BrieFin #6:

Exploring the boundaries between banking supervision and the Capital Markets Union (CMU)

The boundaries which divide Life from Death are at best shadowy and vague. Who shall say where the one ends, and where the other begins?

(Edgar Allan Poe -The premature burial-)

Economic and Monetary Union (EMU) may be the greatest EU project. Yet, more than twenty-eight years after the Maastricht Treaty set up its foundations, the EMU is more a project than a fully-fledged reality. Yet, despairing would not be correct either. The EMU has, indeed, come a long way, and as we witness the (lengthy) birth of two of its major building (or accompanying) blocks, the Banking Union (BU) and the Capital Markets Union (CMU), there are reasons for optimism, but plenty of material for reflection and criticism as well. The BU is not yet a complete reality -lacking its controversial third pillar, i.e., the European Deposit Guarantee Scheme-; the CMU project launched back in 2015 in admittedly underwhelming terms if compared with the BU, now seems to be gaining momentum as a New Action Plan on the CMU was issued in 2020. Things seem to be moving, thus, and as norms evolve, they provide ample ground for discussion and debate from the corners of academia, practice and policymaking and regulation.In line with BrieFin's spirit to be on the cutting edge of things, and not shy away from controversial issues, this sixth number focuses on the interplay and blurry boundaries between the CMU and -banking- supervision. The four contributions presented here look at this reality from different angles and express different sensitivities to this phenomenon. All in all, they ultimately answer to the question: What is the relationship between banking supervision and the intended CMU? The slow but determined achievement of the CMU entails several regulatory, technical and practical challenges as regards the way banking supervision is performed -in its most traditional way-. This BrieFin aims at minding the trend and frame those challenges and opportunities.

Our first contribution from Veerle Colaert, chair of Financial Law at KU Leuven University, explores the relationship between the CMU and supervision on the basis of three case studies: Wirecard, COVID 19 and the danger of greenwashing. The contribution also looks at the role played by supervision in both the CMU and the BU and touches upon the thorny question of the need for unified supervision within the CMU –replicating somehow the Single Supervisory Mechanism approach.

The second contribution is the regulators' view, provided by Rafael Nebot Seguí and Nefeli Douma, from the European Banking Authority. They explore the development of the CMU, in particular, the legislative measures recently taken to enhance the CMU and the role these measures may play in fostering the Banking Union -and EU internal market more broadly-.

The third contribution from Javier Gómez and Ricardo Maestro García, Partner and Associate, respectively, at Pérez-Llorca law firm, offers a timely industry's view on the benefits that the implementation of the CMU will bring to the economy and the single market. In particular, they focus their practitioner's reflections on the benefits and challenges (from a regulatory and economic perspective) linked to the implementation of the Small and Medium Size (SME) Initial Public Offerings (IPOs) initiative.

Finally, the young researchers' view by Alessio Azzutti, Research Associate within the 'Law, Finance, and Technology' program at the Institute of Law & Economics of the Universität Hamburg, offers provocative insights into the interplay between the BU and the CMU. In particular, this contribution focuses on the evolution of competition in the banking sector, and the challenges it may face as a result of the materialistation of the CMU.

We hope that the concise but enlightening pieces presented herein offer the reader an overview of the existing challenges and opportunities stemming from the complex but fascinating interplay between banking supervision and the envisaged CMU. By gathering the views of different stakeholders, we truly wish to spark the debate on this (still) under-explored but critical topic and, at the same time, contributing to identify potential friction points.

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1. The Professor's View

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Is the Capital Markets Union (CMU) in need of more centralized supervision?

1. Introduction

2020 was a busy year for anyone working in the field of EU financial regulation, with, among other things, a range of measures to deal with the COVID-19-crisis, initiatives to further implement the Commission's Sustainable Finance Action Plan, the publication of the European Commission's Digital Finance Package, and last but not least, the Commission's new Capital Market Union Action Plan -New CMU Action Plan-. The Plan (pp. 7-10) indicates that all the above-mentioned initiatives are closely intertwined, announcing measures to support a green, digital, inclusive and resilient economic recovery.

In this contribution we will first draw a brief comparison between the role of supervision in the CMU Action Plans and in the Banking Union. Then, we will further explore the relationship between the CMU and financial supervision using three case studies: Wirecard, COVID-19 and the danger of greenwashing.

2. The role of supervision in the CMU Action Plans and the Banking Union

Despite their very similar names, the Banking Union and the CMU have shown, from the start, a strikingly different level of ambition. Both the Banking Union and the CMU aim at harmonizing law and removing barriers to trade in order to fully realize an internal market for financial services. The Banking Union has been far more ambitious, however, in creating an institutional framework to underpin its single rulebook.

Pre-Banking Union banking regulation had already achieved a relatively high level of harmonization and removed many barriers for banking services. As a consequence, large banking groups thrived and became more and more difficult for national competent authorities (NCAs) to effectively supervise. In addition, the 2007-2008 crisis showed that national supervisors tended to be reluctant to impose strict measures on "their" ailing banks, and even more so to let their national champions fail, creating a doom-loop between banks and their governments. One of the main goals of the Banking Union was aimed at breaking this close link between banks and Member States (vid. pp. 5-8 Binder). Therefore, Banking Union reforms were mainly of an institutional nature, with the creation of a Single Supervisory Mechanism (SSM), a Single Resolution Mechanism (SRM), and an – as of yet not adopted – European Deposit and Insurance Scheme (EDIS). More recently, a fourth pillar, the "backstop" has been added.

The CMU's original focus, in contrast, was from the start "a classic single market project", focussing on more accessible market financing, including for start-ups and non-listed companies, facilitating cross-border investment, and integrating national capital markets into a genuine single market. In regard to supervision, the first CMU Action Plan only stressed the need for supervisory convergence and peer reviews by ESMA (pp. 26-27 of the CMU Action Plan 2015).

