European Law, national rules and Single Supervisory Mechanism: How much harmonisation is needed for a banking union? – Comments

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I. Motor of Harmonisation?

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II. Materiality of Harmonisation: Same risks same rules?

- Introduction
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I. Motor of Harmonisation? - Introduction

- Different national laws e.g. relating to corporate, administrative and insolvency aspects
- Banking Union can be a motor of harmonisation
- But harmonisation has to be proportionate
- Case by case decisions are required
- Harmonisation of the respective national laws only where it is indeed necessary for the proper functioning of the banking union
- Experience of banking industry should be considered

I. Motor of Harmonisation ? - Examples (1/3)

- **Corporate law**
  - Different board systems within the EU (One Tier versus Two Tier Board System)
  - German approach: often requires interpretation of regulatory law aspects (based on EU- or international law/guidelines)
  - Interpretation with justifiable expenditure possible
  - National particularities must be considered
  - Not a big problem in the past

I. Motor of Harmonisation ? - Examples (2/3)

- **Administrative procedures**

  - Partly very time consuming, inconsistent and redundant procedures
    - Fit and proper decisions of very reliable and qualified managers
    - Multiple and overlapping data requests of different authorities (ECB, NCAs, EBA, SRB and National Resolution Authorities)
  - High administrative burden for institutions and interference of business activities

I. Motor of Harmonisation ? - Examples (3/3)

- **Insolvency Law**
  - Consistence of resolution law requires amendments
  - First developments could be observed
  - Sec. 46 f German Banking Act and the corresponding discussions on EU and EU Member State levels

II. Materiality of Harmonisation: Same risks same rules – Introduction (1/2)

Achieving regulatory harmonisation across the EU is essential for a Single Financial Services Market:

- May create or at least promote a level playing field among institutions and
- Will once be finalised reduce the administrative burden of managing the legal complexity of different regulatory frameworks for cross-border institution groups (hopefully)
- ECB`s initiative towards more harmonisation of supervisory practices within the Eurozone regarding various options and national discretions of the CRD IV package generally supports the reduction of different treatment of same risks

BUT

II. Materiality of Harmonisation: Same risks same rules – Introduction (2/2)

Two aspects must be taken into consideration:

- Proportionality
- Fragmentation of the Single Rulebook which the CRR aimed to introduce

Both are crucial for the competitiveness/ survive of significant cross border institution groups

II. Materiality of Harmonisation: Same risks same rules – Proportionality

Proportionality

- Exercise of regulatory powers of EU institutions must be limited to what is necessary to achieve the aimed objectives
- Some harmonised aspects are out of proportion as the enforcement requires a huge effort for institutions while their aim is not clear or has very limited benefit

Example:

- Transitional provisions relating to capital deductions (Art. 16-25 Regulation (EU) 2016/445)
- Only applicable for a limited period of time and expire mainly after 2018
- Harmonisation is not necessary and justifiable due to the limited remaining application period.
- Violation of the principle of legitimate expectations

II. Materiality of Harmonisation: Same risks same rules – Fragmentation of Single Rulebook (1/2)

Three Rulebooks instead of one Single Rulebook for

- Significant banks within the SSM-zone
- Non-significant banks within the SSM-zone
- EU banks outside the SSM-zone

II. Materiality of Harmonisation: Same risks same rules – Fragmentation of Single Rulebook (2/2)

Consequences:

- Disparities in supervisory practices between participating and non-participating EU Member States
- Denial of reduced administrative burden and arising of new legal uncertainties for cross-border groups
- Different treatment of same risks

Example:

- Higher capital requirements for loans (Art. 124 (2) and Art. 164 (4) CRR)
- Margin for the assessment of immovable property market by the competent authorities could be different in case ECB decides for SSM-banks and the respective NCA decides for non-SSM-institutions within the same Member State
- Possibility of different capital requirements within the same Member State for identical exposures and hence identical risks
- Could be worsened in case an SSM-institution of another Member State has the aforementioned exposure of another Member State
- In case of cross-border groups with entities in non-participating Member States the supervisory practice and interpretation of this provision could even differ drastically (see for example Poland)