

LAW AND ECONOMICS YEARLY REVIEW

ISSUES ON FINANCIAL
MARKET
REGULATION,
BUSINESS
DEVELOPMENT AND
GOVERNMENT'S
POLICIES ON
GLOBALIZATION

Editors

F. CAPRIGLIONE – R. M. LASTRA – R. MCCORMICK
C. PAULUS – L. REICHLIN – M. SAKURAMOTO



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The “Law and Economics Yearly Review” is an academic journal to promote a legal and economic debate. It is published twice annually (Part I and Part II), by the Fondazione Gerardo Capriglione Onlus (an organization aimed to promote and develop the research activity on financial regulation) in association with Queen Mary University of London. The journal faces questions about development issues and other several matters related to the international context, originated by globalization. Delays in political actions, limits of certain Government’s policies, business development constraints and the “sovereign debt crisis” are some aims of our studies. The global financial and economic crisis is analysed in its controversial perspectives; the same approach qualifies the research of possible remedies to override this period of progressive capitalism’s turbulences and to promote a sustainable retrieval.

Address

Fondazione Gerardo Capriglione Onlus c/o Centre for Commercial Law Studies Queen Mary,
University of London 67-69 Lincoln’s Inn Fields London, WC2A 3JB
United Kingdom

Main Contact

Fondazione G. Capriglione Onlus - fondazionecapriglione@luiss.it

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THE MAIN CHALLENGES ON THE PATH TO THE CAPITAL MARKETS UNION: CODIFICATION OF EUROPEAN FINANCIAL MARKETS LAW AND CENTRALISATION OF SUPERVISORY POWERS

Mirella Pellegrini*

ABSTRACT: *The paper examines the pivotal challenges confronting the Capital Markets Union, with particular emphasis on the codification of European financial markets law and the centralisation of supervisory powers. The analysis contends that establishing a European Capital Markets Code and restructuring the current allocation of supervisory powers constitute synergetic objectives, essential for achieving true market integration. The current geopolitical context may provide the necessary momentum for realizing these long-sought reforms, ultimately fostering a more cohesive and efficient European financial system.*

SUMMARY: 1. The Capital markets Union in context. – 2. A primer on rulemaking and regulatory techniques for harmonization. – 3. The role of supervisory powers. – 4. CMU as a topical moment for the future development of the financial market.

1. The European Union's financial landscape stands at a crucial crossroads, with the Capital Markets Union (CMU) representing one of the most ambitious initiatives in recent decades to reshape and integrate financial markets across Member States¹. This transformative project seeks to create a unified capital market that transcends national boundaries and enables the free flow of investments and savings throughout the Union.

* Full Professor of Economic Law at Luiss Guido Carli University, Rome.

¹ As pointed out, almost a decade ago, by D. Busch, *A Capital Markets Union for a Divided Europe*, in *Journal of Financial Regulation*, Volume 3, Issue 2, September 2017, p. 262 and ff. the CMU project is geared towards the creation of a fully integrated European capital market, remediating the existing fragmentation and ensuing inefficiencies.

The evolution of financial market integration in Europe has been marked by a series of incremental steps, from the early days of the European Monetary System to the creation of the euro². Each phase has brought its own challenges and lessons, shaping our understanding of what true market integration requires in the contemporary financial landscape.

In this regard, a gradual harmonisation has been accomplished in various areas of financial law (e.g., as a result of the entry into force of MIFID and MIFIR, PRIIPs Regulation, UCITS Directive, etc.), targeting specific product categories. Yet it has not achieved a comprehensive and coherent architecture, that also adequately covers enforcement aspects.

This approach could be framed within the framework of a ‘*small steps*’ perspective³, that should hopefully lead to full integration; however, it has often merely constituted an island of integration, incapable of generating further ‘political’ consequences.

The emergence of new financial technologies, changing investor behaviors, and the growing importance of retail participation in capital markets have created both opportunities and challenges for European integration efforts⁴.

Moreover, the constantly changing environment dictates that reform proposals must be adjusted, considering market developments and the international scenario.

These developments form the backdrop against which the next steps of the CMU must operate.

Indeed, the CMU's scope extends far beyond mere market integration,

² A. Delivorias, *A history of European monetary integration*, EPRS - European Parliamentary Research Service, PE 551.325, March 2015, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551325/EPRS_BRI%282015%29551325_EN.pdf.