The New CMU Action Plan (p.15) also recognizes the importance of "*integrated and convergent supervision*" … "to ensure a genuine level-playing field for all market players" … and as "an essential condition for a well-functioning CMU". More generally, the European Commission pledges to "work towards an enhanced single rulebook for capital markets by assessing the need for further harmonisation of EU rules and monitoring progress towards supervisory convergence." However, in the New CMU Action Plan, the European Commission also considers the possibility of going beyond mere supervisory convergence. The Commission will "*consider proposing measures for stronger supervisory coordination or direct supervision by the European Supervisory Authorities*" (emphasis added). This almost accidental mention of direct ESA supervision is on the one hand revolutionary, but on the other hand still a far cry from an institutional underpinning of the single rulebook in the field of capital markets regulation.

3. Three case studies

The idea of direct supervision by the ESAs is remarkable, but not unexpected. The New CMU Action Plan indirectly and directly refers to the Wirecard debacle, stating that *"in a single market, the impact of a national supervisory failure extends far beyond the borders of a single Member State"* and that *"[t]he Commission will also carefully assess the implications of the Wirecard case for the regulation and supervision of EU capital markets and act to address any shortcomings that are identified in the EU legal framework*".

But the Wirecard case is not the only event that shook up the markets in 2020. The COVID-19-crisis, as well as fears of greenwashing in an explosively growing market for ESG products are also occasions to revisit the structure of capital markets supervision in the EU.

a. The Wirecard Case

The Wirecard debacle has exposed important supervision flaws in the work of the German supervisors, BaFin and FREP (see ESMA Fast Track Peer Review, SMSG Report, EP Study by Langenbucher et al.). Wirecard AG was widely regarded as a pioneer and innovator in the digital payments industry. Its market capitalization was at one point bigger than Deutsche Bank's, and it replaced Commerzbank in the DAX index in 2018. BaFin and the FREP have been criticized for their inactions – e.g. not taking timely or sufficient action to detect accounting fraud – as well as their actions – e.g. the introduction of a shortselling ban regarding individual Wirecard shares, despite counterarguments by the Bundesbank.

Some claim that both investors and the German supervisors have been subject to bias in regard of their "national champion" (pp. 22 EP Study). In respect of the required independence of supervisors, ESMA did find that there is a heightened risk of influence by the Ministry of Finance (MoF) in regard of BaFin. However, supervisory biases are not necessarily a result of a conscious will to protect. Behavioural science has examined a so-called "belief perseverance bias", which means that the actor clings to previously held beliefs despite contradicting information (see Zeranski and Sancak; Pell).

Breaking the link between national supervisors/governments and banks was an important argument for introducing the Single Supervisory Mechanism in the banking sector. In view of the Wirecard debacle, Langenbucher et al. (pp. 22-23) have recently argued in favour of a "European Single Capital Market Supervisor" (ESCMS), modelled after the SSM, as a remedy against incentives of national supervisors to protect a national champion. They argue that an EU authority would not only have introduced a more impartial outsider's view, but would also have been less subject to national pressures.

b. The COVID-19-Crisis

The COVID-19-crisis posed severe challenges to the banking sector. The Banking Union has shown its relevance in this context, with the SSM, and to a lesser extent the SRM, coordinating measures to strengthen European banking stability.

However, the effects of the COVID-19-crisis were also felt on the capital markets, with markets collapsing at a certain point, and then soaring again to record heights, with volatility, market, credit and liquidity risk remaining consistently high (see ESMA TRV Report p. 4). Market turmoil, and especially severe liquidity problems of certain money market funds and open-ended funds (see pp. 6-7 Joint Committee report, pp. 6-7 FSB report), has reopened the debate about the systemic relevance of "non-bank financial institutions" (NBFI) (see pp. 19-20 FSB report). Massive central bank intervention in regard of MMFs to avoid disruption shows that central banks seem in any event convinced that MMFs' failure could be systemically disruptive. The FSB has highlighted the increased importance of interconnectedness – both within the NBFI sector and in their relationship with banks. It is of the opinion that the international regulatory community should reinforce the resilience of the financial system, among other things by "enhancing understanding of systemic risks in NBFI and the financial system as a whole, including interactions between banks and non-banks and cross-border spill-overs" and "assessing policies to address systemic risks in NBFI" (see pp. 2 and 5-7 FSB report)".

ESMA has done whatever was in its powers to coordinate supervisory action to contain the effects of the COVID-19-crisis on the markets (supported by adequate ECB and ESM policy) and NCAs seem to have cooperated well with ESMA. Nevertheless, the question should be raised whether a further integrated EU capital markets supervision, modelled after the SSM, would allow an even more efficient response to crisis situations.

c. Avoiding Greenwashing

The New CMU Action Plan of 24 September 2020 makes reference to the need for a green recovery. Since the launch of the Commission's Sustainable Finance Action Plan, EU regulation in this field has been developing at a remarkable pace, in order to improve the management of financial risks related to environmental and social challenges and to reorient capital flows towards sustainable investments. One of the biggest challenges in this respect is to ensure market integrity and investor protection in the face of the rapidly growing range of products marketed as sustainable, and to avoid "greenwashing": portraying an organisation's products, activities or policies as environmentally friendly when they are not.

This is not an easy task considering the total lack of EU regulation of ESG data providers. Many data providers provide "ESG ratings", while there is no regulation nor any supervision of such rating providers. Moreover, many different sustainability labels are currently in use in the EU. For investors it is not always easy to understand what they cover and how sustainable a product with a label actually is, let alone to compare the sustainability of products with a different label. Those labels are typically awarded by independent, but privately established bodies, without there being any supervisory scrutiny. In view of the need for trust in ESG products, there is an urgent need for more regulation in this area (see in this respect also ESMA's recent call for regulation of ESG ratings). As many labels and ratings are used in cross-border activities, supervision at the EU level seems necessary to ensure an EU-wide and adequate supervision of ESG data providers.

