the new agreement includes some elements demanded by the emerging economies, interfering with the plans of the European lawmaker, even if the G20 then adopted this framework.

Almost the same situation occurred for Basel II, with regard to the United States Congress¹⁵², as the Basel II agreement partly resulted from European requests. Thus, due to the concerns of safety and competitiveness¹⁵³, the U.S. regulation authorities delayed the adoption of Basel II, applied only parts of it¹⁵⁴ and imposed additional requirements¹⁵⁵, absent from the original agreement. For instance, the U.S. authorities modified the capital requirements and the temporary implementation¹⁵⁶; the small banks were also preserved from the new rules. The European lawmakers used thus the U.S. precedent to distance themselves from the Basel III agreement (which is still not subject to adoption by the United States).

The Banking Union was a bold project adopted after the financial and economic crisis, partly because of its impact on the sovereign debts provoked by the so-called sovereign debt crisis and affected Ireland, Portugal, Spain, Italy and still affects Greece. However, unlike for the establishment of the EFSF and the ESM, the Banking Union aims at reforming the banking system, rather than protecting the Member states or directly strengthening the federal state of the European Union. The Banking Union was launched by the European Council in June 2012 and exposed in details by the Commission in September¹⁵⁷. It goes further the projects of prudential surveillance developed in 2010. The Banking Union establishes a uniform regulation for the European banking sector, the “Single Rulebook”, and creates a system of banking supervision and resolution, called the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) applying in the whole European Union, but Sweden and the United Kingdom who opted out this reform. The main goal of the Banking union, following the Dodd-Frank Act, is to avoid taxpayers to pay for bank bailouts¹⁵⁸.

¹⁵² See Atik, *EU implementation of Basel III in the shadow of Euro crisis* (n149) 293, 295

¹⁵³ See European Parliament, *U.S. Implementation of Basel II: Final Rules Issued, But No Supervisory Approvals to Date* (Briefing note, 2011), 11

<<http://www.europarl.europa.eu/document/activities/cont/201110/20111012ATT29102/20111012ATT29102EN.pdf>> Accessed on 12 March 2015

¹⁵⁴ *ibid.* 10, 11

¹⁵⁵ *ibid.* 12

¹⁵⁶ *ibid.* 12

¹⁵⁷ See European Commission, *A Roadmap towards a Banking Union*, COM(2012) 510 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0510&from=EN>> Accessed on 27 June 2015

¹⁵⁸ See Martin Hellwig, *Yes Virginia, There is a European Banking Union! But It May Not Make Your Wishes Come True* (2014) Max Planck Institute for Research on Collective Goods, Preprint 2014/12, 21

Prior to the Banking Union, the regulation establishing the European Banking Authority (EBA) implemented the bases of a European supervision and resolution system, with, in particular, the realization of stress tests on banks by national authorities in coordination with the EBA¹⁵⁹, following the example of the Section 165(i)(2) of the Dodd-Frank Act. These banking stress tests led to mitigate results and have brought the European lawmaker to the conclusion that additional steps were required¹⁶⁰. The new difficulties that faced Greece and then Cyprus in 2012 played also a role in this matter. With regard to this first reform, the paper of the European Commission detailing its principles mentioned in its introduction the implementation of a resolution framework in the United States by the Dodd Frank Act for banks' defaults that may carry systemic risks. In this regard, the Commission mentions that "*it is closely monitoring*" this reform, along with the G20's recommendations¹⁶¹. Actually, the banking resolution provisions rely mainly on the U.S. long experience in this area, whereas most of the European Member states had not enacted any resolution mechanism before the recent financial and economic crisis¹⁶². Indeed, if the European lawmakers did not transpose U.S. law into E.U. legislation, the management of the crisis by the U.S. Federal Deposit Insurance Corporation may have particularly influenced them in their drafting of the European Banking Union; a scholar even considers that the new European framework suffers from the very same loopholes than the United States¹⁶³.

With the new Banking Union, the European Central Bank (ECB) becomes the new supervising authority. Until then, it was only entitled to conduct the monetary policy of the Member states having adopted the Euro (the Eurozone)¹⁶⁴. The European Banking Authority was not removed, but some of its competences as well as competences of national authorities were transferred to the European Central Bank as the main banking supervisor of the European Union, even for the members who are not yet part of the single currency. With this reform, the ECB is entitled to adopt and implement regulations, for instance, by directly conducting bank

¹⁵⁹ 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 (2010) OJ L 331/12

¹⁶⁰ See Anne Michel, '*L'Autorité bancaire européenne n'a pas fait ses preuves*' (The European Banking Authority did not prove itself valuable) Le Monde (Paris, 20 June 2012)

<http://abonnes.lemonde.fr/economie/article/2012/06/20/l-autorite-bancaire-europeenne-n-a-pas-fait-ses-preuves_1721751_3234.html> (accessed on 3 July 2015)

¹⁶¹ See European Commission, *An EU Framework for Crisis Management in the Financial Sector*, COM(2010) 579 final <http://ec.europa.eu/internal_market/bank/docs/crisis-management/framework/com2010_579_en.pdf> Accessed on 12 March 2015

¹⁶² See European Parliament, *Banking Union: The Single Resolution Mechanism* (n26), 8; De Larosi re Report (n79) 39

¹⁶³ See European Parliament, *Banking Union: The Single Resolution Mechanism* (n26), 8; also Hellwig, *Yes Virginia, There is a European Banking Union! But It May Not Make Your Wishes Come True* (n157) 22

¹⁶⁴ Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47, Article 127

stress tests, and to ensure the uniform interpretation of the rules by the national authorities. In the detail, the ECB rules on maintenance of sufficient capital, leverage and counterparty exposure, liquidity, acquisition and disposal of holdings. Moreover, it has a full range of investigatory powers, and got the power to take actions in order to prevent any systemic risk, including: impose fines, oblige banks to take measures to avoid the default, remove a bank's manager or withdraw a license.¹⁶⁵ In this regard, a scholar was considering at the time of the reform's legislative process that *"In a sense, the E.U. (has done) what the Clinton administration and parts of the Wall Street Reform and Consumer Protection Act tried to do for the U.S. banking system: cutting back on the number of regulators, shoring up capital, and expanding regulators' reach over conglomerates."*¹⁶⁶

4) The difficult exportation of the Volcker banking separation rule

The banking separation is a key issue of the financial regulation movement, which benefited from large media coverage. This issue of structural banking separation emerged during the financial crisis, with the consensual acknowledgment that there are banks, which were too big to fail (or often called by the initials "TBTF")¹⁶⁷. Structural banking separation is, as a matter in fact, an issue of financial regulation since the early Glass-Steagall Act¹⁶⁸. Repealed in 1999 by the Gramm-Leach-Bliley Act, its reintroduction was mentioned as a solution to the crisis in 2009 with attempts in the U.S. Congress to reenact the former banking separation rule from lawmakers such as the former republican presidential nominee, Sen. John McCain¹⁶⁹. The endorsement of a banking separation rule by the President of the United States launched a transatlantic debate on the modernization of the Glass-Steagall Act's old system of firewall between commercial and investments banks abolished by the Gramm-Leach-Bliley Act of 1999¹⁷⁰. As summarized by the Bank for International Settlements, host organization of the Basel Committee, the banking structural reforms mark a paradigm shift and every banking separation mechanism share a common element: *"the mandatory separation of commercial*

¹⁶⁵ See Jennings, *Developments in Banking Law – Toward an EU Banking Union* (n145) 19

¹⁶⁶ *ibid.* 18

¹⁶⁷ For a retrospective on TBTF, Frederic S. Mishkin, *How Big a Problem is Too Big to Fail? A Review of Gary Stern and Ron Feldman's Too Big to Fail: The Hazards of Bank Bailouts* (2006) 44 *Journal of Economic Literature* 988

¹⁶⁸ Banking Act of 1933 (n8)

¹⁶⁹ See Banking Integrity Act of 2009, bill S.2886 (111th Congress, 2009) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN02886:@.@@L&summ2=m&>> Accessed on 20 July 2015

¹⁷⁰ See Marc Roe, 'Spooked by Glass-Steagall's Ghost?' Project Syndicate (2012) <http://www.law.harvard.edu/programs/corp_gov/MediaMentions/08-21-12_ProjectSyndicate.pdf> Accessed on 20 July 2015

banking from certain securities markets activities”¹⁷¹. *A priori*, the United States and European countries were the only states in which such banking separation rules have been adopted.

