

EU SECURITIES AND FINANCIAL MARKETS REGULATION

EU Securities and Financial Markets Regulation, by NIAMH MOLONEY, United Kingdom, Oxford University Press, 2014, 3rd edition, lxvi + 1044, Hardback, £145.00, ISBN 978-0-19-966434-4

This is the keenly awaited third edition of this established and authoritative treatise by Professor Moloney, and at just over a thousand pages of substantive text it is a substantial and weighty tome. In these respects it follows the second edition (published in 2008 and covering developments to 31 March of that year), which provided an invaluable, comprehensive, and detailed guide to the development of EC securities regulation following the Financial Services Action Plan and its implementation pursuant to the Lamfalussy process. The timing of the second edition seemed apposite, as after a period of intense activity the Financial Services Action Plan regulatory architecture was in place and the European Commission was seeking a ‘regulatory pause’ in order to enable the new structures to establish themselves.

However, the commencement of the credit crunch in 2007 had already caused considerable concern most notably in the European context in relation to the role of ratings agencies and, indeed, the second edition was able to pick up on the initial consultation to regulatory reform in this field that occurred immediately prior to publication. In retrospect, of course, even as the second edition was published it is now clear that the global financial markets were about to enter into a period of considerable turbulence as the initial credit crunch was the harbinger of a succession of severe financial shocks that was triggered by the bankruptcy of Lehman Brothers in

September 2008 the repercussions of which continue at the time of writing this review with the ongoing negotiations surrounding Greek membership of the eurozone. Such calamities and the regulatory response to them as future events were obviously unable to be treated in the second edition but inevitably form the principal context and substantive analysis of the third edition. It is hardly surprising, therefore, that as well as being keenly awaited, the text not only remains substantial in length but also has been largely re-written in order to provide a comprehensive mapping of the detailed contours of the immense and expanded EU regulatory regime that has been put in place in response to the crises.

Indeed, given the specific origins of the 2008 financial crisis in the banking sector, one of the key issues that Moloney had to determine at the outset was the scope of the EU reforms that would fall within the ambit of the book. Given the complex inter-relationship of financial products, institutional structure and the underlying policy concern with systemic risks this is very far from being a straightforward task. The solution that Moloney adopts is to exclude detailed analysis of rules primarily addressed at bank-based finance (i.e. deposit-based and loan-based financial intermediation) and deposit-taking institutions in their unique capacity as such and to focus upon, "... market-based financial intermediation between suppliers of capital and firms seeking capital, and ... the wide range of relationships and related risks which this form of financial intermediation produces" (p. 1). This definition permits the exclusion of the specific responses to the moral hazards and systemic risks which the 2008 financial crisis highlighted in relation to the specific institutional roles and properties of deposit-taking institutions (though still allowing for analysis of the regulation pertinent to the market-based financial intermediation undertaken by such

bodies) whilst enabling focus upon the traditional core area of securities market activities and gatekeepers (e.g. investment analysts and especially rating agencies) together with the activities of wider financial markets now brought within the regulatory perimeter as a result of the 2008 financial crisis (most notably derivatives trading traditionally undertaken on over-the-counter markets). It is as a result of the regulatory response to key policy concerns in these latter broad substantive areas that the title of the third edition is no longer *EC Securities Regulation* but the broader *EU Securities and Financial Markets Regulation*.

Correspondingly, and in order to reflect the widening of the EU regulatory perimeter, the structure of the third edition, though recognizably based on the foundations provided by the second edition, has accordingly been modified. There are now eleven principal sections, *viz*: an introduction; capital-raising; asset management; investment firms and investment services; trading venues; trading; gatekeepers; market abuse; the retail markets; law-making and supervision; and enforcement. As might be expected given the size and scope of the new EU single rule book a meaningful summary of the content of the third edition is not feasible within the context of a short review but by way of example of new material outside the traditional core areas of policy and illustrating the EU's need to be seen to be responding to the crisis in order to promote market stability there is a welcome and extended discussion of both the new short selling regime and also the new regulatory regime for rating agencies under the auspices of the new European Securities and Markets Authority. As is necessary given the intricacy and volume of the detailed materials surveyed the organisation of the subject matter is very clear and allows for rapid navigation through the text. This is assisted by very helpful internal cross-

referencing, a good index and a very useful list of abbreviations (the subject area is notorious for its plethora of acronyms).

Given the daunting bulk of the materials the care taken by Moloney in its organisation as well as in its exposition is particularly welcome to the reader. The way in which each major theme is contextualised by reference to its particular theoretical and regulatory trajectory enables a nuanced exposition of the reform process pertinent to the theme to be developed with reference to both aspects of continuity and change within the overall regime. The theoretical literatures in finance and regulation are handled with a light and assured touch and supported with judicious reference to the seminal sources. The combination of detailed analysis of the substantive regulatory materials and the accompanying theoretical debates within their specific historical evolution is adroitly managed by Moloney to produce an excellent critical account of the emerging regime and the tensions both inherent in it and created by it due to its direction of travel.