4. Conclusion

The highly institutional nature of the Banking Union can be explained by the fact that the banking sector is prone to systemic risk, the need to break the "doom loop" between governments and "their" national champions, and the fact that many banking groups have an impact far beyond their home Member States.

The complete lack of institutional underpinning of the CMU could be challenged on the basis of very similar arguments today. The Wirecard debacle shows that (conscious and/or unconscious) biases in favour of national champions are not exclusive to the banking sector; the COVID-19-crisis reminds us that systemic risk can also be created by non-bank financial institutions; and providers of data on the sustainability of activities, companies and products have an impact far beyond their home member states. Therefore, the debate on the need for an EU capital markets supervisor and an institutional underpinning of the CMU should be re-invigorated.

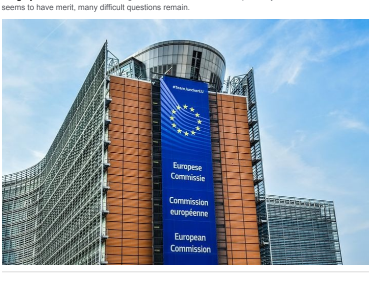
Such a capital markets supervisor could be modelled after the Single Supervisory Mechanism. As indicated by Langenbucher et al., this means that national capital markets supervisors would be integrated in a reinforced network of supervisors, with an EU Authority at its top. The New CMU Action Plan refers in this respect to the possibility of "direct supervision by the ESAs". However, the last thing the CMU needs is a multitude of EU authorities having to cooperate with a multitude of national supervisors. If there is to be an EU capital markets supervisor, it should be ESMA, even in market-related areas which would currently fall into the remit of EBA or EIOPA (e.g., trade in virtual currencies or insurance-based investment products).

The idea of direct EU capital market supervision is not as revolutionary as it may seem. ESMA already has the competence to supervise rating agencies and trade repositories directly -cfr. arts. 21 of the Consolidated CRA Regulation (EC) No 1060/2009 and 55 ff of Regulation (EU) No 648/2012 -. Moreover, it already plays a role in the decision-making of NCAs, for instance on short selling and product intervention -cfr. Arts. 28-29 of the Short Selling Regulation (EU) No 236/2012 and 40 of MiFIR-, and it already has certain powers to intervene in emergency situations -art. 18 of the Consolidated ESMA Regulation (EC) No 1095/2010-.

Nevertheless, the idea of modelling capital markets supervision after the SSM raises many difficult questions. Compared to the banking sector, capital markets involve many more different players, which makes the exercise of dividing powers between ESMA and the national authorities even more challenging than it is in respect of the SSM. It would seem logical that ESMA would become the competent authority for new "gatekeepers", such as issuers of ESG ratings, if new EU regulation would be introduced to regulate them. For labels, however, this is less obvious, since they have been developed nationally and not all of them have a reach beyond their Member State of origin. The contours of ESMA's potential mandate is even less clear when other market players and activities are concerned. In respect of investment funds and share issuances, for instance, there is no obvious answer to the question how to divide powers between ESMA and national competent authorities. Size seems an important criterion, but also the question whether they have a cross-border reach seems relevant. The question could further be raised whether ESMA would also be the competent authority to enforce transparency obligations and the market abuse framework in respect of the (securities of) companies for which it has overseen the issuance. Finally, one could wonder whether there is any need for ESMA to take over supervision of regulated markets, MTFs and OTFS, for instance for markets of a certain size. This is not necessarily warranted.

A question of a different order, finally, is whether an SSM-like framework for supervision of the CMU should be limited to the Eurozone, as is the case for the SSM, or extend to the entire EU. The reasons for limiting the scope of the Banking Union to the Eurozone – breaking the sovereign-banking-loop in the euro-area where national central banks have given up control over the currency in which their debt is issued, putting the ECB in charge (see Hüttle and Schoenmaker pp. 89-90) do not apply to the CMU. We therefore do not see any reason to apply a similar limitation to direct EU supervision of the CMU.

The road to a true CMU should start with enhancing the single rulebook, which indeed represents the bulk of the first and second CMU Action Plans. An equally important step, however, is to establish an optimized cooperation framework between national competent authorities and ESMA. Such a supervisory framework should respect the principle of subsidiarity, while at all times ensuring to take the European dimension into account as well and the need for market stability and market integrity in the CMU. Even though the idea to model such a supervisory framework after the SSM seems to have merit, many difficult questions remain.



2. A Regulator's View

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The interplay between CMU and BU: Banking legislation

EMU – CMU: ***History and current state of play***

The Economic and Monetary Union (EMU) constitutes one of the building blocks of European economic integration. The Maastricht Treaty fully introduced the free movement of capital as one of its four integration pillars. However, until some years ago, the development of that pillar mainly focused on lifting all restrictions to the free movement of capital, which proved not to be sufficient to end the fragmented capital markets that remain today. For that reason, EU policy-making switched from merely removing barriers to harmonisation to seeking to create the most suitable environment for cross-border investments within the common market on a level playing field. In particular, the first leap towards a truly integrated single capital market, a Capital Market Union (CMU), came in September 2015, when the Commission adopted the first CMU's action plan, recently updated -in September 2020- with the so-called New action plan on the CMU.

Following the global financial downturn (2007/2008) and the sovereign debt crisis over the 2010-2012 period, and prior to the CMU initiative, the three-pillar Banking Union (BU) was agreed, though only for EU member states whose currency was the euro, while allowing others to join through a close cooperation mechanism (bringing participating Member States to 21 with Croatia and Bulgaria, currently in ERM II[3] , having joined the Single Supervisory Mechanism and Single Resolution Mechanism in October 2020). The two pillars, centralised supervision (SSM) and the single resolution framework (SRM), complemented by the Single Resolution Fund (SRF), were put in place first, while the third pillar, the European Deposit Insurance Scheme (EDIS) has come to a standstill for the moment. Recently, a backstop to the SRF through the ESM has been approved to enhance reaction capacity and, in this way, the reliability of weathering a systemic crisis.