The U.S. Congress was the first to impose banking separation rules as a response to the crisis. It had a huge impact on other developed economies, and first in Europe where the debate was very intensive. The best proof of that is the number of articles, and primarily economics and legal articles, dedicated to the issue. While some issues were treated early in the regulation movement, such as credit rating agencies, financial supervision, etc., banking separation knew a more mature emergence. The Wall Street Reform and Consumer Protection Act of 2010 entered into force on 21 July 2010, two years after the peak of the crisis but, proof that banking separation reforms were not prepared in Europe, it was enacted much later there. The so-called Volcker rule (from Paul Volcker, former Chairman of the Federal Reserve) really launched the debate. It corresponds to the Section 619 of the Dodd-Frank Act. This Section amended the U.S. Bank Holding Company Act of 1956 by introducing a new Section 13.

The Volcker rule was introduced in the legislative process in March 2010 after the President of the United States publicly endorsed it in January¹⁷², refusing a more moderate project of his Treasury Secretary¹⁷³. This endorsement shook the global financial regulation movement, as the “Leader of the Free World” pushed for going back to an idea, the banking separation, *de facto* abandoned since the 1980s. The idea of banking separation was no more the result of marginal parliamentary initiatives, but was set in stone by the first economy in the world, which is also the country where the financial crisis was born. The signal was clear, even if it is economically controversial: banking separation is a solution to the crisis and able to prevent new crises. The Volcker Rule was designed to modernize the former strict separation of retail and investment banking activities in force under the Glass-Steagall Act, which has become either the golden calf or the old chestnut of the public debate on banking separation. Since then, the Volcker Rule shares with the Glass Steagall Act the ransom of celebrity on the other side of the Atlantic. The Volcker Rule is a twelve pages-long section of the Dodd-Frank Act amending the Bank Holding Act of 1956. As provided in Section 619(a) of the Dodd-Frank

¹⁷¹ See Leonardo Gambacorta, Adrian Van Rixtel, *Structural bank regulation initiatives: approaches and implications* (Basel, 2013) BIS Working Papers No. 412, 1 <<http://www.bis.org/publ/work412.pdf>> Accessed on 21 July 2015

¹⁷² See White House, *President Obama Calls for New Restrictions on Size and Scope of Financial Institutions to Rein in Excesses and Protect Taxpayers* (Press Release, 21 January 2010) <<https://www.whitehouse.gov/the-press-office/president-obama-calls-new-restrictions-size-and-scope-financial-institutions-rein-e>> Accessed on 20 July 2015

¹⁷³ David Cho, Binyamin Appelbaum, ‘Obama’s ‘Volcker Rule’ shifts power away from Geithner’ The Washington Post (Washington D.C., 22 January 2010) <<http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104935.html>> Accessed on 28 July 2015

Act, the rule prohibits, in principle, a banking entity to engage in proprietary trading (when a firm trades for direct gain instead of commission dollars, according to Investopedia¹⁷⁴) and to possess any interest in a hedge fund or a private equity fund. It means that banks cannot trade for their own profit in securities, derivatives, commodity futures and options on them¹⁷⁵. Naturally, this principle is subject to numerous and significant exceptions, largely weakening its impact. There are notably exemptions in the prohibition of proprietary trading for market making, risk mitigating and trading in governmental obligations. Other financial companies than banks should also maintain certain levels of capital if they are involved in proprietary trading operations, according to Section 619(a)(2). Even if it carries some extraterritorial effects, the Volcker Rule does not ban proprietary trading operated by foreign banks. The extensive content of the Volcker rule was clarified by the regulations issued by the main U.S. regulatory agencies in late 2013¹⁷⁶ and the compliance period runs until the end of 2016¹⁷⁷.

The debate was not less intense in Europe than in the United States. Without taking into account the media coverage, European legal scholars and lawmakers exchanged extensively on this issue¹⁷⁸ and, as a result, numerous publications and reports were published, including of course the Vickers and the Liikanen Reports. However, on the opposite of the major part of the European reregulation movement, the introduction of banking separation rules in the Old World was first debated in national Parliaments, and not at the supranational level. The major Member States enacted laws as soon as 2013 on this issue: both Germany and France introduced banking separation laws but these were limited in their substance and preferred subsidiarization than real separation or even prohibition. The British lawmaker was more ambitious than its continental counterparts and created its proper regime, distinctive of the U.S. law. Based on a report of November 2011 that the Chancellor of the Exchequer, George Osborne, commissioned to Sir John Vickers and the Independent Commission on Banking one month before the Dodd Frank Act was signed into law, the rule carries the name of its author in the public debate. The Financial Services (Banking Reform) Act 2013 of the United Kingdom

¹⁷⁴ See Investopedia, *Proprietary trading* <<http://www.investopedia.com/terms/p/proprietarytrading.asp>> Accessed on 24 July 2015

¹⁷⁵ See FTI Consulting Strategic Communications, *Volcker, Vickers, Liikanen: Structural reforms of the banking sector – Quo Vadit Europe?* (2014) <<http://www.fticonsulting.com/~media/Files/us-files/insights/white-papers/structural-reforms-of-the-banking-sector.pdf>> Accessed on 20 July 2015

¹⁷⁶ Board of Governors of the Federal Reserve System, *Agencies Issue Final Rules Implementing the Volcker Rule* (Press Release, 10 December 2013) <<http://www.federalreserve.gov/newsevents/press/bcreg/20131210a.htm>> Accessed on 20 July 2015

¹⁷⁷ FTI Consulting Strategic Communications, *Volcker, Vickers, Liikanen: Structural reforms of the banking sector – Quo Vadit Europe?* (n166)

¹⁷⁸ See Frédéric Lacroix, *La séparation des activités bancaires en France et dans le cadre communautaire* (The separation of banking activities in France and within the Community framework) (2013) 2013 *Revue de droit bancaire et financier*, dossier 40

introduced a new part, corresponding to the “Vickers rule” in the Financial Services and Markets Act of 2010.

Before adopting the “Vickers rule”, the United Kingdom had for many years hesitated between adopting its own legislation and using the U.S. precedents. The Liberal-democrats’ manifesto of 2010 included the project to introduce into British law an UK Glass-Steagall Act. Finally the coalition agreement with the Tories (Conservative Party) mentioned clearly the creation of a commission working on a banking separation rule, as a concession to the Liberal-democrats. The setting up by George Osborne, the Chancellor of the Exchequer, of the Independent Banking Commission chaired by Sir John Vickers was also a response to the parliamentary pressure for a strict banking separation¹⁷⁹. Nevertheless, the pressure did not vanish, even after the releasing of the Vickers’s Report. Its conclusions were heavily criticized by numerous Members of the Parliament, and notably by the Parliamentary Commission on Banking Standards (the UK Banking Commission), whose Chair was known as a proponent of a Volcker-style rule. It has to be noticed that the UK Banking Commission was created after the Libor scandal, in 2012, to inquire the culture and practices of the sector in the United Kingdom and support legislation on this field¹⁸⁰. The Chancellor of the Exchequer faced tough debates from 2010 to early 2013 on his banking separation bill¹⁸¹, transposing the Vickers rule into law. The great echo of Paul Volcker’s hearing in the Parliament is demonstrative of the strength of the U.S. influence on this issue¹⁸², with number of senior officials afraid that the Vickers rule was not tough enough. The UK Banking Commission expressed clear views that it would have preferred the adoption of the American banking separation rule, rather than the Vickers rule¹⁸³. It repeated this idea several times¹⁸⁴, unsuccessfully. However, strong commitments to deliver a stark banking separation with powers given to the regulatory