³ This is an approach that has characterised European integration since its origins. Reference can be made to the European Commission: Directorate-General for Communication, *The Schuman Declaration of 9 May 1950*, Publications Office, 2015, <https://data.europa.eu/doi/10.2775/065>

⁴ On the topic, C. Baba et al., *Fintech in Europe: Promises and Threats*, IMF Working Paper, WP/20/241.

encompassing a comprehensive framework of sixteen key actions designed to address critical challenges in the post-COVID economy.

These actions aim to democratize access to capital, enhance market efficiency, and foster a more resilient and sustainable financial ecosystem that aligns with Europe's broader economic and social objectives.

In the following sections, I will examine some aspects that are instrumental in understanding the broader context of the Capital Markets Union (CMU) and what it entails.

As widely recognized, the CMU is a major EU initiative aimed at creating a single market for capital across all Member States.

It will allow investments and savings to move more freely and efficiently to the benefit of citizens, investors, and businesses. It is a proposal the realization of which has been ongoing for several years now as it was first formulated by the EU Commission in 2015⁵; followed, in 2020, by the publication of a dedicated Action Plan⁶.

The 2020 Action Plan outlines key measures (16 actions) to be adopted for achieving the Capital Markets Union goals. Among those, it aims to:

- 1) provide businesses with a greater choice of funding at lower costs,
- 2) support the economic recovery post-Covid-19,
- 3) offering new opportunities for savers and investors,
- 4) creating a more inclusive and resilient economy.

At the same time, the CMU aims at helping Europe to

- 5) deliver its new green deal and digital agenda,
- 6) reinforcing the EU's global competitiveness and autonomy and
- 7) making the financial system more resilient.

⁵ European Commission, *Action plan on building a capital markets union*, Communication, COM/2015/0468 final, 30 September 2015 which followed the adoption of the Green Paper on Building a Capital Markets Union [COM(2015) 63 final] and the subsequent public consultation.

⁶ European Commission, *A Capital Markets Union for Persons and Businesses-A New Action Plan*, Communication, COM/2020/590 final, 24 September 2020.

All these goals are, indeed, very meaningful and promising objectives that would be key for strengthening the EU financial markets and their functioning. At the present time, the CMU project seems to have reached a turning point and it is thus worth dwelling on its criticalities⁷. In fact, in addition to the challenges that have delayed the realization of the project over the past ten years, the CMU is now also facing difficulties arising from the shifting strategic priorities of the EU Commission in the light of the recent geopolitical changes (that have a clear impact e.g. on sustainability regulations)⁸.

This demanding context poses a number of significant challenges - some political, other having a purely legal nature – that deserve in-depth studies.

In this respect, I would like to briefly address two issues that I consider very relevant: the first one concerning the rulemaking and regulatory techniques to be adopted, whereas the second relates to the enforcement of rules and the (optimal) allocation of the relevant supervisory powers.

2. The history of financial regulation in Europe reveals a pattern of reactive rulemaking, often triggered by crises or market failures⁹. This approach has resulted in layers of regulations that, while addressing specific issues, sometimes lack

⁷ C. Lagarde, *A Kantian Turn for the Capital Markets Union*, Speech at the European Banking Congress, Frankfurt am Main, 17 November 2023.

⁸ Consider in this regard the recent European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, {SWD(2025) 80}, Brussels, 26.2.2025 COM(2025) 81 final 2025/0045 (COD).

⁹ N. Moloney *EU financial market regulation a decade from the financial-crisis-era reforms: crisis, uncertainty, and capacity*, in *Yearbook of European Law*, Volume 42, 2023, p. 169 and ff. in which the Author highlights how financial regulation has traditionally been subject to major reforms in the wake of crisis events (this was clearly what happened in response to the 2007/2008 crisis, but also in other situations in the past).

coherence and create unintended consequences for market participants and supervisors alike.¹⁰

Therefore, the establishment of a uniform regulatory framework for European financial markets represents one of the most pressing challenges in realizing the CMU's objectives.

The lack of homogeneity between national legal systems proves to be harmful for financial market participants as divergences come at a cost. For example, these entail incurring costs for dedicated compliance procedures in each country, discouraging companies (especially smaller ones) from operating in all the countries of the European market. In addition, this leads to low predictability of the outcomes of disputes concerning infringement of securities regulation (including the national transposition rules): in this respect, not only the range of public and private enforcement remedies that can be activated in each national legal system is very fragmented, but the case law - also by the European courts - has only rarely gone so far as to impose specific type of remedies under civil law for particular violations¹¹.