The BU is still far from being complete, although it has come a long way. Completing the BU is key to the future of EMU. There are still some areas of competence which remain under Member States' remit and which are often regarded as a deterrent to orderly integration: fiscal policies (including withholding tax and other administrative obstacles to cross-border investments), deposit insurance, or national insolvency regimes, for instance.

BU & CMU: T*wo sides of the same coin*

BU and CMU -essential components of the EMU- are two sides of the same coin, both indispensable and beneficial to each other. Financial institutions adopt several roles as either sponsors, service-providers, issuers, investors, etc. Furthermore, a fully-fledged CMU would help credit institutions and financial systems advance on risk sharing, reduce the dependency on banking lending, favour cross-border investments, support small and medium-sized institutions in accessing third-party investment funding. The latter becomes relevant, as all banks are obliged to have a minimum requirement of own funds and eligible liabilities (MREL). Nevertheless, those small and medium-sized institutions usually face serious constraints in issuing MREL resources due to their small size and limited capacity to reach out to external investors, and being predominantly deposit-funded, they mainly raise capital from shareholders.

Brexit: ***What's next in the EU-UK relationship?***

Following the UK's exit from the EU, which has been one of the most relevant players as regards the EU capital markets, a CMU becomes essential. The role of the UK as a third country and the role to be adopted by the different EU local capital markets should be redefined within the CMU architecture. The end of the transition period on 31 December 2020 marked the end of 'passporting', bringing the question of equivalence to the table. The references to financial services in the Withdrawal Agreement are rather scarce, which will necessitate further negotiations in that area. Equivalence will be the determining factor in ascertaining the gaps arising from regulatory discrepancies between the two counterparties. From a legal perspective, equivalence is more precarious than passporting as it can be revoked if the assessed regime starts to diverge in the future. Its availability also depends on the provisions of sectoral legislation and varies significantly across sectors. As the situation currently stands, the UK has 'on-shored' EU legislation to a great extent and allowed for EU firms and central counterparties to operate on its territory, which the EU has not yet reciprocated, pending the MiFIR/MiFID II review in June.

In view of the Basel 3 reform, it is expected that the Commission will take into account UK tax and anti-money laundering rules. Concomitantly, the "ECB grants reprieve on the large exposures limit" to UK and international banking groups operating through EU subsidiaries using London trading books. That will allow institutions to exceed exposure limits while EU-UK negotiations are still ongoing. In the absence of an agreement before the end of June, intra-group exposures between EU and UK entities could entail further capital charges.

The process of setting up a fully-fledged CMU – Initial remarks

Setting up a CMU is a complex process, requiring aligning the desires of all Member States with regulatory provisions in several areas. In order to establish the CMU, both legislative and non-legislative measures should be implemented. This contribution focuses on the legislative aspect as a way of fostering the CMU and, in particular, banking legislation, which can be directly related to the CMU or indirectly via the strengthening of the BU, as mentioned. In a post-Brexit era and amid the Covid-19 pandemic crisis, what has already been done, where does the EU stand and what are the next steps in relation to banking regulation?

As regards legislative measures aiming at reinforcing the BU, one of the most relevant milestones was the so-called 'Risk Reduction Measures Package' introduced in 2019, with a view to minimising risks in the banking sector and further reinforcing banks' resilience. The package included amendments to the capital requirement legislation (CRR and CRD) and reinforcement of the crisis management framework (BRRD and SRMR). Several mandates on the development of technical standards were conferred on the European Banking Authority (EBA), the latter having already been endorsed by the European Commission almost in their entirety. That second layer of binding standards, originating from the Lamfalussy process, has proven to be a very practical tool for the completion of the BU. Involving EU national supervisory and resolution authorities, EEA EFTA countries, ECB, SRB, the Commission, Banking Stakeholder Group, and input from the industry and other stakeholders via public consultation, maximises the level of convergence within a more proportionate and fair common framework.

By the end of 2019, the EBA had received more than 100 new mandates for technical standards under CRR/CRD, BRRD and investment firms regulation (IFR) and directive (IFD) legislative packages. Almost all of these mandates have now been delivered, while some are outstanding and included in the EBA's priorities for 2021, as reflected in the EBA 2021 Annual Work Programme.

The aforementioned package has considerably bolstered banks' ability to cope with economic downturns and, hence, economic regression. However, the prudential and resolution framework is again under review, as shown by the recent targeted consultation document on the review of the crisis management and deposit insurance framework, launched by the European Commission, which will likely culminate, amongst others, in BRRD3 for the reasons explained below.

Bank resolution in particular: ***The interplay between SRM and EDIS***

In order to place a bank under resolution (extraordinary administrative procedure), which implies limiting some rights (such as the freedom of doing business or the right to property), when an institution is declared *failing or likely to fail*, a positive *public interest assessment* should occur. Otherwise, credit institutions should be subject to orderly liquidation under normal insolvency proceedings. Accordingly, the vast majority of banks throughout the EU would be liquidated in case of failure, as has been the case so far since the resolution framework's existence, proving that BRRD has not harmonised the crisis management framework for institutions. Nonetheless, normal insolvency proceedings are not substantively harmonised within the EU, leading to 27 different proceedings. That results in regulatory divergence, impairing the completion of a genuine BU and also a CMU, as capital markets are also directly affected by how non-financial corporations and financial institutions are liquidated or resolved and by how non-performing loans (NPLs) are dealt with. Liquidation emerges as a priority for European legislators not only for institutions to be wound down, but also for entities to be resolved, whose resolution strategy requires a counterfactual analysis of what would have been the result of a liquidation under insolvency proceedings. Another alternative to a common insolvency framework to be explored could be to define a clear, consistent and wider public interest concept, so as to cover mid-sized banks under the resolution framework.

Since the approval of BRRD, monitoring the MREL issuance capacity of institutions has demonstrated that they are quite restrained from issuing MREL eligible liabilities due to their market size and limited access to overseas investors. Hence, a CMU will definitively help to overcome this hurdle, helping banks to reduce their dependency on equity and depositors.