¹⁷⁹ See Interview, ‘Davis: “we must break up the banks”’ BBC News (London, 13 June 2010) <http://news.bbc.co.uk/2/hi/programmes/andrew_marr_show/8737606.stm> Accessed on 12 July 2015

¹⁸⁰ See Webster, *Developments in Whistleblowing* (n111)

¹⁸¹ See Hannah Kuchler, ‘Osborne warns against bank bill rethink’ Financial Times (London, 21 November 2012) <http://www.ft.com/intl/cms/s/0/0f824346-33c8-11e2-9ae7-00144feabdc0.html?ft_site=falcon&desktop=true#axzz3hAD1Mtxf> Accessed on 12 July 2015

¹⁸² See Phillip Inman, ‘Volcker says banking ringfence is flawed’ The Guardian (London, 17 October 2012) <<http://www.theguardian.com/business/2012/oct/17/paul-volcker-banking-ringfence-flawed>> Accessed on 12 July 2015

¹⁸³ See Louise Armitstead, ‘Parliamentary Banking Commission to call for banks to be broken up, rather than just ring-fenced’ The Telegraph (London, 16 December 2012) <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9748949/Parliamentary-Banking-Commission-to-call-for-banks-to-be-broken-up-rather-than-just-ring-fenced.html>> Accessed on 12 July 2015

¹⁸⁴ See Isabel Hardman, ‘Banking commission to force Chancellor’s hand on reform’ The Spectator (London, 24 December 2012) <<http://blogs.spectator.co.uk/coffeehouse/2012/12/banking-commission-to-force-chancellors-hand-on-reform/>> Accessed on 11 July 2015; also VINA Gonzalo, ‘Parliament repeats demand that Osborne toughens bank bill’ Bloomberg (New York, 10 March 2013) <<http://www.bloomberg.com/news/articles/2013-03-11/parliament-repeats-demand-that-osborne-toughens-bank-bill>> Accessed on 12 July 2015

authorities to impose forcedly banking separation and certain parliamentary amendments achieved to convince the Members of the Parliament to pass the bill¹⁸⁵. The Vickers Report and the rule derived impose a strict legal, economic and operational separation between the deposit banking entity and the investment activities within a banking holding group, the so-called “ring-fencing” of banking entities. The Vickers rule aims at isolating the “vital banking services” catering primarily the interests households and small businesses. Only these isolated banking entities may provide “mandated services”, for instance the activities of deposit and credit, in order to reduce at their maximum the systemic risks¹⁸⁶. Behind this idea, there is the assumption that breaking universal banks is not necessary to avoid systemic risks.

With regard to the continent, the new laws introduced in Germany and France were largely inspired by the report written by the high-level group chaired by Erkki Liikanen (the Liikanen Report), former European commissioner and governor of the Finnish Central Bank. The European Commissioner in charge of the financial services Michel Barnier set up this group in November 2011 and the report was released in October 2012. With regard to banking separation, the national lawmakers were therefore quicker to react than the European Commission. The Commission took a long time before releasing its proposal to the European co-lawmakers, on 29 January 2014¹⁸⁷, arguing that the banking union was its top priority¹⁸⁸. And in their turn, the European Parliament and the Council took a longer time to pass this act. Indeed, more than one year and half later, the legislative process is still ongoing and the Council of the European Union just adopted its position. This long adoption process is demonstrative of the sensibility of this debate in a continent that has fewer difficulties to impose very strict rules upon American credit ratings agencies than taking decisions that may be harmful for some *national champions* such as Deutsche Bank, BNP Paribas, etc. It should however be conceded that the structure of European continental banks differs from their U.S. counterparts’, where the model of “*banques universelles*” (universal banks) is less implanted and banks traditionally play a less important role in the financing of the economy. This is the famous model of “Rhine banks”, banking intermediation that is very much stronger in Europe

¹⁸⁵ See Mark Scott, ‘Osborne promises more regulatory power to split up big banks’ Dealbook - New York Times (New York, 4 February 2013) <http://dealbook.nytimes.com/2013/02/04/osborne-promises-more-regulatory-power-to-split-up-big-banks/?_r=0> Accessed on 15 July 2015

¹⁸⁶ See Pierre-Yves Thoraval, *Gouvernance bancaire: Volcker, Vickers et Barnier?* (Banking governance: Volcker, Vickers and Barnier?) (2012) 2012 Revue Banque No. 746

¹⁸⁷ See European Commission, Proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions, COM(2014) 43 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014PC0043&from=EN>> Accessed on 10 January 2015

¹⁸⁸ See Margaux Curie, *La réforme du secteur bancaire: vers quelle forme de réglementation bancaire en Europe* (The banking sector reform: what kind of banking regulation in Europe?) (2013) 2013 Revue des Juristes de Sciences Po 74

than in the United States where financial markets are the traditional place for companies to find finance (disintermediation).

The Liikanen report takes into account this situation. According to the final report, the Liikanen high-level group “*was requested to consider in depth whether there is a need for structural reforms of the EU banking sector or not and to make any relevant proposals as appropriate, with the objective of establishing a safe, stable and efficient banking system serving the needs of citizens, the EU economy and the internal market.*”¹⁸⁹ The High-level group was naturally influenced in this regard by the Volcker rule and, thus, mentions it several times throughout the report. However, at the end, the Liikanen group prescribes a separation, which differs from the U.S. prohibition rule, of the banking entities in the same holding group. It does not require the groups to divest any entity but, basically, proposes an opposite “*ring fencing*” system to the Vickers rule. Instead of isolating the deposit banking entity within the holding, the Liikanen report recommends to isolate the proprietary trading activities. Hence, even if the separation regime prevails upon prohibition, the focus on proprietary trading shows that the European group was largely influenced, if not inspired, by the Dodd-Frank Act and its Volcker rule¹⁹⁰. Thus, similarly to the Volcker rule but on the opposite of the Vickers rule, the Liikanen report recommends to allow the deposit banking entity to “*perform underwriting business*” and to “*hold non-trading exposures to other financial intermediaries*”, according to a paper of the Bank for international settlements¹⁹¹. Speculative activities are also affected by this subsidiarization, because it is considered that they carry too many risks and are not productive enough for the financing of the economy¹⁹². This new subsidy should be legally and financially separated from the deposit bank. Nonetheless, the prerequisite of this rule is that it would not break the famous system of European universal banks, therefore there is only a formal separation of entities within a banking holding, and no strict prohibition of activities¹⁹³.