Conversely, financial service providers acting on a cross-border basis can significantly benefit from cost savings when the rules to which they are subject – and their interpretations in the relevant case law – are uniform. A notable example is the possibility of adopting a single procedure for each service provided.

At the same time, the existence of uniform provisions throughout the European single market ensures better consumer protection, as users can rely on homogeneous rules, with no need to worry about the level of protection offered by individual national laws.

¹⁰ For example, in the Italian context, in the Combined Act on Finance there are several similar (but not fully overlapping) definitions which refer to similar phenomena that have been regulated in different moments, as each definition derives from the transposition of EU directives

¹¹ F. Della Negra, *Financial Services Contracts in EU Law*, Oxford University Press, 2023, p. 271 and ff.

The achievement of harmonization of the applicable rules (and their interpretation by supervisory authorities and courts) is therefore a priority objective, but still a long way off¹².

As it has been noted, in the absence of perfect alignment by means of regulatory harmonization, the existence of conflict-of-law rules that identify the applicable law and assign supervisory powers to the home country authorities can try to level the playing field by relying (only) on negative integration¹³, thus limiting the possible divergencies. However, this integration policy does not seem to be sufficient. In fact, as is currently the case, this approach may result in different levels of protection based on the provider's country of origin: as hinted, for retail investors, it would make it very difficult to ascertain the level of protection applicable in different countries.

The implementation of the CMU objectives is the very opportunity to remedy this situation and to provide a unified and comprehensive reaction to the challenges that have emerged in recent years.

After the 2008 financial crisis, European securities regulation has experienced a “dynamic overhaul”¹⁴: there has been a mix of different elements consisting in the surfacing of new financial products, the unveiling of market interdependencies that for long time were not detected and caused new risks, as well as fast paced legislative activity seeking to counter such emerging risks. The ensuing legislative activity, that led to the creation to single rulebooks in the field of the European securities regulation

¹² N. Moloney, *EU Securities and Financial Markets Regulation*, Oxford EU Law Library, 2023, p. 56 and ff.

¹³ M. Gargantini, *Diritto europeo e discipline nazionali dei mercati finanziari: l'armonizzazione normativa dopo la capital markets union*, in Banca Borsa Titoli di Credito, fasc.1, 1 February 2024, p. 25.

¹⁴ Armour et al., *Principles of Financial Regulation*, Oxford University Press, 2016, specifically Introduction (p. 3 and ff.) and Conclusion – Designing Tomorrow's Financial System Today (p. 643 and ff.)

resulted in the mere aggregation of individual rules, lacking a systematic order. At the same time, the rules became highly complex and sometimes inconsistent.

Against this background, the idea of codification, to create a European Capital Markets Code as the recent book edited by Rudiger Veil¹⁵ advocated for, has resurged among European legal scholars and policymakers.

Creating a European Capital Markets Code¹⁶ – thus bringing the single rulebooks under a common frame - would allow to better develop the systematic order of rules, specifying their regulatory objectives (i.e., the smooth functioning of securities markets and public confidence in markets, that are prerequisites for economic growth and wealth and contributes to the internal market) and ensuring coherence of the entire system, thus remedying both the discrepancies caused by national transposition law, and by the narrowly segment-specific nature of the regulatory interventions of European law to date. Moreover, in this context, some concepts, like e.g. the one of investor confidence, could be (and will need to be) better defined and translated into more concrete terms. In the context of a single European code - which would be the CMU's main regulatory product - an effort should also be made to bridge the discrepancies in national caselaw with regard to the interpretation of general clauses and principles stemming from European law (which were variably implemented in each Member State).

Furthermore, the Code should not be merely recognitive of already existing principles and rules. It should serve as an opportunity to introduce innovations, also in relation to ESG issues¹⁷. The entire rulebook should integrate sustainability and

¹⁵ R. Veil (edited by), *Regulating EU Capital Markets Union. Volume I: Fundamentals of a European Code*, Oxford University Press, 2024

¹⁶ This project reminds the proposal - which has been proposed a long time ago and it is still in an infant phase, not having borne concrete fruit - for the elaboration of a European civil code, covering in particular contract law. For an overview of the historical reasons underpinning the project for the establishment of common rules on contract law applicable throughout Europe see G. Alpa, *Harmonisation of Contract Law and the Plan for a European Civil Code*, *European Business Law Review*, Vol. 15, Issue 1, 2004, p. 33 and ff.