In a similar course of action, the third pillar of the BU, EDIS, currently under negotiation, should be completed as soon as possible, in order to avoid relying on 27 different deposit insurance schemes, even more so, considering that DGSs could adopt a relevant role in a hypothetical future liquidation or resolution of SME banks amid and post- pandemic. Also meriting mention as a pivotal relevant step, is the agreement recently reached on the introduction of ESM's common backstop to the SRF by the beginning of 2022.

In this effort to reshuffle the current framework to beef up the BU, the Banking State Aid Communication may also be considered for review to provide more transparency and consistent, clearer rules in this field, following the CJEU *Tercas* case on the consideration of state aid funds used by deposit guarantee schemes (DGS) as a precautionary measure.

Investment firms reform

Another piece of recent legislation worth mentioning in respect of initiatives favourable to a CMU, is the latest review of the prudential framework for investment firms, introducing the IFR) and IFD. Their aim is to simplify rules supporting open and vibrant capital markets. IFR and IFD seek to establish proportionate rules and comprehensive supervision of all investment firms, which will reduce the constraints many of them face when transacting throughout the EU. Both IFR and IFD entrust the EBA with the power to issue technical standards or guidelines in cooperation or consultation with ESMA, towards fostering the harmonisation of supervisory standards and practices within the Union. As stated by Valdis Dombrovskis, the revised framework: "*will help investment firms facilitate capital flows across the EU, while giving EU investors access to more choice and improved services*".

The CMU action plan and the 2021 supervisory priorities

The CMU action plan proposes 16 legislative and non-legislative actions, with the objective, amongst others, of supporting a green, digital, inclusive, and resilient economic recovery. The Commission is reviewing the current regulatory framework for securitisation to foster banks' credit provision to EU companies, in particular SMEs (action 6 of the Revised CMU action plan). Within a CMU, banks can be the arteries through which capital flows into financial markets. Financial soundness and stability fleshed out through more robust banking regulation are key prerequisites to a green transition and digital transformation.

As regards the third objective of the CMU new plan (integrating national capital markets into a genuine single market), action 11 refers to "mak[ing] *the outcomes of insolvency proceedings more predictable*". To this effect, the Commission will "take a legislative or non-legislative initiative for minimum harmonisation or increased convergence in targeted areas of non-bank insolvency law". In addition, together with the EBA, the Commission will explore possibilities to enhance data reporting in order to allow for regular assessment of the effectiveness of the national loan enforcement regime. Although NPL levels were being steadily reduced before the pandemic, they remained high. Currently, as the pandemic seriously affects the real economy, they constitute one of the most worrisome concerns of banks and supervisors. Therefore, the need for an effective (single or multiple) NPL market platform and insolvency framework emerges as a more pressing priority, as highlighted in the 2021 supervisory priorities.

CMU – EMU: ***Conclusion and Quo vadis?***

Flexible and dynamic markets are crucial to the resilience of EU capital markets and to a fully-fledged financial integration. They are key to unlocking sustained productivity growth and allowing for increased competitiveness against third markets. Two decades after the introduction of the single currency, there is still remarkable lack of progress towards attaining a point of full convergence of financial policies across the EU in order to achieve a genuine BU and, what is more, a CMU, but the EU is on a good track. Asymmetries and lack of harmonisation seriously hamper the deepening of the EMU. A truly integrated capital markets union is the only way forward that could promulgate more effective policies in novel areas of societal life, such as green economy and digitalisation. To that end, the recent legislative reforms as well as the forthcoming ones are instrumental in achieving that goal, which will allow the real economy, markets and their players to operationalise it and smoothly transition into the CMU.

[1] The views expressed herein are just those of the authors and not of the European Banking Authority.

[2] The views expressed herein are just those of the authors and not of the European Banking Authority.

[3] Exchange Rate Mechanism II phase.

3. The Industry's View

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The current situation caused by the COVID-19 pandemic has placed the Capital Markets Union ("**CMU**") under the European spotlight once again. One of the main reasons for the interest shown by economic institutions in the CMU are the benefits that its implementation will bring to the economy.

Of all the groups that have written about the CMU, we have to highlight the High Level Forum on the Capital Markets Union, which is an expert group composed of highly experienced industry executives and leading international experts and scholars established on 7 November 2020 by the EC. Its purpose is to propose targeted policy recommendations for future CMU actions, to ensure that citizens and businesses can access capital markets across the EU on equal terms and irrespective of their geographical location.

One of the areas affected by the implementation of the CMU is the Initial Public Offerings ("**IPO**"). The IPO was traditionally the instrument used by companies to obtain funds, but over the last few decades, companies have turned their backs on it as it has been replaced by other ways of obtaining funds in a more straightforward fashion. There are several factors that explain the reduction in the number of IPOs, but we would highlight the red tape and all associated costs that companies have to face while planning an IPO and once they are listed.

The change in trends mainly affects Small and Medium Enterprises ("**SMEs**"), as they are opting to grow through mergers and acquisitions, debt increase or private equity, rather than IPOs.

In the following article, we will try to summarise the current situation and the main problems with IPOs in Europe, the main recommendations proposed by the High Level Forum and the impact of these measures and, to conclude, some thoughts on the future of IPOs within the CMU framework.

1. Current situation and main problems with IPOs in Europe

As previously stated, the number of IPOs in the European Union ("**EU**") has drastically decreased over the last few years. In order to reverse this downward trend, the EU has already taken several measures, which include the modification to the SME Growth Markets and all the regulations related to them brought by the Markets in Financial Instruments Directive II ("**MiFID II**") and the Market Abuse Regulation ("**MAR**").

Both the MiFID II and the MAR have relaxed regulations for all of the SMEs listed in the SME Growth Markets, in an attempt to promote IPOs all over the EU. In this regard, the new regulations have reduced the entire administrative burden not only of being listed but also remaining listed on these markets.