France and Germany, as mentioned supra, adopted their own banking separation laws in 2013 in the aftermath of the Liikanen Report. Issued shortly before their respective legislative processes, the German and French law-makers referred heavily on the Liikanen Report to build

¹⁸⁹ See E.U. High-level Expert Group (Liikanen Commission), *Final report of the High-level Expert Group on reforming the structure of the EU banking sector* (Brussels, 2012)

<http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf> Accessed on 19 December 2014

¹⁹⁰ See Frédéric Lacroix, *La séparation des activités bancaires en France et dans le cadre communautaire* (The separation of banking activities in France and within the Community framework) (n177)

¹⁹¹ See Gambacorta, Van Rixtel, *Structural bank regulation initiatives: approaches and implications* (n170) 9

¹⁹² See Alain Gourio, *La séparation de certaines activités bancaires* (The separation of some banking activities) (2013) 2013 *Revue de Droit bancaire et financier*, dossier 53

¹⁹³ See Pierre-Yves Thoraval, *Gouvernance bancaire: Volcker, Vickers et Barnier?* (Banking governance: Volcker, Vickers and Barnier?) (n185)

their national banking separation rules. For instance, the French representative in charge of the reform at this time considered that, unless a single exception - the inclusion of market making in the ring-fenced entity -, the French regime of banking separation should strictly “*be in line with the (Liikanen’s) recommendations*”¹⁹⁴, on the opposite of the Volcker rule¹⁹⁵. Actually, the preparatory works of the reform first intended to adopt a Volcker rule *à la française*. The governor of the Banque de France even declared that the best thing to do was to prohibit purely the speculative activities from the banking system¹⁹⁶. However, the French government finally decided to follow the conclusions of the Liikanen report, restricting however the scope of the banking separation, excluding market making of the ring fenced entity¹⁹⁷. This subsidiary benefits from a special regime, it should *inter alia*: be financially autonomous, respect the prudential requirements and act like it is not owned by the holding¹⁹⁸. Nonetheless, the French banking separation rule includes also the obligation for banks to ring-fence the participations in hedge funds, which was not included in the Liikanen report¹⁹⁹. In fact, this rule is derived from the original reform proposal, which intended to ban participations in hedge funds, like the U.S. Congress did in the Dodd-Frank Act²⁰⁰. The German banking separation law (*Trennbankgesetz*), part of the Law of Compartmentalization of Risks and Restructuring and Winding-Up of Credit Institutions and Financial Groups of 2013 (*Gesetz zur Abschirmung von Risiken und zur Planung der Sanierung und Abwicklung von Kreditinstituten und Finanzgruppen*)²⁰¹, provides for a very similar rule, even the date of entry into force is the same than for the French law, i.e. on 1 July 2015. It only differs in a few aspects, such as the independence of the subsidiary with regard to intra-group operations and the mandatory protected services of the deposit entity²⁰².

¹⁹⁴ See Karine Berger, *Rapport fait au nom de la Commission des Finances, de l’économie générale et du contrôle budgétaire sur le projet de loi de séparation et de régulation des activités bancaires* (Report on behalf of the Commission of finances, economy and fiscal control on the separation and regulation of banking activities bill) (No. 707, Assemblée Nationale, 2013) <<http://www.assemblee-nationale.fr/14/pdf/rapports/r0707.pdf>> Accessed on 12 March 2015

¹⁹⁵ *ibid.* 73; see also Gourio, *La separation de certaines activités bancaires* (The separation of some banking activities) (n191) point 16

¹⁹⁶ See Curie, *La réforme du secteur bancaire: vers quelle forme de réglementation bancaire en Europe* (The banking sector reform: what kind of banking regulation in Europe?) (n187)

¹⁹⁷ See Gourio, *La separation de certaines activités bancaires* (The separation of some banking activities) (n191) point 11

¹⁹⁸ *ibid.* point 16

¹⁹⁹ Loi n°2013-672 du 26 juillet 2013 de séparation et de régulation des activités bancaires (2013) Journal officiel de la République Française n°0173, 12530

²⁰⁰ See Curie, *La réforme du secteur bancaire: vers quelle forme de réglementation bancaire en Europe* (The banking sector reform: what kind of banking regulation in Europe?) (n187)

²⁰¹ Gesetz zur Abschirmung von Risiken und zur Planung der Sanierung und Abwicklung von Kreditinstituten und Finanzgruppen vom 7. August 2013 (2013) Bundesgesetzblatt 2013 Teil I Nr. 47, 3090.

²⁰² See Lacroix, *La séparation des activités bancaires en France et dans le cadre communautaire* (The separation of banking activities in France and within the Community framework) (n177)

Nevertheless, the proposal of the European Commission, released on 29 January 2015, is much stricter than the recommendations made by the Liikanen Report. The sometimes-called “Barnier rule” (because of the name of the European commissioner in charge of financial services) or “Liikanen proposal” get closer to the Volcker rule than any other European banking separation reform. In this regard, the U.S. influence is particularly sensitive. The Barnier rule is even often labeled as a mix between the Volcker and the Vickers rules²⁰³. In the detail, the Barnier rule proposed to the European lawmakers a ban on proprietary trading and investment in hedge funds. Even if the ban on proprietary trading is narrower defined than the one provided by the Volcker rule, it also includes far less exceptions. It is particularly remarkable because none of the E.U. Member states have adopted a Volcker-style prohibition and because this proposal contradicts the recommendations of the Liikanen report. There is also a facultative rule of separation of the other trading activities from the banking entity. This faculty, similar to the Vickers rule, is however not mandatory, on the opposite of the bans of proprietary trading and investment in hedge funds²⁰⁴. Similarly to other proposals, the explanatory document of the reform refers to the U.S. Volcker rule, explaining that they both “share the same objectives” but are not identical²⁰⁵. It is however clear that the Barnier rule is more inspired by the Volcker rule than by the Vickers’ one.

However, the proposal of the Commission faced fierce critics, in particular from the banking lobby, which considered the proposed bans as an attack against the European model of universal banks²⁰⁶. Actually the big banks were the most critics as the Commission proposed some thresholds to apply the rules, thus targeting primarily the systemically important banks. Whereas the European Parliament adopted in 2013 a resolution, which referred to the Glass-Steagall Act and to the Dodd-Frank Act, along with E.U. Member States’ laws²⁰⁷, it faced

²⁰³ See Mayer Brown, *Does Volcker + Vickers = Liikanen?* (Legal update, 2014) <https://www.mayerbrown.com/files/Publication/f6722a7a-b666-4384-931f-0f77d6424e37/Presentation/PublicationAttachment/1a249a85-3015-43eb-8389-26237a62e419/update_volcker_vickers_feb14.pdf> Accessed on 2 January 2015

²⁰⁴ The banking separation rules adopted notably by the British, French and German lawmakers may be exempted from the application of this facultative rule, according to the European principle of equivalent effect; see Freshfields Bruckhaus Deringer, *Structural reform of EU banks* (2014) <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/00136_SE_FIG_FIG_Liikanen%20Briefing_FOR_SCREEN_AW.pdf> Accessed on 19 July 2015

²⁰⁵ See European Commission, *Structural measures to improve the resilience of EU credit institutions – frequently asked questions*, MEMO/14/63 (2014) <http://europa.eu/rapid/press-release_MEMO-14-63_fr.htm?locale=fr> Accessed on 13 July 2015

²⁰⁶ See Matt Levine, ‘Europe’s New Volcker Rule Enrages Everyone Equally’ BloombergView (New York, 29 January 2014) <<http://www.bloombergview.com/articles/2014-01-29/europe-s-new-volcker-rule-enrages-everyone-equally>> Accessed on 12 July 2015

²⁰⁷ See European Parliament, *Resolution of 3 July 2013 on reforming the structure of the EU banking sector*, TA(2013)0317; also European Parliament, *Reforming the structure of the EU banking sector* (Briefing, 2014)

important difficulties to reach an agreement on the Barnier rule²⁰⁸. For its part, the Council of the European Union (council of the ministers of the Member states) eased substantially the requirements proposed by the European Commissioner Michel Barnier (no longer in charge)²⁰⁹. If the European Parliament agrees with the Council, proprietary trading and investment in hedge funds would not be banned but only separated from the deposit banking entity, going back to the Member States' legal regime. Hence, even if the European Commission was clearly inspired by the Volcker rule, the European lawmakers, both at the national and supranational level, were only influenced by the Dodd-Frank Act and are significantly resisting against any importation of the U.S. law in this area.

