

The maintenance of the structural and functional parallelism among ESAs despite the misalignment in the current and proposed allocation of supervisory tasks

Raffaele D'Ambrosio (*) and Marco Lamandini

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Agenda

- The Commission's proposal maintains a functional and structural parallelism among ESAs
 - a set of new supervisory powers are conferred to all the three ESAs
 - parallel changes are introduced with regard to all the three ESAs' governance, independence and funding
- The conferral of the new powers does not take due account of the misalignment among ESAs' tasks
- ... the establishment of the SSM,
- ... the ESAs legal basis and Meroni's constraints

Functional and structural parallelism among ESAs

- The Commission's proposal: confers to all the three ESAs a set of new material supervisory powers
 - supervisory convergence and coordination (alignment of EIOPA and ESMA regulation to EBA regulation on supervisory handbooks; EBA handbook in the field of resolution)
 - Stress testing (alignment of EIOPA and ESMA regulation to EBA regulation on stress testing)
 - third countries equivalence
 - collection of information
- ... envisages a new governance structure and a new funding system for all the three ESAs

Changes in ESAs' governance, independence and funding

- The reform introduces an independent Executive Board replacing the current Management Board
- The functions of the ExB are not confined to that of preparing the decisions to be taken by the BoS but also includes decision making powers in material supervisory areas
- The role of the BoS will be confined to the adoption of the regulatory and quasi-regulatory acts

Changes in ESAs' governance, independence and funding

- Maintaining the BoS competence to adopt regulations/soft law/binding mediation acts is in line with ESA's current harmonization role
- On the contrary, conferring specific supervisory powers to a new EU ExB completely separate from NCAs is a logical effect of the conferral to ESAs of direct supervisory powers
- No similar cases in the architecture of financial supervision
- SRB model (in executive composition) not comparable, as the SRB's decisions are fundamentally approved by the Commission/Council
- ECB's view: maintaining new EU ExB with a mere administrative role

Changes in ESAs' governance, independence and funding

- The revision of the ESAs current funding system is designed to reflect the ESAs new powers and governance
- The new regime retains the public funding element provided by the EU and combines it with contributions by industry, replacing current contributions from NCAs
- The aim of the new funding system would be
 - making the ESAs decision making process independent from NCAs (as ESAs will be financed only by the EU and the industry)
 - reducing indirectly the industry contributions (to the extent that contributions paid by industry to NCAs will be decreased as not more designed to cover the tasks conferred to ESAs)

Changes in ESAs' governance, independence and funding

- The new ESAs funding system is criticized by the Council's Legal Department to the extent it includes payments not remunerating a given service and thus such to be considered as fiscal provisions excluded from Article 114(1) TFEU
- The Commission takes the different view that
 - approximation that underlines the ESAs' reform does not concern fiscal provisions (ESAs are creations of EU law so that no national law need to be approximated)
 - fee financing of supervisory tasks is perfectly established in the CRA/trade repositories supervision, SSM and SRM
- It is disputable that the industry fees will be reduced thanks to the tasks transferred to ESAs, as NCAs shall keep on complying with ESAs regulatory/quasi-regulatory acts and thus increase their staff

The misalignment between the ESMA and EBA tasks

- The conferral to all the three ESAs of new material supervisory powers does not take into account the current differences between ESMA and EBA/EIOPA tasks
- These differences are even deepened in the Commission's package as ESMA is vested with further specific supervisory powers on EuVECA, EuSEF and ELTIF, CCPs, ect.

The misalignment between the ESMA and EBA tasks

- ESMA already enjoys supervisory powers towards CRA and trade repositories
- EBA and EIOPA only enjoy (as ESMA) specific temporary intervention powers (provided for in specific rules contained in short-selling/MiFiR/PRIPs regulations)
- In this field ESAs' reform package abstains from establishing a general enabling clause and merely clarifies that MiFIR intervention powers cover managers of UCITS/AIFs

The misalignment between the ESMA and EBA tasks

- Moreover, the Commission departs from the need to maintain regulatory and supervisory powers distinct, weakening the ESAs' power to issue guidelines and recommendations to NCAs
- If a majority of the relevant ESA Stakeholder Group considers that the ESA exceeded its competence may issue an opinion to the Commission that may require the ESA to withdraw the guideline/recommendation

ESMA's supervisory powers on CCPs

- The review of EMIR as regards CCP Supervision (EMIR 2) confers strong supervisory powers to ESMA
- This competence is essentially exclusive for third-country CCPs, while for EU CCPs major supervisory decisions are proposed by national competent authorities (NCAs) and then subject to the prior consent of ESMA before they can be formalized.
- If ESMA proposes changes, draft decisions by NCAs cannot be taken unless modified accordingly