Economic agents have welcomed all these changes. However, they have not been enough to reverse the aforementioned situation regarding IPOs, as the relative numbers are not increasing.

The European Commission ("**EC**"), bearing all of this in mind, has set up several committees and expert groups in order not only to fully implement the CMU, but also to increase the number of IPOs.

2. Main recommendations proposed by the High Level Forum and their impact

These committees and expert groups have proposed several measures to tackle the full implementation of the CMU, but in this article, we will focus on those that we consider to have the greatest potential impact on the number of SMEs IPOs.

The first measure we will analyse is the proposed alleviation to MAR. This measure aims to reduce compliance costs while maintaining equal access to relevant information across market participants. This should be achieved by ensuring the principle of proportionality (i.e., the information that should be provided by a large company cannot be the same as the information provided by a SME).

The justification for this principle of proportionality lies not only on the size of the company and the quantity of information it can generate, but also the economic cost for listed companies associated with generating all of the previously required information.

In this regard, one of the changes caused by the alleviations to MAR is to insider lists. According to the High Level Forum Report, the regulation related to insider lists must be amended in order to reduce the information they should contain. By doing this, the issuers would be relieved of one of the burdens associated to being listed.

However, and as previously stated, the principle of proportionality should be preserved in order to ensure the shareholders and the investors have access to relevant information, while at the same time ensuring that SMEs are not forced to provide excessive information.

From a practical perspective, it is our understanding that all the measures aimed at reducing both the red tape and the associated costs should be welcomed by issuers and investors. Information overload is not beneficial to the investors, as this can cause distraction as well as incurring in higher costs for its analysis.

At this point, we should give a special mention to the proposed EU Single Access Point ("**ESAP**") due to its significance regarding the European regulatory institutions and access to company information. According to the High Level Forum Report, the establishment of an EU-wide digital access platform would help to make companies' public financial and non-financial information available for everyone, but on the other hand, this could result in an additional administrative burden for companies.

Furthermore, even if the establishment of the ESAP should not involve major changes in reporting regulations, some issues or reservations could arise, as the national authorities could perceive that strengthening the power of the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority infringes, or could collide with, their own powers.

The second measure we should review is the implementation of so-called dual-class shares and loyalty shares. Both breach the one-share one-vote rule, but the differences between them are vast. While dual-class shares constitute two different classes of shares with different voting rights since its constitution, loyalty shares constitute only one class of shares, but shareholders who retain the shares for a certain number of years are "rewarded" with an extra voting right. It is worth mentioning that the draft of the new Spanish Companies Act regulates loyalty shares for the first time, which has been received with certain scepticism.

By way of example, loyalty shares, as currently contemplated in the draft of the Spanish Companies Act, grant double voting rights per share to shareholders of listed companies who hold them for a minimum period of two years provided that such provision is included in the by-laws (being the approval of that inclusion subject to reinforced majorities); this two-year minimum term can be extended but not reduced. It should be noted that, except in some limited cases, the transfer of shares with double voting rights would cause these rights to be lost. In this regard, the double voting rights will be taken into account not only to establish the quorums and majorities, but also for notifying significant shareholdings and rules on takeover bids. Finally, in companies that include loyalty shares in their by-laws when applying for listing on a market, shareholders who can prove that they have held the shares for the aforementioned minimum period, will obtain double voting rights from the moment the shares are admitted to trading. However, please note that this draft is still subject to changes until the final law is passed by the Parliament.

Given that the implementation of these kinds of shares, which should be voluntary, aims to allow owners to maintain control of their company, preventing them from being taken over by larger companies, and due to their greater popularity in European countries, we will focus on loyalty shares. However, due to the practical similarities between them, the following considerations are applicable to both.

The main point of allowing owners to maintain control of their company after an IPO is to let them focus on the company's strategy in the long term so as to not be pushed by new shareholders into focusing on short-term strategies. In this regard, we have to bear in mind that long-term investments are linked to long-term sustainability principles. Due to this relationship between long-term investments and sustainability principles, one of the measures proposed by the High Level Forum is to review the regulation of European Long-term Investment Funds in order to promote funds supporting sustainable investment objectives.

However, even supporters of loyalty shares consider that a sunset clause establishing the effectiveness period must be included with the loyalty shares provision of the by-laws of the company. Should this sunset clause not be included, the investors would be discouraged from investing in the company. The reason is that in order to obtain a controlling stake in a company, a new investor would need to make a significantly higher investment than the original shareholder would have made at the time.

Therefore, even if loyalty shares can prevent a company from being merged or acquired by a larger company or by an investment fund, this measure does not incentivise companies to make an IPO. We have to consider the implementation of loyalty shares as a protective measure, as it prevents investors from changing the company's strategy from long term to short term.

However, a company's funders or main shareholders can take several actions to prevent this from happening, like finding a white knight or entering into a shareholders' agreement with the rest of the shareholders before making an IPO, for example. In our opinion, the implementation of loyalty shares in all European markets should not be taken as a positive measure aimed at increasing the number of IPOs but at letting the controlling shareholders of a company retain their control.

The third and final measure we will analyse is the creation of a pan-European public-private IPO fund (the "**Fund**") backed by the EU, which aims to achieve two main goals. The first is to provide funds to SMEs in order to cover all the costs of making an IPO. In this regard, the research costs, which currently must be borne by the companies, would be covered by the Fund, so a greater number of SMEs would be able to attract investors' attention. The second goal is to provide funds over a long-term basis, so that companies can focus on their long-term goals. In addition, with these kind of investments, the Fund would act as an anchor investor, playing a main role in the companies' transition to public.

In our opinion, this measure is one of the easiest to effectively implement, as the EU could establish the fund using existing institutions, i.e. the European Investment Bank and the European Investment Fund.