<http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/542145/EPRS_BRI%282014%29542145_REV1_EN.pdf> Accessed on 13 July 2015

²⁰⁸ See Ben Moshinsky, 'EU Bank-Structure Rules Falter With Parliament Divided' BloombergBusiness (New York, 26 May 2015) <<http://www.bloomberg.com/news/articles/2015-05-26/eu-bank-structure-rules-falter-with-parliament-divided>> Accessed on 13 July 2015

²⁰⁹ See Council of the European Union, *Council position on the Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions* (19 June 2015) <<http://www.consilium.europa.eu/en/press/press-releases/2015/06/pdf/st10150-en15.pdf>> Accessed on 21 July 2015)

IV. The influence of the extraterritoriality of U.S. law on both European finance and law

Extraterritoriality usually goes against the concept of national jurisdiction, which is essential in public international law²¹⁰. However, legal territoriality principles are often completed, if not bypassed, by an effects-based approach²¹¹. With such an approach, the lawmakers or the regulatory authorities intend to avoid the continuation of activities by foreign companies that produce significant effects on territories where such activities are banned. For instance, a U.K. bank, affiliate of a U.S. banking holding, trade financial products related to U.S. assets with an U.S. bank, without being subject to the U.S. capital requirements for such an activity. Extraterritoriality provisions are often met in antitrust law on both sides of the Atlantic²¹².

The treatment of extraterritoriality as part of the influence of the law of the United States over the European financial reforms may be seen as off topic. At this admitted risk of going off on a tangent, extraterritoriality is however a very important data of the influence of the U.S. law and to better frame this part, only the Dodd-Frank Act of 2010 and its effects will be considered. First, this influence is exercised over the European financial sector, as extraterritoriality of the Dodd-Frank Act produces significant effects outside the territory of the United States that may change the deal in numerous segments. Indeed, the U.S. Congress adopted numerous extraterritoriality provisions in the Dodd-Frank Act²¹³. Second, even this extraterritoriality produced effects on the European law, and precisely on the development of the European financial reforms. Therefore, extraterritoriality will be briefly treated as part of the problem in order to give to the reader a chance to have a look at the big picture, even if it may be not exhaustive²¹⁴.

²¹⁰ See Phoebus Athanassio, Mikulas Prokop, Alkaterini Theodosopoulou, *Effets extraterritoriaux du droit américain sur les institutions financières non-américaines – une vue d'ensemble* (Extraterritorial effects of American law on non-American financial institutions – an overview) (2014) 2014 Revue de droit bancaire et financier, étude n°20, point 2

²¹¹ *ibid.* point 3

²¹² See Coffee Jr, *Extraterritorial financial regulation: why E.T. can't come home* (n6) 1266 ; Athanassio, Prokop, Theodosopoulou, *Effets extraterritoriaux du droit américain sur les institutions financières non-américaines – une vue d'ensemble* (n209), point 8

²¹³ See Coffee Jr, *Extraterritorial financial regulation: why E.T. can't come home* (n6) 1262 ; Athanassio, Prokop, Theodosopoulou, *Effets extraterritoriaux du droit américain sur les institutions financières non-américaines – une vue d'ensemble* (Extraterritorial effects of American law on non-American financial institutions – an overview) (n209) point 5

²¹⁴ For more details, please refer notably to John C. Coffee Jr, *Extraterritorial financial regulation: why E.T. can't come home* (n6) 1259

1) Some aspects of the extraterritoriality of U.S. law

Swaps were the first example in the short history of the last financial regulation movement to be subject to very discussed extraterritorial provisions of the U.S. law. The reason may be found in the collapse of the big U.S. insurance company, AIG. Its collapse was mostly due to its reliance on credit default swaps, written by an unregulated U.K. subsidiary²¹⁵. Still in 2011, CDS in the United States were only 7% to be traded by two American counterparties²¹⁶. Cross-border transactions, difficulties to identify their geographic locations and attempts of regulatory arbitrage encouraged the U.S. Congress to include extraterritoriality in the Dodd-Frank Act's rules on swaps, targeting in particular U.S. subsidiaries and foreign persons trading with U.S. persons²¹⁷.

Extraterritoriality provisions adopted by the U.S. Congress in the Dodd-Frank Act affect the banks too, through the Volcker rule²¹⁸. Thus, the prohibition of proprietary trading and ownership of an investment fund applies to the U.S. banking entities and their affiliates as well as to foreign banking entities licensed in the United States, unless the transaction is made without connection with the United States²¹⁹. This applied naturally to Europe, to such an extent that the European Commissioner in charge of financial services at this time, Michel Barnier, had declared that it was unacceptable "*that U.S. rules have such a wide effect on other nations.*"²²⁰ It was at the time particularly problematic because of the lack of any banking structural reform in Europe and the exclusion of this issue from the G20 discussions²²¹.

For a long time, since the Sarbanes-Oxley Act of 2002 entered into force, the U.S. law imposed companies exercising their activities on the territory of the United States to apply its rules, and notably the creation of internal channels of reporting, i.e. hotlines for whistleblowers in most of the cases²²². Otherwise, the companies may be *inter alia* heavily

²¹⁵ *ibid.* 1273

²¹⁶ *ibid.* 1275

²¹⁷ *ibid.* 1275, 1277

²¹⁸ *ibid.* 1267 ; also Athanassio, Prokop, Theodosopoulou, *Effets extraterritoriaux du droit américain sur les institutions financières non-américaines – une vue d'ensemble* (Extraterritorial effects of American law on non-American financial institutions – an overview) (n209), points 21 & 22

²¹⁹ See Coffee Jr, *Extraterritorial financial regulation: why E.T. can't come home* (n6) 1288, 1289

²²⁰ *ibid.* 1290

²²¹ *ibid.* 1291

²²² Assertions on whistleblowing are mostly based in this paragraph on the article of Webster, *Developments in Whistleblowing* (n111)

fined. For this reason, the companies trading in the United States applied scrupulously these protective measures for whistleblowing. Nonetheless, before the European Union and its Member States provide for equivalent requirements, this extraterritoriality of the U.S. law faced fierce reactions from Europe, where data protection is much more protected than in the United States. There, whistleblowing was for a long time assimilated to the old practice of denunciation, which traumatized Europe during the World War II because of the numerous denunciations (and rewards granted for denunciations) of Jews. The Dodd-Frank Act of 2010 did not alleviate the U.S. regime for whistleblowing, with notably the creation of a whistleblower bounty program to reward this practice. Thus, these rewards may be granted to any employee of a company operating in the United States, so that the extraterritorial effects of the U.S. law with regard to whistleblowing increased. And even if the European Union made some steps in the direction of the protection of whistleblowers, it still refuses this, considered mostly as potentially perverse and inefficient.

The extraterritoriality of U.S. law is not only a theoretical matter; it is well implemented in practice. The plea bargain of BNP Paribas in June 2014 and May 2015 fined for a record amount of \$8,9 billion for violations of the extraterritorial provision of the U.S. law is demonstrative in this regard²²³.

2) The existence of extraterritorial provisions in European financial reforms

Even if it criticized numerous times the attempts of the United States to apply extraterritorial legal effects, the European Union is not exempt of critics, with regard to extraterritoriality. Both for derivatives financial products under EMIR and for the banking separation rules, the European Union lawmakers asserted Europe's international jurisdiction, applying therefore extraterritorial effects, facing far less criticism than its American counterparts.²²⁴ Actually, the extraterritorial provisions of E.U. law may find their sources in U.S. law, as they look very similar to the ones provided by the United

²²³ See Athanassio, Prokop, Theodosopoulou, *Effets extraterritoriaux du droit américain sur les institutions financières non-américaines – une vue d'ensemble* (Extraterritorial effects of American law on non-American financial institutions – an overview) (n209), point 15; also Devlin Barrett, Christopher M. Matthews, Andrew R. Johnson, 'BNP Paribas Draws Record Fine for "Tour de Fraud"' Wall Street Journal (New York, 30 June 2014) <<http://www.wsj.com/articles/bnp-agrees-to-pay-over-8-8-billion-to-settle-sanctions-probe-1404160117>>

Accessed on 24 July 2015

²²⁴ See Coffee Jr, *Extraterritorial financial regulation: why E.T. can't come home* (n6) 1261

States lawmakers. For instance, the effects-based approach as well as the firewall against rules' evasion under EMIR copy, in the language used too, in large part the rules included in the Dodd-Frank Act with regards to swaps regulation, precisely in its Section 722(d)²²⁵. The ESMA likewise provided for implementation regulations similar to the ones of the SEC and the CFTC in this respect²²⁶. The future banking separation rule of the European Union is also likely to have extraterritorial effects, similar to those of the Volcker rule, according to the proposal of the European Commission²²⁷.