Taking the considerable knowledge and erudition underpinning the substantive regulatory aspects of the text as a given (and without in any way detracting from the immense achievement thereby represented) one of the other key virtues of the book is to place the regulation of securities and financial markets by the EU in the wider institutional context of that body. The book opens with an excellent introductory chapter in which, *inter alia*, Moloney characterises four broad phases of activity at EU level prior to the 2008 financial crisis. Whilst the second edition of the work was primarily engaged with the third of these phases (i.e. the implementation of the Financial Services Action Plan and the recommendations of the Lamfalussy

committee) it is the labour of the third edition to deal with the fifth phase, being the response to the 2008 financial crisis. The report of the de Larosière Group (2009) provides a central roadmap to this endeavour as it both called for the generation of a single EU rulebook and recommended the adoption of a new regulatory institutional structure.

In the above light Moloney views the fifth broad phase as having two “distinct waves”: first, the initial response to the crisis which generated the new institutional structure (in particular, in the context the European Securities and Markets Authority) and widened the regulatory perimeter (especially, as aforementioned, broadly to catch derivatives trading); and secondly, subsequent reforms to core existing securities market regulations pursuant to the ongoing obligation to review such regulations (e.g. in the fields of prospectus regulation, transparency and to a more significant extent market abuse). Whilst in the second wave there was a high degree of underlying continuity in regulation the relevant change was inevitably coloured by the financial crisis as well as reflecting incremental improvements in the regulation consequent to the normal review process.

The interplay between continuity and change is also evident at a more fundamental policy level in terms of the location of the site of regulatory power and the principal rationale leading to regulatory action. In the former case, as Moloney notes, the direction of change remains the same:

Over the FSAP era, liberalization-driven regulatory reform in support of cross-border activity saw the location of securities and markets regulation shift to

the EU from the Member States. The crisis era has led to the almost complete ascendancy of the EU (p. 39).

However, as regards the rationale for regulatory intervention the 2008 financial crisis clearly had a more radical effect:

The preoccupation with financial stability over the financial crisis, and the recharacterization of the single market in terms of risk, has led to the regulatory function of EU securities and markets regulation trumping the liberalization function (p. 40).

In Moloney's view the combination of the two tendencies has undoubtedly been to introduce a more intrusive and more intensive substantive regulation.

In the concluding part of the book Moloney gives a very thorough analysis of the role and powers of the new European Securities and Markets Authority which arguably lies at the heart of the new institutional matrix and will be a key body in implementing the new regulatory ambition. That very power has, of course, led to profound EU constitutional issues centring on the scope and application of the *Meroni* decision (1958) to the European Securities and Markets Authority, which as Moloney ably demonstrates are far from clearly resolved as a matter of general principle in the recent challenge by the UK to the legality of aspects of the new short selling regime in the *Short Selling Case* (2014). With its ability to create soft law and to propose binding technical standards the European Securities and Markets Authority has the potential to both create but also to diffuse the inevitable tensions arising from the new more comprehensive regime for regulating EU securities and financial markets and

Moloney is surely absolutely correct to make its role and potential central to her analysis of the new post-crisis regime.

In sum, this is a very clearly written book which admirably succeeds in marshalling the vast and diverse substantive materials comprising the EU's regulatory response to the events unfolding from the 2008 financial crisis as relevant to securities and financial markets within a clear analytical framework that both contextualises the regulatory trajectory of specific regimes and provides a critical survey of the available theoretical underpinnings. Within this framework the elements of continuity and change in the field are discussed in a nuanced manner and Moloney's emphasis on the growing importance of the European Securities and Markets Authority and the constitutional tensions generated by both widening the regulatory perimeter and locating regulation at the EU level is surely prescient. For her third edition Moloney has again chosen an optimum moment for publication as the text incorporates the core regulatory response of the EU in terms of securities and financial markets as finalised by the raft of measures approved by the European Parliament on 15 April 2014 ('Super Tuesday'). Whilst this should ensure that the book has good longevity in a notoriously fast moving field the wider picture remains fraught with instability especially in terms of the institutional trajectory of the EU and the Eurozone and the inherent structural tensions in the contemporary neo-liberal order. Nevertheless, the third edition of this text is an exceedingly fine piece of scholarship which provides a lucid, cogent and comprehensive review of this vast body of highly complex regulation, and, as such, it will doubtless ensure that the work deservedly remains one of the key points of reference in the field.