Furthermore, this measure, alongside the creation of a pan-European index, would help to solve some of the biggest issues (e.g. the listing costs, the lack of information regarding SMEs, the loss of control of the company after an IPO, etc.) highlighted in some reports, such as those written by Josef Anton Schuster, the Federation of European Securities Exchanges, Jay R. Ritter, Andrea Signori and Silvio Vismara and the European IPO Task Force. Also, if implemented correctly, it could generate revenue not only for the companies but also for European society as a whole.

3. Conclusion

The implementation of the CMU should be a priority, not only to help to increase the number of IPOs but also to try to accelerate the recovery of the European economy. According to the main economic reports drafted in relation to the CMU, its full implementation would allow European countries not only to solve some economic issues but also to strengthen the business ecosystem.

In this regard, after reviewing the main measures we can confirm that almost all of them should have a positive effect on the European economy, increasing the number of IPOs in the years following their implementation.

However, the main point that European institutions should bear in mind is that the regulatory and corporate reality is quite different in each European country. Therefore, even if the proposed measures are positive, they can be entirely inappropriate if they are not adapted to different situations. Furthermore, the basis of some measures is correct, but the EC must develop them in order for economic agents to understand them completely.

In relation to loyalty shares, the problems related to different regulatory and corporate realities can be greater than in other areas, as the implementation of loyalty shares in technological companies could benefit the project and the original shareholders, but in other companies, this could result in some abuses. Additionally, it should be noted that in some countries, dual-class shares are banned.

In this sense, it would be necessary to determine whether the Fund would cover the costs of IPOs by investing in the companies or by granting them a loan, the structure, which companies or funds will be allowed to invest in it, etc.

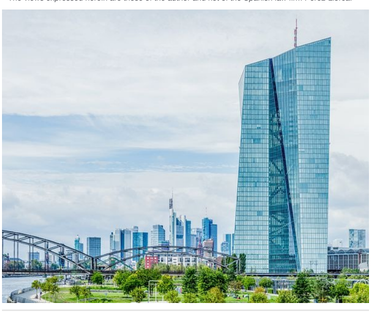
In addition, regarding the pan-European index, we can confirm that this is also a good measure, but it needs further development, as it is not clear where the index will be placed, how the companies could be listed, if the listing requirements would be the same for all countries, etc.

These are just a few examples of all the questions and issues that these measures can generate and that must be solved before the CMU is fully implemented in order not to cause inequalities between European countries.

Furthermore, the implementation of these measures would trigger some challenges and complexities for financial supervisors, not only due to the strengthening of European authorities' powers, but also due to the coordination between national and supra-national public authorities. We have to keep in mind that one of the main goals of the CMU is to establish an efficient federative supervisory European model, and this would result in a reduction of national authorities' powers.

Nevertheless, and as we have mentioned throughout this article, the measures aimed at implementing the CMU effectively and improving the number of SME I

* *The views expressed herein are those of the author and not of the Spanish law firm Pérez-Llorca.*



4. Young Researchers' View

Alessio Azzutti*

The *'Trip to Jerusalem'* of European Banks: Between financial stability and competition concerns

Among the many possible perspectives, this short piece looks at the intersection of the 'banking union' (BU) and the 'capital markets union' (CMU) by focusing on the relationship between the ongoing *consolidation* affecting the European banking industry, and the resulting but most likely unintended *trade-off* faced by policymakers between financial stability and competition concerns. The *Trip to Jerusalem* is the attempt of existing European banks to stay in business while the EU is approaching the achievement of the CMU. With the prospect of more active, liquid and prosperous EU capital markets, at the same time, there is a question mark as to what role European (traditional) banks should play within the CMU.

Since its origins, the CMU project has intended to lead EU economies to gradually loose their long-lasting dependency on (traditional) banks' lending. It is true that the EU banking market is currently undergoing an industry-wide restructuring. This *consolidation* process dates back to the 2007-8 global financial crisis outbreak. It had intensified with the subsequent Sovereign debt crisis, which had exposed all the fragilities of European Monetary Union governance- of which the bank-sovereign nexus is the most sensitive political facets. At the end of 2008, European banks peaked an all-time record of 8,525 registered entities. Since then, the total number of credit institutions has been steadily declining.[1] Amid the pandemic, as of December 2020, European banks have reached their lowest figures yet with 5,442 units.[2] This amounts to a drastic down-size of roughly 35% in the last twelve years. However, the effects of consolidation on market *concentration* (measured as the portion of assets held by the five biggest national banks) are somewhat ambiguous, with the EU Member States showing different trends.[3]

These structural changes have mainly involved M&A activities within member states' national borders, whereas cross-border consolidation remains very low. Moreover, this negative trend has occurred in quite an unfortunate macroeconomic environment, characterised by prolonged times of ultra-low interest rates, and weak profitability levels which remain a critical challenge for European banks. To illustrate this, in 2019, European banks' return-on-equity was 5.4%, falling short of their cost-of-capital which was estimated at around 8-10%. This figure is relatively low compared to those of global peers (e.g. US and Nordic banks)[4]; and, arguably, further downward trends can be expected due to the economic effects of the pandemic.

According to a 2019 ECB study, there is a threefold explanation for European banks' *weakness*. (1) For a large part, they have not fully addressed their problems with NPLs still sitting on their balance-sheets, although some promising results are being achieved at both the legislative and supervisory levels. (2) In some Member States, price competition for (traditional) banking services has become a concern, as highlighted by the very poor revenue-generation capacity suffered by an increasing number of credit institutions (e.g., in Germany). (3) More generally, European banks' weakness is due to a combination of both fragilities. Weak profitability is viewed with high suspicion and therefore, closely monitored by EU financial authorities, since it can eventually undermine financial stability. In the eyes of EU regulators, this *weakness* has, doubtless ,one main interpretation: i.e., *overbanking*.[5] Whenever a banking system operates in 'overcapacity' conditions, it is arguably more prone to unhealthy market dynamics. Here, the EU regulators' approach would suggest allowing weaker players to exit the game and, generally, support pan-European consolidations. In their view, this strategy could unlock important economies of scale in forming enhanced cross-border activity. In other words, EU financial regulators seem to make presumptions about an *optimal* banking competition level to prepare EU economies for a fully-fledged CMU. In the recently published guide on the supervisory approach to banking consolidation, the ECB itself seems to promote an increase in cross-border M&A, while also demonstrating its commitment to tackling prudential supervision seriously when triggered by mergers involving European banks.[6]