If extraterritoriality is significantly present in post-crisis U.S. and E.U. laws, it has to be noted that the paradigm shifted in the recent years, in comparison with the early years of extraterritorial law. Indeed, the extraterritoriality provisions enacted by the U.S. Congress in the Sherman Act differ appreciably from the recent extraterritorial rules in financial law. While the Sherman Act may have been the mark of certain U.S. imperialism, on the opposite, the Dodd-Frank Act uses a more cooperative and dialogue-based approach. Indeed, to avoid some unavoidable regulatory arbitrage and evasion, the Dodd-Frank Act opens the doors to mutual recognition *via* the substituted compliance rule²²⁸. This is for instance the case for swaps²²⁹. The U.S. regulatory authorities significantly eased also the requirements applying to foreign entities²³⁰. And both European and U.S. authorities emphasized regularly the importance of the E.U.-U.S. regulatory dialogue²³¹. Given that finance does not merely know any border and that the last financial regulation movement was not limited to the United States but was reverberated in the whole world, notably thanks to the impulse of the G20, it is in these countries' mutual interest to seek for such mutual recognition.

²²⁵ *ibid.* 1262

²²⁶ *ibid.* 1263

²²⁷ See Gambacorta, Van Rixtel, *Structural bank regulation initiatives: approaches and implications* (n170) 3

²²⁸ See Coffee Jr, *Extraterritorial financial regulation: why E.T. can't come home* (n6) 1266, 1287

²²⁹ *ibid.* 1276, 1279

²³⁰ *ibid.* 1285

²³¹ For instance, U.S. Department of Treasury, *U.S.-EU Financial Markets Regulatory Dialogue Joint Statement* (Press Release, 15 January 2015) <<http://www.treasury.gov/press-center/press-releases/Pages/j19741.aspx>> Accessed on 31 July 2015

Conclusion

From whistleblowing to banking separation, the U.S. law created a substantive precedent influencing financial regulation, particularly in the European Union. The financial reforms adopted in the European Union these last few years relied heavily upon the influence of the U.S. law. This influence has varying degrees, according to the field of the financial regulation, because of its accuracy, of the economic, legal and political differences between the United States and the European Union. Its extent is however remarkable. Despite the non-exhaustive character of this study, which let several areas aside, the multiple examples show that the United States has a clear lead with regard to financial regulation. The European executives, lawmakers and regulatory authorities were, and still are, very attentive to the developments of U.S. financial law and regulation in their legislative duties, even if it naturally did and does not prevent them to adopt specific and sometimes contradictory rules for the European Union. After having a closer look at the detail of the influence, it is possible to note a correlation between the degree of influence and the historicity of the regulation. Thus, the newer the regulation applies in Europe to a specific area, the stronger is the influence of the U.S. law. Credit rating agencies, derivative financial products, whistleblowing, executive compensation were largely unregulated in Europe before the crisis. In these areas, the lawmakers of the European Union transposed almost rigorously the provisions of the law of the United States in the E.U. legislation. In contrast, the European lawmakers are less reliant to U.S. law when the area of legislation was previously treated either at the European level, or directly by the Member states. The regulation of investment funds is here in a particular position, in-between. These funds were not regulated pre-crisis but the European lawmakers adapted significantly the U.S. legislation to the continent.

This influence of U.S. law on European financial reforms may be a sign that the globalization of financial markets reaches not only the national leaders assembled in international forums such as the G20, but the federal lawmakers of these two big economies, the European Union and the United States. In this regard, it is a kind of legal globalization where these lawmakers freely interact and share ideas, concepts and proposals.

Bibliography

Books

COURET A., COQUELET M.-L., GRANIER T. LE NABASQUE H., PORACCHIA D., RAYNOUARD A., REYGROBELLET A., ROBINE D., *Précis de droit financier* (2nd edition, Dalloz, 2012)

SCOTT H. S., *International Finance: Law and Regulation* (3rd edition, Sweet & Maxwell, 2012)

Institutional working papers and documents

BERGER K., *Rapport fait au nom de la Commission des Finances, de l'économie générale et du contrôle budgétaire sur le projet de loi de séparation et de régulation des activités bancaires* (Report on behalf of the Commission of finances, economy and fiscal control on the separation and regulation of banking activities bill) (No. 707, Assemblée Nationale, 2013)

<<http://www.assemblee-nationale.fr/14/pdf/rapports/r0707.pdf>> Accessed on 12 March 2015

E.U. High-level group on Financial Supervision in the EU (Larosièrè Group), *Report* (2009) Brussels <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf> Accessed on 3 March 2015

E.U. High-level Expert Group (Liikanen Commission), *Final report of the High-level Expert Group on reforming the structure of the EU banking sector* (2012) Brussels

<http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf>

Accessed on 19 December 2014

European Parliament, *Banking Union: The Single Resolution Mechanism* (Compilation of notes, 2013)

<<http://www.europarl.europa.eu/document/activities/cont/201304/20130422ATT64861/20130422ATT64861EN.pdf>> Accessed on 12 March 2015

– – *Derivatives, central counterparties and trade repositories* (Compilation of notes, 2011)

<http://www.europarl.europa.eu/RegData/etudes/note/join/2011/451488/IPOL-ECON_NT%282011%29451488_EN.pdf> Accessed on 12 March 2015

– – *Rating Agencies – Role and Influence of their Sovereign Credit Risk Assessment in the Euro Area* (Compilation of notes, 2011)

<<http://www.europarl.europa.eu/document/activities/cont/201203/20120323ATT41788/20120323ATT41788EN.pdf>> Accessed on 12 March 2015

– – *U.S. Implementation of Basel II: Final Rules Issued, But No Supervisory Approvals to Date* (Briefing note, 2011)

<<http://www.europarl.europa.eu/document/activities/cont/201110/20111012ATT29102/20111012ATT29102EN.pdf>> Accessed on 12 March 2015

GAMBACORTA L., VAN RIXTEL A., *Structural bank regulation initiatives: approaches and implications* (Basel, 2013) BIS Working Papers No. 412 <<http://www.bis.org/publ/work412.pdf>> Accessed on 21 July 2015

U.K. Independent Commission on Banking, *Final Report, Recommendations* (Domarn Group, 2011) <<http://webarchive.nationalarchives.gov.uk/20131003105424/https://hmt-sanctions.s3.amazonaws.com/ICB%20final%20report/ICB%2520Final%2520Report%5B1%5D.pdf>> Accessed on 27 July 2015

U.S. Department of the Treasury, *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation* (2009) <http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf> Accessed on 2 April 2015

U.S. Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* (U.S. Government Printing Office, 2011) <http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf> Accessed on 15 February 2015

Articles

- General

ALOGNA F. G., MARTIN D., SABA O., *European responses to the Financial Crisis* (2009) 2009 La Semaine Juridique Entreprises et Affaires 1776

Brett Bickel, *Harmonizing Regulations in the financial services industry through the Transatlantic Trade and Investment Partnership*, 29 Emory International Law Review 557

LUDWIG E. A., *Assessment of Dodd-Frank Financial Regulatory Reform: Strengths, Challenges and Opportunities for a Stronger Regulatory System* (2012) 29 Yale Journal on Regulation 181