¹⁷ M. Driessen, *Sustainable Finance: An Overview of ESG in the Financial Markets*, in D. Busch-G. Ferrarini-S. Grünwald (edited by), *Sustainable Finance in Europe. Corporate Governance, Financial Stability and Financial Markets*, EBI Studies in Banking and Capital Markets Law, Palgrave

social integrity as embedded principles. It may represent the opportunity of integrating those values and priorities in the financial regulation rules – solving the current intricacies¹⁸ – creating a truly European platform.¹⁹ It is therefore crucial that European values are at the heart of the initiative and are not sacrificed lightly for the sake of the competitiveness of the European market (in relation to other non-EU financial markets).

The codification process will also be the opportunity to clarify the relationship between the regulatory objectives, providing an answer to the question whether a hierarchy exists between the objectives of financial stability and market functioning²⁰.

At the same time, the question arises as to whether the Code should state clearly how to frame sustainability as a goal of securities regulation²¹. Although sustainability (so far) has undoubtedly gained a central place on the legislator's agenda and among the priorities of the supervisory authorities, there is a lack of any precise provision specifying its positioning among the goals of financial regulation. The creation of a European Capital Markets Code would allow to make it clear whether sustainability can now be considered as an independent regulatory objective of financial regulation and how that can be reconciled with the traditional regulatory objectives of EU capital markets law (e.g., with respect to financial stability).

3. The evolution of financial supervision in Europe also reflects a delicate balance between national sovereignty and the need for coordinated oversight.

Macmillan, 2024, p. 465 and ff. Specifically on the interactions between the CMU project and the pursuit of ESG objectives see B. Spießhofer, *Sustainability and ESG Aspects*, in R. Veil (edited by), *Regulating EU Capital Markets Union. Volume I: Fundamentals of a European Code*, Oxford University Press, 2024, p. 182 and ff.

¹⁸ For example, V. Colaert, *The Changing Nature of Financial Regulation: Sustainable Finance As A New EU Policy Objective*, *Common Market Law Review*, 2022, 59, p. 1705 highlights the current difficulties in identifying a clear hierarchy in the relationship between sustainable finance and the other objectives of financial regulation.

¹⁹ It would reduce the current criticalities stemming from gold-plating phenomena (when member states introduce stricter rules than the ones provided for in the EU directives).

²⁰ R. Veil, *The Idea of Codification of European Capital Markets Law*, in R. Veil (edited by), *Regulating EU Capital Markets Union*, cited, p. 3 and ff.

²¹ V. Colaert, *The Changing Nature of Financial Regulation*, cited, pp. 1669–1710.

Historical attempts at creating unified supervisory mechanisms have often faced political resistance, technical challenges, and questions about democratic accountability. The increasing complexity of financial products and services, combined with the cross-border nature of modern financial markets, has exposed limitations in traditional supervisory approaches.

Such (fragmented) allocation of supervisory powers has major impact on the harmonization process²². In fact, despite a steady strengthening of powers granted to ESMA²³, supervisory powers are still mostly vested in national authorities.

This structure poses glaring drawbacks and in order to fully achieve the CMU's objectives, a thorough review of the current set-up of supervisory powers will be necessary.

As of now, the insufficient harmonization levels in the European capital markets are attributable – together with other reasons²⁴ – to the different levels of enforcement of rules by the “multitude” of competent national authorities. The lack of a single supervisory authority for the CMU (unlike the ECB in the Banking Union²⁵) prevents uniformity of safeguards and supervisory practices. Under the current institutional setting, the actual application of the rules that would compose the CMU code inevitably will depend on local interpretations as well as, ultimately, on the supervisory style of the NCAs involved.

Since divergences in supervisory guidelines result from the co-existence of several NCAs, a natural solution might be to concentrate supervisory powers in a

²² N. Moloney, *EU Securities and Financial Markets Regulation*, Oxford EU Law Library, 2016, p. 36 and ff, p. 951 and ff.

²³ N. Moloney, *The age of ESMA. Governing EU Financial Markets*, Bloomsbury, 2018, passim. The Author points out all the cases in which ESMA is granted direct supervisory powers on supervised entities. Also based on this, she highlights how ESMA is gradually assuming a key role in the financial markets, to the extent that it is positioned preferentially to become the European supervisor over the financial sector within the CMU.