ESMA's supervisory powers on CCPs

- Despite such a strengthening of ESMA's supervisory powers, fiscal responsibility in case of default of a EU CCP remains national according to the draft Regulation on CCP Recovery and Resolution
- EMIR 2 establishes a CCP Executive Session within ESMA that would absorb all competences on CCPs, including those of the Board of Supervisors, where most NCAs are represented today
- Hence, it would be competent for supervision, regulation and dispute resolution

ESMA's supervisory powers on CCPs

- Which relationship between the proposed ESMA's executive session and the proposed ESMA's ExB?
- Which role for NCAs in the new framework?
- Which role for the ECB in the supervision of CCP?
- Which role for the ESCB?
- ESCB contribution to CPU and supervision on CCP's
- CJEU case law on ECB regulatory powers concerning settlement of securities
- The need to amend Article 22 ESCB Statute

ESMA's supervision on EuVECA, EuSEF and ELTIF

- Commission proposes to entrust ESMA with direct supervisory powers on EuVECA, EuSEF, ELTIF and their managers, with the aim to :
 - streamline the administrative process governing authorization and registration of these EU label funds in the Union
 - strengthen the level playing field in their supervision
 - promote their development also via lower transaction and operational costs
- Each one of said funds is governed by a directly applicable EU Regulation that ESMA would enforce
- In some cases ESMA would also be required to enforce the AIFMD as implemented by MS (i.e for ELTIF funds and when managers have a total of assets under management exceeding the threshold of 500 million of euro)

The misalignment between ESMA and EBA tasks

ESMA's supervision on EuVECA, EuSEF and ELTIF

- The most critical aspect of the proposal arises from the circumstance that the same entity (e.g. an SGR) can manage or market simultaneously EuVECA, EuSEF or ELTIF funds and other type of funds
- The Commission's proposal only clarifies that when the total assets under management of a manager of EuVECA and EuSEF funds exceed 500.000.000 euro and thus AIFMD applies, ESMA would be the competent authority and exercise its supervisory powers under national law implementing the AIFMD
- It is not clear whether and to what extent NCAs would remain responsible for the supervision of the AIF managers for the portion of funds different from EuVECA and EuSEF
- Both ESMA and NCAs would be responsible to apply to said managers the same supervisory controls under the same rules

The misalignment between ESMA and EBA tasks

Further ESMA's supervisory powers

- coordination role for ESMA in relation to market abuse investigations
- supervision of data reporting service providers
- supervision of certain types of prospectuses
- supervision of administrators of benchmarks

The interplay between the new EBA and the SSM

- EBA's new power on the EU-wide strategic supervisory plan may jeopardize the ECB independence
- The ECB's opinion on EBA's reform correctly raises concern on this aspect
- Other minor issues:
 - In the context of breach of EU law investigations, EBA is able to address a request for information to the ECB too
 - Settlement of disagreements between competent authorities, including ECB, may be triggered on EBA's own initiative
- The ECB's soft law may impinge on the EBA's/Commission's regulatory powers
- Council Legal Department's opinion on ECB addendum on NPL
- Which outlook? Separation between regulator and supervisor? Conferring to the ECB both the powers? Conferring to the EBA both the powers?

Supervisory powers, legal basis and Meroni's constraints

- Whether Article 114 is a sound legal basis for the assignment to ESAs of specific supervisory powers
- In this regard, also in the light of the precedents of the ECJ (C-270/12, *Short Selling*, 115), the conferral of specific powers to EU Agencies as a measure to realise a better harmonisation in the Union can be justified only «where there may be cross-border implications and competent national authorities have not taken sufficient measures to address the» issue
- Under the Council Legal Department's view Article 114 TFUE is a suitable legal basis for new ESAs powers:
 - as those powers are closely linked to the objectives of the EU acquis concerning the internal market of financial services and
 - their calibration falls under the remit of the political assessment of the EU legislator

Supervisory powers, legal basis and Meroni constraints

- The Commission proposal could be not Meroni compliant (ECJ C-9/56 *Meroni*, 40): a delegation to EU Agencies involving discretionary power implying a wide margin of discretion would trigger an illegal transfer of responsibility in contrast with the Treaties
- New powers conferred to ESAs by the Commission proposal are:
 - neither bound by ex ante criteria which can limit their discretion, as in the case of ESMA ones on CRA and trade repositories
 - nor subject to the ex post endorsement of the EC and/or the Council, as basically in the case of the SRB
- Could the current EU constitutional architecture allow to overcome the Meroni's prohibition?
- What consequences on the ESAs liability issues?