MASERA R., *Reforming financial systems after the crisis : a comparison of EU and USA* (2010) 63 PSL Quarterly Review 297

UGEUX G., *Can Europe produce a coherent and effective financial regulation?* (2012) 18 Columbia Journal of European Law 20

TAYLOR M. W., *Regulatory Reform in the UK* (2013) 18 North Carolina Banking Institute 227

TURNER N. W., *Dodd-Frank and International Regulatory Convergence: The Case for Mutual Recognition* (2012) 57 New York Law School Review 391

- Credit rating agencies

OSTER J., *Who rates the raters? The regulation of credit rating agencies in the EU* (2010) 17 Maastricht Journal of European and Comparative Law 353

SCHNEIDER F., *Les agences de notation et les pouvoirs publics* (Credit rating agencies and public authorities) (2015) 2015 Revue de droit public et de la science politique en France et à l'étranger 83

SEVE M., *Les agences de notation: de la dérégulation à la re-régulation* (Credit rating agencies: from deregulation to reregulation) (2012) 2012 Cahiers de l'entreprise, dossier n°32

- Derivatives and short selling

BLOINK R. S., *Does the Dodd-Frank Wall Street Reform Act Rein In Credit Default Swaps? An EU Comparative Analysis* (2011) 89 Nebraska Law Review 587

SALAZAR M., *Swapping more than Regulations: Reexamining the goals of the Dodd-Frank Act and the European Market Infrastructure Regulation on the over-the-counter derivative markets* (2014) 21 Southwestern Journal of International Law 217

WYMEERSCH E., *Regulation and Case law relating to Financial Derivatives* (2013) 2013 Revue de droit bancaire et financier, dossier n°10

- Corporate governance

ALT E., *Lanceurs d'alerte: un droit en tension* (Whistleblowers: a tensioned right) (2014) 2014 La Semaine Juridique Edition Générale 1092

COTTER J. F., PALMITER A. R., THOMAS R. S., *Dodd-Frank's Say on Pay: Will it lead to a greater role for shareholders in the corporate governance?* (2012) 97 Cornell Law Review 1213

DESAI U., *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010* (2012) 43 Loyola University Chicago Law Journal 427

FLEISCHER H., SCHMOLKE K. U., *Financial Incentives for Whistleblowers in European Capital Markets Law? Legal Policy Considerations on the Reform of the Market Abuse Regime*

(2012) 2012 ECGI - Law Working Paper No. 189

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2124678##> accessed on 22 July 2015

GREENE S., PARGNATTARO M. A., *"Say on Pay": The Movement to Reform Executive Compensation in the United States and European Union* (2011) 31 Northwestern Journal of International Law and Business 593

HAUSER P., *Whistleblowing: chance or risk? – new tendencies in Europe* (2013) 2013 European Insurance Law Review 51

KANNAN A., POULLE J.-B., *MIF II: la protection des investisseurs* (MiFiD II: Protection of investors) (2014) 2014 Revue de Droit bancaire et financier, dossier 61

LECOURT B., *Rémunération des dirigeants de sociétés cotées et politique de remuneration dans le secteur des services financiers: vers l'adoption de normes contraignantes* (Executive compensation of public listed companies and remuneration policy in the sector of financial services: towards the adoption of binding standards) (2010) 2010 Revue des sociétés 607
– – *La directive "CRD IV" du 26 juin 2013 et les mesures ayant trait au gouvernement d'entreprise* (The CRD IV directive of 26 June 2013 and the provisions relating to corporate governance) (2013) 2013 Revue des sociétés 654

REBEYROL V., *La réception du "whistleblowing" par le droit français* (The receipt of whistleblowing in French law) (2012) 2012 La Semaine Juridique Entreprise et Affaires 1386

ROUSSEAU S., *Le Say on Pay: l'expérience nord-américaine* (Say on Pay: The North-American experience) (2014) 2014 Revue trimestrielle de droit commercial 461

TCHOTOURIAN I., *Gouvernance d'entreprise et rémunération à l'aune de la nouvelle régulation financière américaine* (Corporate governance and remuneration in the lights of the new American financial regulation) (2010) 2010 Bulletin Joly Bourse 376

THOMAS R. S., VAN DER ELST C., *Say on Pay around the world* (2015) 92 Washington University Law Review 653

WEBSTER A., *Developments in Whistleblowing* (2015) 16 Business Law International 65

WISSKIRCHEN G., *The Introduction of Whistleblower Systems in the European Union* (2010) 77 Defense Counsel Journal 366

- Too big to fail and banking supervision

ATIK J., *EU implementation of Basel III in the shadow of Euro crisis* (2013) 33 Review of Banking and Financial Law 283

HELLWIG M., *Yes Virginia, There is a European Banking Union! But It May Not Make Your Wishes Come True* (2014) Max Planck Institute for Research on Collective Goods, Preprint 2014/12

JENNINGS A., *Developments in Banking Law – Toward an EU Banking Union* (2012) 32 Review of Banking & Financial Law 13

JOHNSON K. N., *Macroprudential regulation: A sustainable approach to regulating financial markets* (2013) 2013 University of Illinois Law Review 881

- Banking separation reform

CURIE M., *La réforme du secteur bancaire: vers quelle forme de réglementation bancaire en Europe* (The banking sector reform: what kind of banking regulation in Europe?) (2013) 2013 Revue des Juristes de Sciences Po 74

LACROIX F., *La séparation des activités bancaires en France et dans le cadre communautaire* (The separation of banking activities in France and within the Community framework) (2013) 2013 Revue de droit bancaire et financier, dossier 40

GOURIO A., *La separation de certaines activités bancaires* (The separation of some banking activities) (2013) 2013 Revue de Droit bancaire et financier, dossier 53

MISHKIN F. S., *How Big a Problem is Too Big to Fail? A Review of Gary Stern and Ron Feldman's Too Big to Fail: The Hazards of Bank Bailouts* (2006) 44 Journal of Economic Literature 988

THORAVAL P.-Y., *Gouvernance bancaire: Volcker, Vickers et Barnier?* (Banking governance: Volcker, Vickers and Barnier?) (2012) 2012 Revue Banque No. 746

- Financial supervision

WYMEERSCH E., *Europe's New Financial Regulatory Bodies* (2011), available at SRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1813811> accessed on 25 July 2015

- Investment funds

DYMALLY L. V., GEORGE B. C., *The end of an area of limited oversight: the restructured regulatory landscape of private investment funds through the U.S. Dodd-Frank Act and the E.U. Alternative Investment Fund Managers Directive* (2013) 25 Florida Journal of International Law 207

GIBEAU B., *AIFMD: entre obligations réglementaires et nouvelles opportunités business* (AIFMD: between regulatory obligations and new business opportunities) (2014) 2014 Bulletin Joly Bourse 34

- Extraterritoriality

ATHANASSIOU P., PROKOP M., THEODOSOPOULOU A., *Effets extraterritoriaux du droit américain sur les institutions financières non-américaines – une vue d’ensemble* (Extraterritorial effects of American law on non-American financial institutions – an overview) (2014) 2014 Revue de droit bancaire et financier, étude n°20

COFFEE Jr. J. C., *Extraterritorial financial regulation: why E.T. can’t come home* (2014) 99 Cornell Law Review 1259

WATT H. M., *Le champ d’application dans l’espace de la législation financière américaine – Le serpent de mer de l’extraterritorialité* (The territorial scope of the American financial legislation – The extraterritoriality’s old chestnut) (2012) 2012 Cahiers de droit de l’entreprise, dossier n°31

Conferences and other legal analyses

BLOOMBERG Brief Financial Regulation, *EMIR Special Issue* (2014)
<http://www.bloomberg.com/professional/content/uploads/sites/4/2015/02/Financial_Regulation_EMIR_Special_Issue_2014.pdf> Accessed on 7 July 2015