²⁴ E.g. the different level of development of financial markets in each Member state, deriving from the population financial education, availability of resources, etc.

²⁵ For some interesting insights F. Annunziata, *European Banking Supervision in the Age of the ECB: Landeskreditbank Baden-Württemberg—Förderbank v. ECB*, in *European Business Organisation Law Review*, Volume 21, 2020, p. 545-570.

single authority under European law: the most expedient approach in this direction would, of course, be to expand ESMA's direct supervisory powers²⁶. For feasibility reasons, the centralization process could initially involve only certain areas, as envisaged in Action 16 of the new CMU Action Plan. For example, in the area of prospectus approval, there are those who believe²⁷ that the completion of a true CMU would require the creation of a single authority.

Even if the specificities of national markets - and the reluctance of national authorities – would not allow for a prompt full centralization of powers in the hands of ESMA, half-way solutions could be explored: progressively strengthening ESMA's coordination powers, in the perspective of a gradual centralization of power, while pursuing the goal of full harmonization, protecting investors and market competitiveness.

Drawing a conclusion from what has been said so far, the creation of a single capital markets code and the amendment of supervisory set-ups are synergetic objectives - likely to be realized in different timelines, both being highly ambitious - on which the concrete success of the CMU will depend.

4. For the examined reasons, and for many others, the Capital Markets Union has become pivotal for the future development of financial markets.

The transformation of global financial markets through technological innovation, changing demographic patterns, and evolving investor preferences creates both opportunities and imperatives for European capital markets. Yet, the ability to harness these changes while maintaining market stability and investor protection will be crucial for Europe's economic competitiveness.

The intersection of capital markets development with broader societal

²⁶ C. Gortsos-K. Lagaria, *The European Supervisory Authorities (ESAs) as "direct" supervisors in the EU financial system*, EBI Working Paper Series, n. 57/2020, p. 4 and ff.

²⁷ E. Avgouleas-G. Ferrarini, *The Future of ESMA and a Single Listing Authority and Securities Regulator for the CMU: Costs, Benefits and Legal Impediments*, in D. Busch-E. Avgouleas-G. Ferrarini (edited by), *Capital Markets Union in Europe*, Oxford University Press, 2018, p. 55 and ff.

challenges, including climate change, aging populations, and technological disruption, requires a comprehensive approach to market integration. These challenges demand solutions that go beyond traditional financial market considerations to encompass broader economic and social objectives.

In such sense, the CMU represents a groundbreaking, comprehensive and sustained effort to build a robust financial system that supports economic growth, innovation, and sustainability. Realizing its full potential requires the collective commitment of EU institutions, Member States, market participants, and all Europeans.

The recent proposal of the EU Commission on the Savings and Investments Union²⁸ marks the last development in this area: it combines the Capital Markets Union and the Banking Union and builds on their past achievements in order to advance further reforms. In particular, the proposal aims to leverage the (enormous) wealth of private savings in support of the wider objectives of the EU, focusing its *“action on supporting people to save better, fostering capital for innovation, unlocking digital finance, ensuring the competitiveness of the financial sector and harnessing sustainable finance”*²⁹.

Incidentally, the most recent version of the initiative presented by the European Commission appears to be perfectly consistent with the Draghi Report³⁰, that highlighted the existing inefficiencies in EU’s capital markets (in particular a significant savings and investment mismatch in the EU, where citizens’ wealth is being underserved by low-yielding deposits, and companies, particularly young and innovative ones, are struggling to meet their) calling for swift and decisive action.

In conclusion, the current situation of geopolitical transformation, and the

²⁸ European Commission, *Communication on European Savings and Investments Union. Call for evidence*, Ref. Ares(2025)807910, 03 February 2025, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14488-Savings-and-Investments-Union_en

²⁹ *Idem*, p.1.

³⁰ M. Draghi, *The future of European competitiveness*, Part A | A competitiveness strategy for Europe, September 2024, passim and spec. p. 59 and ff., available at https://commission.europa.eu/topics/eu-c-competitiveness/draghi-report_en#paragraph_47059.

consequent stimulus towards greater integration as a response to external dangers, could therefore be a propitious moment to realise the much sought-after Capital Markets Union, drawing on the scholarly debate that have matured in the ten years since the first proposal. It is precisely in this context that may finally be found the impulse needed to realize a European Code of Financial Markets Law as well as to define a supervisory set-up that best balances instances of centralisation and 'local' specificities.