In fact, many recent EU regulatory measures arguably support banking consolidation, even indirectly, as a policy solution. For instance, both the first (i.e. SSM) and second pillar (i.e. SRM) of the BU are two substantial achievements somewhat reflecting this policy orientation. On the one hand, with the SSM, the EU has a centralised institutional framework of European banking supervision, with 'significant institutions' directly supervised by the ECB together with the NCAs. The common supervisory framework contained in the so-called 'single rulebook' has been a vital aspect of an integrated EU banking system. On the other hand, with the SRM, EU member states share a unified framework for banking resolution, albeit this has not been fully operationalised yet. In plain English, despite some minor nuances, the SSM and the single rulebook create a common playground for banks and their supervision, which is also a prerequisite to apply the SRM effectively. The latter, by its part, could further contribute to banking consolidation by al-lowing markets to solve banking failures through M&A. Overall, the combined effects of the SSM and SRM can foster EU banking integration and consolidation. Notwithstanding all of these achievements, some barriers to cross-border M&A persist. For instance, progress can still be made in harmonising national laws on a number of subjects (e.g., insolvency rules) to achieve a genuinely single rulebook, which could further facilitate conditions in working towards greater banking cross-border consolidation and activity.

Furthermore, banking consolidation is also significantly influenced by market dynamics, wherein technological innovation is undoubtedly in the spotlight. Traditional banks face enhanced competitive pressure by new market entrants (i.e. FinTech and BigTech), emerging outside the perimeters of financial regulation and offering technology-enabled financial solutions that are better able to meet the changing demands of EU digital consumers. Meanwhile, EU regulators are doing their best at monitoring emerging risks from the shadow banking ecosystem. They have also adopted laws aiming to strengthen the level playing field and foster competition between incumbent firms and new entrants, as for the payments industry (cf. PSD 2). Nevertheless, both FinTech and BigTech are expected to impact market structure, although their compound effects may have more ambiguous implications for competition in the banking industry. While both are proposed to disintermediate traditional banks, it is hard to conceive banks entirely out of the competition. In fact, with respect to FinTech, those (traditional) banks surviving their *Trip to Jerusalem* towards the CMU will arguably enjoy a prominent role,[7] as being at the core of the EU *digital platform* (i.e. Digital Single Market). Still, whenever the regulatory governance of both FinTech and BigTech, as well as their relations with incumbent firms, falls short, this could also pose a serious threat to financial stability as also highlighted by a 2019 report by the Bank for International Settlements.

The implications of banking consolidation for financial stability are yet to be fully understood. Remarkably, there is no agreement between global regulators on the desirability of competition in the banking industry.[8] While enhanced competition is generally thought to be beneficial to mar-kets, this does not always seem to be the case for the financial sector. Given the importance of the economy's overall stability, banks are considered special economic agents: the interconnect-ed nature of the banking industry renders it extremely vulnerable to systemic risks. As highlight-ed by the OECD, competition in the banking industry *per se* is not a problem vis-à-vis financial stability.[9] Effective competition can lead to several efficiency gains. Thus, it needs to be promoted and safeguarded by financial regulation whenever appropriate. By contrast, competition can be-come problematic only if not supported by sound regulation. According to this view, the specific nature of the financial services industry would require a thoughtful policy balancing between competition and stability. Depending on the soundness of financial regulation to achieve financial stability, one could predict corresponding optimal competition levels that regulators may aim to achieve. In the pursuit of their institutional mandate, instead, banking supervisors should not have a say in shaping the industry towards pre-defined market settings at least as long as no specific market failure has been manifest (but cf. UK Financial Conduct Authority). Indeed, changes to the market structure should ideally be the outcome of market dynamics, where technological innovation catalyses the pace of change. Thus, whenever "strong" normative considerations on market structure pervade financial supervision, supervisory action requires being legitimated by law (e.g., to safeguard financial stability), and procedurally transparent to guarantee accountability. This because, *ceteris paribus*, market concentration is a matter of policy

preference, which can put political and reputational pressure on financial authorities.

In this long and tortuous *Trip to Jerusalem* towards the CMU, only those banks that can face the challenges brought by technological and regulatory innovation will stay in play. All in all, *the EU (traditional) banking market will most likely be more concentrated and characterised by more cross-border activity*. Fewer, but larger, and more diversified banks will arguably populate and serve the EU single capital markets of the future. Bigger players are presumably anticipating some strategic moves in the field of payments (cf. European Payments Initiative), which may well suit - technologically speaking – the possible future launch of a digital euro by the ECB. Nevertheless, *FinTech and BigTech firms' compound effects may lead traditional banks into 'narrow banking', which may give rise to new competition and financial stability concerns*. Besides, with an increasing number of bigger banks (i.e. 'significant institutions'), the ECB will face greater supervisory responsibility. With the likely emergence of megabanks, competition authorities may become more active in EU law enforcement in the financial services (and technology) industry but, at the same time, may require new conceptual frameworks and regulatory tools (e.g. given the increasingly high network effects and potential negative externalities in digital banking). Lastly, ESMA will need to become a centralised supervisory authority with integrated EU capital markets, mirroring the ECB's powers in banking supervision to achieve supervisory symmetry. However, most of this would require additional sensitive agreements among EU institutions and the Member States alike. Along the *Trip to Jerusalem* of European banks, *EU regulators will need to make fundamental decisions in updating both the EU financial regulatory framework and their institutional arrangements for financial supervision, while approximating the achievement of the CMU in order to safeguard the fulfilment of basic public goals such as competition, financial stability, and not least consumer protection*.

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