CLIFFORD CHANCE, *Dodd-Frank Act v. EMIR, Confirmation, reconciliation, compression and documentation rules* (Client briefing, 2012)
<http://www.cliffordchance.com/briefings/2012/10/dodd-frank_act_vemirconfirmation.html>
Accessed on 1 January 2015

FRESHFIELDS BRUCKHAUS DERINGER, *Structural reform of EU banks* (2014) <
http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/00136_SE_FIG_FIG_Liikane_n%20Briefing_FOR_SCREEN_AW.pdf> Accessed on 19 July 2015

FTI Consulting Strategic Communications, *Volcker, Vickers, Liikanen: Structural reforms of the banking sector – Quo Vadit Europe?* (2014)
<<http://www.fticonsulting.com/~media/Files/us-files/insights/white-papers/structural-reforms-of-the-banking-sector.pdf>> Accessed on 20 July 2015

LINKLATERS, *Comparison between the European Markets Infrastructure Regulation, and relevant aspects of the Markets in Financial Instruments Directive/Regulation and Dodd-Frank*

Wall-Street Reform and Consumer Protection Act (2012)

<http://www.linklaters.com/pdfs/mkt/london/EMIR_DFA_Comparison_Chart.pdf>

Accessed on 1 January 2015

MAYER BROWN, *Does Volcker + Vickers = Liikanen?* (Legal update, 2014)

<https://www.mayerbrown.com/files/Publication/f6722a7a-b666-4384-931f-0f77d6424e37/Presentation/PublicationAttachment/1a249a85-3015-43eb-8389-26237a62e419/update_volcker_vickers_feb14.pdf> Accessed on 2 January 2015

PADOA-SCHIOPPA T., *Markets and Government before, during and after the 2007-20XX crisis* (Basel, 2010) <<https://www.bis.org/events/agm2010/sp100627.htm>> Accessed on 18 December 2014

SWEET W., *Dodd Frank Act becomes Law* (Harvard Law School Forum on corporate governance and financial regulation, 2010)

<<http://blogs.law.harvard.edu/corpgov/2010/07/21/dodd-frank-act-becomes-law/>> Accessed on 27 December 2014

TARULLO D. K., *Next steps in financial regulatory reforms*, George Washington University Center for Law, Economics and Finance conference on the Dodd Frank Act (12 November 2010)

WHYTE P., *How to Restore Financial Stability* (Centre for European Reform, 2010)

<http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/p_943-258.pdf> Accessed on 31 December 2014

Zusammenfassung

Die große Finanz- und Wirtschaftskrise von 2007-2009 wird weithin als die größte und wichtigste Krise seit der 1929 bezeichneten “*great Depression*” betrachtet. Im Gegensatz zu dieser letzten, tauchte die vor kurzem stattgefundenen Krise in einer Zeit in der wir in einer globalisierten und sehr miteinander verbundenen Welt leben, dank des freien Handels und der neuen Technologien. Auch Finanzen spielen heutzutage eine wichtigere Rolle in unserer Gesellschaft als in 1929, da jetzt keine Grenzen mehr existieren. Allerdings wirkte diese Krise hauptsächlich auf den Vereinigten Staaten und der Europäischen Union ein. Die große Finanzkrise führte zu einer wichtigen Änderung der Regelungen im Bereich der Finanzen und der Banken. Nach vielen Jahren von Deregulierung, wurde die Selbstregulierung als erfolglos anerkannt und es tauchte eine weltweite Bewegung in der Richtung finanzieller Regulation, die hauptsächlich die Vereinigten Staaten und die E.U. betraf. Anders als in den USA, war so eine Bewegung eine Neuigkeit in der Europäischen Union. Zum ersten Mal wurden auf beiden Seiten des Atlantiks zahlreiche und detaillierte Reformen eingenommen um den Finanzsektor zu regulieren und um die Risiken für die Wirtschaft zu überwinden die von der Krise stammen könnten. Diese kürzlich erfolgten Reformen verwandeln weitgehend die Gesetzeslage des Finanzsektors.

2010 war den Wall Street Reform and Consumer Act (auch bekannt als Dodd-Frank Act) verkündet. Diese detaillierte und umfangreiche Reform hatte eine große Auswirkung auf der anderen Seite des Atlantiks und beeinflusste die Europäische Kommission und die Gesetzmacher der E.U. bedeutend. In zahlreichen Gesetzentwürfen und Dokumenten die zu der Einführung von Verordnungen, Richtlinien oder Durchführungsbestimmungen führten, verwiesen die EU-Behörden auf den Dodd-Frank Act und weitgehend auf die Finanzreformen die in den USA eingenommen wurden. Diese Beeinflussung von amerikanischen Gesetzen variiert allerdings von Fall zu Fall. Im Fall der Kreditratingagenturen, finanzieller Derivatprodukten, Vorstandsvergütungen und der Whistleblowingverfahren, für die in Europa zuvor keine Regulierung im Finanzsektor existierte, nahmen die europäischen Gesetzmacher das amerikanische Modell als Vorbild. Manche Vorschriften wurden sogar nachgeahmt und in E.U. Vorschriften umgesetzt. In anderen Fällen jedoch, wie zum Beispiel im Fall der Investmentfonds oder der Finanzielle und Bankenaufsicht und Regulierung (Strukturen des Bankensektors, aufsichtsrechtliche Anforderungen, etc.), waren die europäischen Gesetzmacher zwar von den amerikanischen Vorschriften beeinflusst, nahmen dann aber letztendlich von den

amerikanischen abweichenden oder gegensätzliche Vorschriften ein. Letztendlich spielt Extraterritorialität eine wichtige Rolle, weil extraterritoriale Vorschriften nach US-Recht einen Einfluss auf den Europäischen Finanzsektor haben, da es sich an die Anforderungen der US- und EU-Rechts anpassen muss, die den Grundsatz der Extraterritorialität der Finanzregulierung übernimmt.

Abstract

The major financial and economic crisis of 2007-2009 is widely considered the most important one since the Great Depression of 1929. On the opposite of 1929, it emerged in a very interconnected and globalized world thanks to free trade and new technologies. Finance plays also a more important role in the society of today than in 1929, as it does not know borders any more. However, it affected primarily the United States and the European Union. This major financial crisis led to an important movement of regulation targeting the financial and banking sector. After many years of deregulation, the self-regulation was considered a failure and a global movement of financial regulation emerged, reaching primarily the European Union and the United States. On the opposite of the United States, such movement of financial regulation is a première in the European Union. For the first time, on both sides of the Atlantic, numerous and bold reforms were adopted to regulate the financial industry and counter the systemic risks for the economy its crises may cause. These recent reforms transform extensively the legal framework of the financial sector.

In 2010, the Wall Street Reform and Consumer Protection Act (also known as the Dodd-Frank Act) was signed into law. This bold and comprehensive reform has a huge impact on the other side of the Atlantic and influenced significantly the European Commission and the lawmakers of the European Union. In numerous proposals and documents, leading to the adoption of Regulations, Directives or implementation rules, the European authorities referred to the Dodd-Frank Act, and widely to the financial reforms adopted in the United States. This influence of the U.S. law, however, varies in degrees. On issues such as the credit ratings agencies, derivative financial products, executive compensation and whistleblowing, which were unregulated or simply not treated in Europe until then, the European lawmakers were very inspired by the provisions of the U.S. law. Some provisions were even copied and transposed into the law of the European Union to close these legal loopholes. Nonetheless, on other issues, the investment funds, or more anciently treated, such as the financial and banking supervisions and regulations (banking structures, prudential requirements, etc.), the European lawmakers were influenced but adopted different, and sometimes opposite rules, with regard to the law of the United States. Finally, extraterritoriality plays a role in this matter, because the extraterritorial provisions of the U.S. law have an influence on both European finance that had to adapt themselves to the requirements of the United States and European law, which takes over the principle of extraterritoriality of the financial regulation.