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Europees financieel toezicht

Een onderzoek naar de verdeling van toezichtbevoegdheden tussen de lidstaten van de Europese Unie onderling en tussen de lidstaten en Europese Instellingen en Agentschappen
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Publication date

2017

Document Version

Other version

License

Other

[Link to publication](#)

Citation for published version (APA):

van Praag, E. J. (2017). *Europees financieel toezicht: Een onderzoek naar de verdeling van toezichtbevoegdheden tussen de lidstaten van de Europese Unie onderling en tussen de lidstaten en Europese Instellingen en Agentschappen*. [, Universiteit van Amsterdam].

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Summary of Phd Thesis

Emanuel van Praag

“Europees financieel toezicht

Een onderzoek naar de verdeling van toezichtbevoegdheden tussen de lidstaten van de Europese Unie onderling en tussen de lidstaten en Europese Instellingen en Agentschappen”

European Financial supervision

An enquiry into the distribution of supervisory competences amongst member states and amongst member states and European institutions and agencies.

The author investigated the distribution of supervisory powers between European financial supervisors and between European financial supervisors and national financial supervisors. The dissertation is on the cutting edge of financial law and European law. Supervisor was prof. C.E. du Perron (financial law). Co-supervisor was Dr R.H. van Ooik (European law).

This is a hot topic. Until the financial crisis of 2008, financial institutions were only subject to supervision by their national supervisor. With the founding of the European Supervisory Authorities (EBA, EIOPA and ESMA) in 2011 and the transfer of banking supervision in the Eurozone to the ECB in 2014, these EU organizations started to play major role in the supervision of financial institutions and markets.

The author investigated when which of the various supervisors is competent and how they work together. An illustration of the questions answered by the author: an investment firm mainly has clients in Member State A, but is located in member state B, which member state is in charge of supervision? EBA is of the opinion that a national supervisor does not sufficiently enforce PSD II, can EBA intervene? If EBA intervenes, which court is competent to deal with complaints by the payment institution? What does the ECB have to say about a branch office in the Netherlands of a British bank, and what if that bank is American? The author provided a complete overview of such jurisdiction rules and to this end deals with the application of the four freedoms of the TFEU on supervision, the role of the ESAs, the role of the ECB and the SRB, and various sectoral European regulations (including with regard to investment firms, UCITS and AIF funds and managers, credit institutions, insurance companies, insurance intermediaries, CCPs, prospectuses, transparency, market abuse, short selling, the regulation of trading venues and credit rating agencies).

The author then assesses to what extent these jurisdiction rules are optimal. The author comes to the conclusion that the current distribution of supervisory powers on points no longer suffices. The core findings are:

The competent national supervisor is determined by European regulations by looking at where (on the territory of which Member State) a financial undertaking is physically located. In the online world this connecting point no longer suffices. Even without any physical establishment in a Member State, a company can have a significant (economic) impact on the market.

The current regulations treat subsidiaries differently from branches without their own legal personality. This does not do justice to the fact that financial companies are managed centrally.

The high threshold for supervisors' liability means that supervisors do not have to take sufficient account of the interests of clients and other interested parties from other member states.

Because the European legislators do not want to amend the Treaty on the Functioning of the European Union (TFEU), artificial constructions have been developed for financial supervision, whereby decisions are formally taken by persons and organizations, but in practice by others..

At European level, a directive or regulation is always adopted for each type of financial enterprise. This caused inconsistencies in the regulations. Other solutions are chosen for the same problems or questions.

European supervisors are not really European. The management of these European supervisors consists of representatives of national supervisors. This is a problem, because these European supervisors have to monitor the national supervisors independently.

At the European and national level there are now so many supervisors involved in the supervision with overlapping and parallel powers that financial companies in practice no longer know who to listen to.

The author makes concrete proposals to address these defects.