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Abstract

This short paper gives an overview of some of the basic features of the new supervisory landscape that was introduced in Europe starting from 2011. Are mentioned, the relationship between local supervision and centralised rulemaking, the relationship of the new European authorities with the national supervisors and their position in the overall EU regulatory structure, their internal organisation and finally the powers that have been conferred on these new bodies.

Europe's New Financial Supervisory Bodies

On the 1st of January 2011, Europe's financial regulation entered into a new era. The Union has adopted four measures allowing for a better oversight and supervision of financial activity in all its aspects. On the one hand, systemic risk, one of the patent causes of the crisis, will be monitored by the European Systemic Risk Board (ESRB), leading to recommendations and warnings about developments that might contain the risk of a systemic incident. On the other, three bodies in charge of regulating activities of banks, insurance enterprises (including pension funds) and securities and markets were created, allowing coordinated action in developing regulation and ensuring its effective application.

These three authorities are

- The European Banking Authority: EBA, located in London, successor to the Committee of European banking supervisors (CEBS)
- The European Insurance and Occupational Pensions Authority, EIOPA, based in Frankfurt and successor to the Committee of European Insurance and occupational Pensions Supervisors (CEIOPS)
- The European Securities and Markets Authority, ESMA and successor to the Committee of European Securities Regulators (CESR) located in Paris.

Europe has chosen for a model that reflects its specific form of federalism, in which the states retain an important part of the day-to-day running of the actual – here: supervisory - activities, but coordinate on the overall policies. This has also happened here: while day-to day supervision will continue to remain in the remit of the national supervisors, policy coordination and the development of common regulations, will increasingly be centralised, leading over time to the much vaunted "European rulebook", a synthetic presentation of an increasingly large number of measures that would be applicable all over Europe. This core idea – summarised in the slogan "central regulation, local supervision" – is likely to result in the "unity in diversity", that a so divers system as the Union characterises.

Once an agreement was found on this basic scheme, a certain number of options were adopted: there were to be three lines of coordination, not one single. Hence the creation of three new "authorities", that would continue to pre-existing three committees. Some have defended centralising all supervision, but that would have been a false path. Rather one should take into account Europe's rich diversity, and therefore ensure that all supervisors act according to the same rules, while someone looks over their shoulder to ensure that the rules are applied the same way. That is precisely what the new regulation achieves, although still in an imperfect way: but the basic scheme becomes visible.

How does the new structure fit into the overall Union legal power structure? Could these authorities, fundamentally agencies, act independently, and what would be their relationship to the Union supreme bodies, Commission, Council and Parliament. A complex balance has been adopted: delegation for rulemaking can only be granted to the Commission, not to a subordinate body such as these new authorities. In the field of secondary regulation, the Lisbon Treaty sets the limits to delegated rulemaking: it can only relate to further implementation of principles or policies that have been adopted by the co-legislators, but without allowing the Commission to make policy choices or exert discretionary powers. . Therefore there has to be an explicit provision in the basic directive or regulation allowing the

enactment of delegated acts, for which both Council and Parliament retain the right to call back a proposed measure or even to withdraw the delegation as a whole. These partly old–known as the Meroni doctrine – and partly new – i.e. the Lisbon treaty - principles of Union law put a severe strain on the rulemaking efforts that will have to be undertaken after the crisis. But in practical terms, it means that the new authorities will essentially have an advisory function or may propose regulation to be "endorsed" by the Commission, but without being entitled to enact the rules themselves.

The relationship between the new authorities and the national supervisors also deserve some attention. The national supervisors are fully involved in the functioning of the authorities and most decisions will be submitted to them, whereby the Regulation as a rule provides for a majority decision of members. Cases of rulemaking and recommendations and guidelines are excepted: here a qualified majority will apply, as defined in the applicable EU treaty. As will be mentioned further, the national authorities are supposed to comply with the common rules, and if not can be invited by the European authority to comply. However, in case of refusal, no action can be undertaken by the European authority against the national supervisor – as distinct from action against the firms active in the jurisdiction of the national supervisor. The former is therefore not a supervisor of supervisors, what can only be said about the European Commission in the context of the application of art. 258 TFEU.

The internal structure of the new authorities has been build on the pre-existing committees, of which they are the express continuation, e.g. regarding the ongoing business, or for keeping into force the decisions and statements adopted under the previous regime. That means that the national supervisors, organised in the "board of supervisors" will have a final say in much of the decision making, that a board – called "management board" will be elected by them, vested with the general powers provided for in the Regulation, but later to be expanded by specific delegations. The main difference is the position of the chair, who is appointed by the board of supervisors, but de facto on a proposition from a selection committee in which the Commission has - or has had on the basis of the transitional measures in art 76(1) and (2) – a preponderant role. The Parliament has the right to object to the decision of the board of supervisors appointing the chair. The chair should be an independent, full-time professional, accountable only to the authority, and to the European institutions. There is also an executive director, successor of the previous secretary-general, in charge of running the organisation. This scheme is also the one that has been adopted in several other agencies. Different is the fact that the intervention of the Commission has been reduced to some essential measures, essentially on budgetary matters.

What will these authorities do? On the one hand they will continue to function as before, adopting recommendations, guidelines, giving advice to the Commission, and coordinating the action of their members, the national supervisors. They will continue to be very important in fields as stress testing, or specific tasks related to systemic issues, collecting information, or creating a common supervisory culture. e.g. in the context of the colleges of supervisors But in addition, the authorities have been granted certain legal powers in five domains. In the case of rulemaking, the different substantive directives will grant the authorities the power to adopt "regulatory technical standards" that must be endorsed by the Commission before they can become binding. Technically these will be regulations, therefore directly applicable in the national legal order. The second stage after the adoption of these RTS is the surveillance of their implementation: normally this is the task of the Commission, guardian of the Treaty, on the basis of art. 258 of the TFEU. However the authorities could do the preparatory work, indentifying and investigating violations, mediate a change in the local regulation or practice.

If that is not successful, the Commission will have to take up the case, eventually up to the ECJ. The authority does not have to stand idle: in certain, clearly defined circumstances, it can oblige the market participants active in the jurisdiction of an unwilling national authority, to declare the rule directly applicable to them.

A third field of legal competences concerns the cases of mediation for disputes among supervisors: in the precise fields where the directives provide so, mediation and even decisions can intervene, and these can be made binding on the affected market participants. Finally, the authorities have some powers in cases of emergency, and when products or services may reveal to be a danger to financial stability and to the orderly functioning or integrity of the markets.

How should one value these innovations? Firstly, much will have to be worked out in later directives and regulations, granting powers to the authorities. This trend is already apparent in the recently adopted measures. Secondly, the regulation as it now stands is not the final one: the functioning of the authorities will evolve over time, as they get more credibility and confidence from markets and public authorities. Further improvements should be considered, with as a core objective, the possibility to adopt rules on an autonomous basis. Thirdly, one can expect a certain number of domains to become the subject of direct supervision by the European authorities, especially in those fields where due to the specific structure of the firms involved, it would be counterproductive to submit them to national supervision and accompanying mutual recognition. This is already the case for the credit rating agencies, of which there are essentially three important ones. It might also be the case for the trade repositories, or for some other subjects with a very intense Europe-wide interest. However, full centralisation of all supervision would be counterproductive and also contrary to the subsidiarity principle. But indirect supervision, i.e. analysing how the national supervisors have exercised their powers, may become increasingly necessary.

All this points to one final conclusion: this a work under way, and nobody knows for sure how it will look like in ten years time.

Financial Law Institute

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